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

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PREFACE.

Seventy-two years of history are nominally included in this volume, but the field is somewhat broader, owing to the topical method by which a few subjects have been considered. The volume begins with the first amendment to the Constitution of 1821, and closes with the chapter on the Judiciary Commission of 1890, though later constitutional development is, for practical reasons, considered in the previous chapter. The volume covers two constitutional periods,—the second and the third,—beginning in 1823 and ending in 1894. It includes, specifically, amendments to the second Constitution, the Convention and Constitution of 1846, the interval between that Convention and the Convention of 1867, the work of the latter Convention, the Commission of 1872, whose work supplemented and completed in part that of the Convention of 1867, the interesting period between 1874 and 1894, during which several important constitutional policies were adopted, notably that of free canals, and closes with the Judiciary Commission of 1890.



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CHAPTER V.

Amendments to the Constitution of 1821.

Eight amendments to the Constitution of 1821 were adopted, as follows:

1. 1826. Extending the qualifications of voters.

2. 1826. Providing for the election of justices of the peace.

3. 1833. Reducing the duties on manufactured salt.

4. 1833. Providing for the election of mayor in the city of New York.

5. 1835. Restoring to the general fund the duties on manufactured salt, and on sales at auction, after the payment of a certain amount of the canal debt.

6. 1839. Providing for the election of mayors of cities.

7. 1845. Abolishing property qualifications of public officers.

8. 1845. Hearing on charges against judicial officers.

1st. Suffrage.—It is apparent that the people were not satisfied with the provision relating to suffrage, contained in the second Constitution. The debates in the Convention, to which we have already referred, show that there was a wide divergence of opinion on the question of the qualifications of voters, but, because the Constitution was submitted as a whole, there was no opportunity for the people to express their opinion directly concerning any particular provision.

Two years after the Constitution took effect, Governor De Witt Clinton, in his message to the legislature, January

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4, 1825, requested the attention of the legislature to a "more accurate definition, a more liberal extension, and a more secure enjoyment, of the elective franchise. Without the right of suffrage, liberty cannot exist. It is a vital principle of representative government, and it ought, therefore, to be effectually fortified against accident, design, or corruption." Referring to the classification of voters under the Constitution, he said: "This arrangement excludes a great body of citizens from the elective franchise." He pointed out some possible results of the system established by the Constitution, and said that "the right of a citizen ought not to be held at the pleasure of others, but should be fixed and unchangeable." "The labor of a day on the highway, or the payment of a petty commutation, however meritorious in themselves, certainly do not furnish such high evidences of public service in the agents as to justify a monopoly of the elective franchise; and such, I am persuaded, is not the wish of that respectable portion of the community. I, therefore, submit to your consideration, whether the Constitution ought not to be so modified as to render citizenship, full age, and competent residence, the only requisite qualifications."

That part of the Governor's message relative to suffrage was referred to a select committee, which reported on the 18th of January, approving the Governor's suggestion, and recommending a constitutional amendment, providing for an extension of the qualifications of electors. The report considers the subject with considerable detail, reviewing the action of the late convention, and pointing out some defects which the new Constitution had developed by actual experience. The committee suggested that, in view of the fact that the new Constitution had been in operation only three years, there should be some hesitation in recommending changes; but that it is

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"one of the soundest maxims of republicanism that 'without the right of suffrage, liberty cannot exist,' and that no time is improper to recommend a more accurate definition, a more liberal extension, and a more secure enjoyment of the elective franchise." Referring to the provision of the Constitution making labor on the highways a qualification of an elector, the committee remarked that the effect of this is to make the right to vote dependent on the option of the overseer of highways, who, in preparing the list, may include or exclude names, according to his whim or caprice, and thereby confer or deny the right of suffrage. The committee proposed an amendment eliminating all qualifications for white persons, except residence and citizenship, and requiring persons of color to be residents three years and possess a freehold worth $250. The resolution as finally adopted by the senate at this session, and concurred in by the assembly, swept away all property qualifications applicable to white voters, and made the simple and comprehensive declaration that "every male citizen of the age of twenty-one years, who shall have been an inhabitant of this state one year next preceding any election, and for the last six months a resident of the county where he may offer his vote, shall be entitled to vote in the town or ward where he actually resides, and not elsewhere, for all officers that now are or hereafter may be elective by the people."

2d. Election of justices of the peace.—Governor Clinton, in his annual message to the legislature, in 1825, also called attention to the method of choosing justices of the peace, established by the Constitution, and said:

"By the Constitution a complex mode of choosing justices of the peace, through the instrumentality of the supervisors of towns and judges of the county courts, is established. As this system has been found inexpedient in its operation, and exceptionable in all its important

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bearings, I recommend such an alteration, through the forms of the Constitution, as shall bring the choice of those magistrates directly home to the people, in their primary assemblies. They are certainly much better judges of the claims and qualifications of their local magistrates than persons at a distance, and they have stronger inducements to make good selections."

The Governor's recommendations were referred to a select committee in the senate, which, on the 3d of February, 1825, reported unanimously in favor of the election of justices of the peace, and proposed an amendment to the Constitution to accomplish that result. This amendment was adopted by the senate, and concurred in by the assembly, and ratified by the people in November, 1826.

3d. Reducing the duties on manufactured salt.—By the canal act passed April 15, 1817, the minimum duty on manufactured salt was fixed at $ .12½ a bushel. By the constitutional amendment adopted in 1833 this minimum was reduced to $ .06 a bushel.

4th. Election of mayor of the city of New York.—By § 10, article 4, of the Constitution, mayors of cities were to be appointed by the common councils. By the amendment adopted in 1833 the mayor of the city of New York was to be elected by the people.

5th. General fund.—Restoring to the general fund the duties on manufactured salt and on sales of goods at auction, after the payment of a certain amount of the canal debt, except $33,500, already appropriated for other purposes.

6th. Providing for the election of the mayors of cities.—The reform adopted for New York in 1833 was extended to other cities by an amendment ratified in 1839, giving the people in all cities the right to elect their own mayor.

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It will be observed that the right of popular choice was extended to two important classes of officers by the amendments of the second Constitution; namely, to justices of the peace and to the mayors of cities. The growth of sentiment in the direction of elections, as against appointment of public officers, was quite rapid during the next few years, and we shall have occasion to note in detail the scope of this extension when we consider the Constitution of 1846. Some of the maxims enunciated by the statesmen of the period of the second Constitution were reversed by the convention which framed the third Constitution.

7th. Abolishing property qualifications of public officers.—The second Constitution continued from the first Constitution the provision requiring the governor and senators to be freeholders. It was believed that this requirement would add dignity to these offices and insure the selection of incumbents who had a direct property interest in the state. The same policy was expressed in the provision requiring voters to possess certain property qualifications; but the abolition of the property qualifications of voters in 1826 naturally led to the opinion that, if the right of suffrage should be exercised by all persons, regardless of property considerations, the right to hold office should be subject to the same liberal rule. This idea found expression in an amendment submitted to the legislature near the end of the second constitutional period, intended to abrogate the property qualifications of the governor and senators. It was passed by the legislature in 1844, and submitted to the next legislature. Governor Wright, in his message of 1845, referred to the pending amendment, saying that "the qualification is doubtless in conflict with the present policy of our laws and feeling of our people, as the day has passed by when the title to a freehold is supposed to be a necessary quali-

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fication either to entitle a citizen to vote or to be voted for;" and he commended the amendment to the favorable consideration of the legislature. The amendment, which declared that "no property qualification shall be required to render a person eligible to or capable of holding any office or public trust in this state," was passed again by the legislature of 1845, and approved by the people, with only 3,901 adverse votes. The policy of this amendment, though not directly expressed, was continued in the third Constitution.

8th. Hearing on charges against judicial officers.— This amendment did not apply to ordinary impeachments, but to removals of judicial officers by the legislature or by the senate on the governor's recommendation. The amendment required notice of the charges to be given to the officer accused, secured to him an opportunity to be heard, and required the cause of the removal, with the yeas and nays, to be entered on the legislative journals. Governor Wright, in his message of 1845, commenting on this amendment, said the principle involved in it was sound, and "in strict conformity with the policy and spirit of our law." The amendment was submitted to the people and approved in November, 1845. The full text of the amendment will be found in the Introduction, with other amendments to the second Constitution. The substance of it was included in § 11 of article 6 of the Constitution of 1846, and was continued in the judiciary article of 1869 and the Constitution of 1894.

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CHAPTER VI.

The Third Constitution, 1846.

A. Preparation.

A constitution is not spontaneous: it is a growth. John Jay, writing the first Constitution, used the forms of government with which he was familiar under the colonial system. The development of the state, and the addition and change of institutions, made a modification of the first Constitution necessary by the Convention of 1821. The amendments to the second Constitution, adopted and proposed, show that the process of evolution was going on. Perfection has not been reached, and is not to be expected. A constitution presumably expresses in outline the theory, purposes, and forms of organized society; as society fluctuates it is found that some constitutional regulations are too lax and others too rigid, and it must be the constant effort of statesmen and constitution-makers to adjust a proper equilibrium of the various parts of government, loosening or tightening the bands of limitation as circumstances seem to require. Sometimes these changes are in the direction of restraints of power, and sometimes in the direction of a more liberal exercise of power or privilege.

Of the eight amendments to the second Constitution, five accomplished an enlargement of popular rights; namely, the election of justices of the peace and mayors of cities, an extension of the right of suffrage, and the removal of property qualifications of officeholders; while three were administrative; namely, reducing the duty on

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salt, applying the proceeds of certain revenues after payment of the canal debt, and prescribing certain forms of procedure in the removal of judicial officers.

While eight amendments to the second Constitution had been adopted, many others had been suggested, and it became apparent soon after the Constitution went into operation that it was not satisfactory in all respects. Year by year this dissatisfaction grew and found expression in prolonged discussion and numerous proposed amendments. It was found that the rights of the people were too restricted; that in many important respects the power of the legislature was too large; and that, from many points of view, the Constitution was inadequate and defective; and when the Convention of 1846 was chosen the field of constitutional reform was already white to the harvest. To fully appreciate the work of the Convention it will be necessary to consider some of the defects which had been pointed out in the existing Constitution, the remedies proposed, and changes suggested.

AGRICULTURAL LEASES.

Kiliaen Van Rensselaer, astute merchant prince, member of the Amsterdam Chamber, and a director in the Dutch West India Company, listening to the tales of his countrymen returning from their voyages to the New World, as they described the virgin wonderland of the West, ready to yield rich rewards to Dutch enterprise and thrift, determined to acquire there a large domain whereon he might exert the energy and business talents that had made him one of the most successful men of his time. He dreamed of wealth and power for himself and his children; but he could not foresee that he was setting in motion forces which, two centuries later, in a great state yet to be, far over sea, would culminate in resistance to law, in riot, murder, and civil war; that the civil and

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military power of the state would be summoned to maintain peace and suppress disorder; that his great manor of Rensselaerwyck, which he probably never saw, would, soon after his own guiding hand had been withdrawn from its affairs, pass under the dominion of another nation, with different laws, institutions, and aspirations; that the land policy which he so innocently transplanted to America, amplified and established by his successors, would engender disputes which would create social and political issues on which governors and legislatures would be chosen; that a landed and baronial aristocracy, with its feudal characteristics and customs, could not permanently endure on a free soil of a new world, whither the pioneers had carried the free institutions of England and the Netherlands, with Magna Charta and The Great Privilege of Holland; that the land tenures established by his successors and the proprietors of other large tracts of land in the new state would produce conditions requiring important legislation, modifying common and statute law which had long governed England and her colonies; and finally, that a great convention, chosen to revise and recast the principles underlying constitutional government, would find itself confronted with unhappy conditions resulting directly or indirectly from the Van Rensselaer land policy; and would deem it necessary to abolish all feudal tenures, declare all lands to be allodial, abolish all restrictions on alienation of land, and prescribe the duration of agricultural leases,—thus imposing on all the people of the state restrictions and limitations which would not otherwise have been necessary, and which primarily applied only to a limited portion of the state.

Kiliaen Van Rensselaer in 1630 began buying land of the Indians; and in 1637 had acquired a tract 24 miles north and south and 48 miles east and west, containing over 700,000 acres, and embracing nearly all of the pres-

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ent counties of Albany, Rensselaer, and a part of the county of Columbia. But his was not the only large tract. There were several other extensive grants of land which are mentioned by Lord Bellomont, then governor, in his letter of May 3, 1699, to the Lords of Trade. He said several of these grants were 20 miles square, and some even larger; and in another letter, January 2, 1701, he estimated that 7,000,000 acres had been disposed of in thirteen grants, which he characterized as extravagant.

Many of these large tracts were erected into manors, and the owners were clothed with extensive manorial powers and privileges. This manorial system brought into practice a peculiar policy of colonial development; for instead of opening the country to independent settlers who might soon become owners of the soil, a policy was initiated under which the ownership of the land continued in the proprietor, and the occupants acquired only a leasehold interest, under conditions and with limitations and restrictions which finally were considered so burdensome as to justify every form of resistance to the claims of the proprietors; and these leasehold conditions, developing slowly through two centuries, terminated in a social convulsion and revolution resulting in a radical change of legal and constitutional policy concerning land tenures. It will not be profitable to show here in detail the development of these conditions; the reader will find abundant materials for the study of this subject in various local and family histories, in legislative proceedings, and executive messages. A few incidents showing conditions existing at different stages of this development will be sufficient to illustrate the process of evolution through which the subject was passing towards the complete abolition of the manorial system.

Under the Charter of Freedoms and Exemptions, 1629, the proprietors of these large tracts were encouraged to

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plant colonies by the offer of special privileges. Kiliaen Van Rensselaer, immediately on acquiring his land, took steps to establish a colony, and to encourage settlers to occupy portions of the tract. His successors pursued the same policy under varying conditions. A lease of a portion of the Van Rensselaer tract, made in 1646, for five years, required the tenant to erect at his own expense a large farmhouse and barn, which were to be the property of the landlord. The landlord delivered certain stock, and he and the tenant were to share equally in the increase. The tenant was to deliver to the landlord one tenth of the grain raised on the farm, and also twenty-five pounds of butter each year. The tenant might have the land three years longer by paying five hundred guilders annually in addition to the tenths. The feudal character of this lease appears from the provision which required the tenant "punctually to observe the same, under confiscation of all his goods, having and to have, present and future, how much soever they may be, under obligation of renouncing, according to law, all lords, courts, judges, and rulers. Promising, moreover, to be in all obedience subject to all his magistrates; to be true and faithful to them as occasion may demand, as a good subject is bound to be." Another lease, given in 1647, required the tenant to pay as rent one tenth of the grain, five hundred guilders annually, one half the increase of the stock, to cut and clear certain timber lands, perform three days' service with his wagon and horses each year, and also deliver annually one half mud (two bushels) of wheat, twenty-five pounds of butter, and two pairs of fowls. The tenant also submitted himself as a "faithful subject, to all regulations, orders, and conditions made by the patroon, and read before him, regarding dwelling together, and to all the statutes and ordinances to be hereafter made."

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In addition to the relations between the owner and the tenant, established by these leases, the patroon was vested with general civil, military, and judicial authority in his manor, and the tenants were his subjects, and took the oath of fealty and allegiance to him. The patroon also had the first right to purchase the tenant's interest whenever it was offered for sale, and if he did not buy it he might require the payment to him of a certain portion of the purchase price. Sometimes this proportion was fixed at one tenth, sometimes at one fifth, and was later established at one fourth.

The legislature, on the 22d of October, 1779, passed a law providing for the punishment of certain loyalists, and the forfeiture of their estates, with a further provision declaring that "the absolute property to all messuages, lands, tenements, and hereditaments, and of all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, duties, and services, by whatsoever names respectively the same are called and known in the law, and all right and title to the same," belonging to the Crown of Great Britain on the 8th of July, 1776, were and are, from and after the 9th, vested in the people of this state.

The reader will recollect that the date fixed in this provision is the day on which the first constitutional convention of New York ratified the Declaration of Independence.

On February 20, 1787, the legislature enacted another important statute, entitled "An Act Concerning Tenures," which substantially re-enacted in modern form the English statute of *quia emptores,* 18 Edward I., 1290, which gave every freeholder a right to sell a part or all of his lands, and substituted the "purchaser in the place of his vendor in respect to the chief lord of the fee, requiring him to perform the service which had been due from

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his vendor." The court of appeals in *De Peyster* v. *Michael* (1852) 6 N. Y. 467, 57 Am. Dec. 470, held that the statutes of 1779 and 1787 "put an end to all feudal tenures between one citizen and another, and substituted in their place a tenure between each landholder and the people in their sovereign capacity, and thus removed the entire foundation on which the right of the grantor to restrain alienation had formerly rested;" and that a provision in a lease in fee, made in 1785, reserving to the lessor or grantor a pre-emptive right of purchase, and the right to one quarter of the price received on a sale to any other person, was void. The prohibition against any restraints on the right of alienation contained in these statutes was confirmed and made absolute by the Constitution of 1846.

Early in the history of the Van Rensselaer colony, New Netherland, including Rensselaerwyck, became an English province, and the Dutch titles were confirmed by the Articles of Capitulation, in 1664. Notwithstanding this confirmation, a question seems to have arisen concerning the Van Rensselaer title. This question was submitted to the Duke of York, then proprietor, who, in 1674, referred the matter to Governor Andros for investigation, and in 1678 directed him to issue a patent to the proprietors of Rensselaerwyck, confirming the title and rights which they had acquired prior to the English conquest. The patent itself was issued by Governor Dongan on the 4th of November, 1685. This patent, among other things, erected Rensselaerwyck into one lordship and manor, conferred manorial powers and privileges on the proprietors, including the right to hold a Court Leete (criminal) and a Court Baron (civil), with the jurisdiction incident to those courts as then established. The patent also gave the proprietors authority to distrain for all rents, services, and other sums of money, and reserved

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to the Crown an annual rent of fifty bushels of "good winter wheat." This patent was confirmed by another in 1704.

The colony grew rapidly, and with its growth came a spirit of discontent. The tenants were extremely dissatisfied with the conditions imposed on them, and they did not always readily render the obedience which the patroon desired, and which was required by the terms of the leases, or by the laws governing the colony. In a letter written to Lord Chatham from Claverack in June, 1766, the writer says that "for some months past a mob has frequently assembled and ranged the eastern parts of the manor of Rensselaer." There was a battle between the sheriff's posse and the rioters, in which four persons were killed and several wounded. About twenty years after this unfortunate occurrence, Stephen Van Rensselaer 3d, the sixth patroon, reached his majority, and assumed the management of the manor. Under his administration the manor flourished and affairs were generally quiet. It is said that on the advice of his brother-in-law, Alexander Hamilton, he initiated a new form of conveyance, prepared by Hamilton, by which he conveyed an absolute title, and in which the grantee agreed to pay yearly a certain quantity of grain, a specified number of fowls, and perform certain personal services for the grantor. These deeds contained provisions of a feudal character, requiring, among other things, that, on a sale of the land by the grantee, the grantor should have the first right to buy; and in case of a sale to another person, should be paid one quarter of the purchase price.

This Stephen Van Rensselaer, probably the most distinguished of the patroons, was also prominent in public affairs, holding many high civil and military positions. There was little trouble among the holders of land in his manor during his lifetime, but it is evident that the gran-

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tees whose land was burdened with a perpetual rent charge were becoming restive. The patroon died in January, 1839, and when his sons attempted to collect rents, much of which had fallen in arrears, they encountered violent resistance. The sheriff was unable to serve process, and after several months spent in a vain attempt to enforce the law, he called to his aid the power of the county, but this proved inadequate to the emergency. It is said that Ex-Governor Marcy was among those called out by the sheriff; he responded to the call and went with the sheriff's posse to aid in maintaining the supremacy of law. The sheriff's expedition having failed, Governor Seward, in December, 1839, ordered out a large military force, which marched to the Heldebergs, but found no enemy, the rioters having dispersed. Immediately thereafter the disturbance subsided, and the sheriff was able to serve process.

Governor Seward, in his message of 1840, gave a brief history of these troubles, and the causes which produced them. He said that "the resistance to the sheriff arose out of a controversy between the tenants of the manor of Rensselaerwyck and its proprietors. The lands in that manor are held under ancient leases, by which mines and hydraulic privileges, rents payable in kind, personal services, and quarter sales are reserved. Such tenures, introduced before the Revolution, are regarded as inconsistent with existing institutions, and have become odious to those who hold under them. They are unfavorable to agricultural improvement, inconsistent with the prosperity of the districts where they exist, and opposed to sound policy and the genius of our institutions. The extent of territory covered by the tenures involved in the present controversy, and the great numbers of our fellow-citizens interested in the questions which have grown out of them, render the subject worthy of the consideration of the leg-

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islature. While full force is allowed to the circumstance that the tenants enter voluntarily into such stipulations, the state has always recognized its obligation to promote the general welfare, and guard individuals against oppression."

He expressed the hope that some measure would be adopted which, without violating contracts, or doing injustice to either party, would "assimilate the tenures in question to those which experience has proved to be more accordant with the principles of republican government, and more conducive to the general prosperity and the peace and harmony of society."

Governor Wright, in 1845, considered the subject at great length in his annual message, giving a history of the troubles and efforts to resist the execution of the laws, and the issues involved, and recommending legislation which he thought would aid in restoring order. He said that the difficulties between the proprietors and tenants had been accumulating for several years, and had been the occasion of local disquiet, sometimes leading to disturbances which threatened social order and public peace; that "an exciting state election was made the occasion for an earnest attempt to intermix these questions with the general politics of the state, and make them tests of election to the legislature." He said it was expected that since the troubles had been made an issue in the election an opportunity would be given the legislature to act before the disturbances were resumed, but this had not been the case. Resistance had continued without waiting for legislative action. "Organized bands of men assuming the disguise of savages, with arms in their hands, have already bid defiance to the law, its process, and its officers." He informed them that two peaceable and unoffending citizens had lost their lives in the disturbances, that these events, with continued and aggravated breaches

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of the peace and general disquietude caused by organized resistance to law, "had given to the whole public mind a shock which nothing but the prompt and effectual restoration of the reign of law and order can calm." He said the question between the proprietors and the tenants was "whether the leasehold tenures should be perpetuated, or the rents should be commuted upon fair and reasonable terms, and fee simple titles should be given upon the payment of a capital in money, which, invested at a stipulated rate, would reproduce the rents to the landlord;" and that the "controversy was one in which the feelings and sympathies of our people were deeply enlisted, and strongly inclining in favor of the tenants." He further remarked that without the existing disturbances the question would have been how "contracts onerous in their exactions, and tenures in their nature and character uncongenial with the habits and opinions of our people, could be peaceably and justly and constitutionally modified to meet the changed circumstances of the times;" but in view of the hostile attitude assumed by those in charge of the cause of the tenants, threatening all organized government, the Governor refrained from discussing the issue on its merits, expressing the opinion that the attention of the legislature and of all good citizens should be addressed first to the suppression of disorder and the re-establishment of lawful authority. He appealed to the tenants and others who had joined in organized resistance to government, to desist from further lawless acts, and aid in restoring good order; suggesting that not till then could the merits of the controversy receive the calm and deliberate consideration which its importance demanded. He said that the principal disturbances of recent date had been confined to the counties of Columbia and Rensselaer, and that in the former county the disorders had become so serious that Governor Bouck, in 1844, had ordered out the militia

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to aid in preserving the peace. Governor Wright, referring to the fact that persons who resisted the law were disguised, sometimes as Indians, recommended that a law be passed making it an offense to assume such disguises, and making the wearers of such disguises subject to arrest and examination, even if no actual crime had been committed. The legislature adopted this suggestion, and passed a law declaring persons appearing in disguise to be vagrants. The legislature also at this session passed "an act to enforce the laws and preserve order," providing for the organization of jail guards, prescribing penalties for resisting legal process, authorizing the Governor to loan equipments for local use, and by proclamation to declare a county in a state of insurrection where the execution of legal process is resisted by bodies of men and combinations to resist the execution of such process by force, and where the power of the county has been used and found insufficient for the emergency.

Governor Wright, in 1846, resumed the discussion of this important subject, reviewing the events of the preceding year. He said that disturbances amounting in some cases to riot had occurred in the counties of Columbia, Delaware, and Schoharie, but that "it was reserved for the ill-fated county of Delaware, however, to bring these mistaken and ill-advised disturbances to open insurrection, and to crown the long catalogue of crime with a cold, deliberate, and cruel murder." He then related the incidents connected with the death of deputy sheriff Osman N. Steele, who, on the 7th of August, 1845, had been killed while in the performance of his duty. The disorders in this county became so serious that, on the 27th of August, the Governor declared it in a state of insurrection, and the proclamation continued in force until the 22d of December. Three hundred militia were called into service in Delaware county and proceeded at once to sup-

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press the disorders, and aid in enforcing the execution of legal process. Governor Wright said that peace had been restored to a degree sufficient to justify him in considering the merits of the controversy between the landlords and tenants, remarking that the object sought by the tenants was a change of the tenures from leasehold to fee simple estates, and that the odious character and evil influence of the leasehold tenures had formed the burden of the complaints that had reached him. He said that the change of tenures could be effected only by a plan of commutation based on concessions and compromises, and that negotiations were pending for this purpose; that the tenants demanded the abolition of distress for rent, and he recommended the passage of a law for that purpose, abolishing distress as to future leases. The Governor said that the claim had also been made that there was great inequality in taxation and injustice to the localities affected, from the fact that the leasehold land had to bear the entire burden of taxation, and that the owners of the reserved rents ought to be taxed the same as the holder of a mortgage, for the reason that the rent reserved was in effect interest on capital for which the land was security, and that it was a form of investment by which the seller of the land put his money into a perpetual security, with perpetual interest. Remarking that there seemed to be force and truth in this position, he recommended the subject to the consideration of the legislature, and said this would be "the introduction of a new principle in reference to the assessment of personal property of resident citizens."

The most important suggestion in the Governor's message, from a constitutional point of view, related to the limitation of agricultural leases. On this topic he said: "A suggestion has been frequently made, in connection with the troubles arising from these tenures, the adoption

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of which I suppose to be within the unquestioned power of the legislature, although I am not aware that it has been urged by the tenants upon the existing leasehold estates. It is that a law should be passed to prohibit for the future this form of selling farming lands, by declaring that no lease for such lands for a longer term than five or ten years or some other short period shall be valid. It is entirely apparent, notwithstanding the very unwarrantable character of the late disturbances upon the leasehold estates, that these tenures are not in accordance with the spirit of our institutions, or with the feelings of that portion of our people in no way interested in the disturbances, or in the relations out of which they have grown. Such is manifestly the settled state of the public mind upon this point, that the multiplication or material extension of leasehold estates would be looked upon as a public evil, threatening more widespread and serious disturbances than those which have recently interrupted our internal peace."

He suggested that the legislature pass a law embodying such a limitation. This is the earliest suggestion I have found on this subject, and its adoption by the Convention of 1846 shows, as I have already indicated, how the leasehold policy concerning agricultural lands throughout the state was affected and altered by anomalous conditions existing in a few eastern counties.

Many members of the legislature of 1846 had been chosen on issues which grew out of the anti-rent troubles. Samuel J. Tilden, then thirty-two years of age, was elected to the assembly from Columbia county, and here began a long and active public career. The legislature addressed itself earnestly to the task of trying to discover and apply adequate relief from the unfortunate conditions existing in the eastern part of the state, growing out of the prevailing policy concerning leasehold tenures. The

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part of the Governor's message on this subject was referred to a select committee in each house. Mr. Tilden was chairman of this committee in the assembly. The committee gave hearings, examined witnesses, read petitions, and listened to counsel who represented the various interests involved. The proprietors of the manor of Rensselaerwyck attended by counsel. Representatives of the tenants appeared from the counties of Albany, Rensselaer, Columbia, Schoharie, Schenectady, Montgomery, Greene, and Delaware. The report of the committee, said to have been written by Mr. Tilden, set forth elaborately and with great ability the whole subject of tenures involved in the anti-rent controversy. The report describes the leases, many of which were perpetual or in fee, while others were for long terms of years, or for life. The rent was sometimes to be paid in money, sometimes in grain or in poultry, and sometimes with services with carriage and horses.

The committee expressed the opinion that there could be no doubt of the unfavorable influence of the leasehold tenures upon the agricultural prosperity and the social condition of the communities where they existed. The committee discussed at some length the condition in the Van Rensselaer manor, and stated that at the time of the death of the "great patroon," in 1839, the rents due him had fallen in arrears some $400,000. It was the vigorous attempt by the new proprietors of the manor to enforce collections of these arrears that precipitated the issue between the landlords and tenants, which culminated in the disturbances and disorders already noted. The committee said that the tenants presented three propositions for relief; namely, the taxation of rents reserved, the abolition of distress for rent, and the right to dispute the landlord's title. The committee adopted the first two propositions, but rejected the third. The propositions

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relating to taxation of rents and the abolition of distress for rent were embodied in appropriate bills, which were passed by the legislature at that session. The committee also reported a bill limiting agricultural leases to ten years. This bill passed the assembly, but failed in the senate.

The legislature adjourned on the 13th of May, nineteen days before the meeting of the constitutional convention. The incidents growing out of the disturbances created by the anti-rent controversy were then fresh in the public mind, and it was only natural that the Convention should deem it important to take some action which would forever set at rest questions which had been the occasion of so much disorder in the state.

The anti-rent troubles, which were the legitimate result of the policy of leasehold tenures inaugurated by the Van Rensselaers, culminated in Governor Wright's administration, when the county of Delaware was declared to be in a state of insurrection, and continued under executive ban for nearly four months. It is evident from both of Governor Wright's messages that he felt a deep sympathy for the tenants, but that he had no sympathy for law-breakers, and we might very properly indulge in some discouraging reflections on official faithfulness, when we remember that, according to current history, Governor Wright was defeated for re-election in 1846 because of the prompt and vigorous measures taken by him to suppress disorder, preserve the peace, and maintain the dignity and good name of the state.

The action of the Convention on this subject will be considered in its proper place. While the Constitution changed the policy of the state, and prescribed rules and limitations which would govern future cases, it did not and could not cure all existing evils. The anti-rent controversy continued in a modified form, but happily not

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including the violent demonstration which had marked some of the earlier stages of the struggle. It may be profitable to continue this sketch a little beyond the Convention, for the purpose of showing the action taken by the state itself in trying to settle one phase of the controversy.

Governor John Young, in his message of 1848, considered the subject quite fully, remarking that what was known as "manor excitement" still continued, and that in many quarters there was manifest a very decided feeling of unrest over conditions which had not been cured by the Constitution and various remedial statutes. The Governor said it was believed "that more than 1,800,000 acres of land are still held in this state under these leases, containing annual reservations of rent, and, in some instances, of service and quarter sales, and that a population of more than 260,000 people resided upon lands thus held."

A phase of the controversy that had recently developed was the denial by the tenants of the validity of the title of their landlords. In 1846 the tenants had asked for legislation permitting them to deny this title. We have already seen that the assembly committee rejected this suggestion. Governor Young, in 1848, also condemned it. The opinion had been formed in some way that the proprietors of the manors did not have a valid title; that a manor could not be created in the colony under the English land system; that the lands which the proprietors had received by various colonial patents, which were claimed to be invalid, had in fact become the property of the state at the Revolution, and that the state could assert its title and take possession of such lands. The Governor suggested that the legislature might properly take proceedings for the purpose of determining this question by instituting an action in the name of the state to recover the

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land or some portion of it, on the ground that the state was the real owner, and had never parted with its title; and he remarked in this connection that the judgment in such an action would have the effect to quiet the controversy, and establish the titles of the landlords, if it were found that the colonial patents were valid; and, on the other hand, if it were found that the patents were invalid, and that, either by operation of the Revolution, the statute of 1779, transferring Crown titles to the state, or the law of escheats, the state should be declared to be the owner of the land, and entitled to its possession, such land could and probably would be released to the occupants, whose title would thus be confirmed.

The part of Governor Young's message relating to this subject was referred to a select committee of the assembly, who, on the 4th of March, 1848, made a report approving the Governor's suggestion concerning proceedings by the state, and recommending the adoption of a resolution by the legislature directing the attorney general to investigate the manorial titles, and, if satisfied that the title of the claimants might be justly questioned, and the right of the state be established according to law, to take proceedings, by suit or otherwise, to test the validity of such titles or claims. The resolution was adopted on the 6th of April, and later in the same year the attorney general brought an action of ejectment,—*People* v. *Van Rensselaer,* 9 N. Y. 291,—to test the validity of the title of land held under the Van Rensselaer patents. The pleadings and opinions set forth a full history of the Van Rensselaer titles from their inception; describing in detail the various steps by purchase, patent, or otherwise, under which it was claimed the titles had been firmly established. A decision of the court of appeals was rendered in December, 1853, sustaining the Van Rensselaer title, and holding, among other things, that "royal letters patent

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granting lands in the province of New York, are not void by reason of their conferring manorial privileges and franchises upon the patentees, but that such grant of manorial privileges, if it were unauthorized, would not avoid the grant of lands in the same letters patent," and that the Dongan patent of 1685 was confirmed by the colonial statute of May 6, 1691, which ratified all prior patents. It should be noted that this act of 1691 was the second statute passed at the first session of the new assembly which had been re-established by William and Mary.

BANKING AND CURRENCY.

Our financial system seems now so well settled and the business of banking so firmly established on what is believed to be correct principles, that this generation finds little need for constitutional restriction. The Convention of 1846, however, found it necessary to give its attention to the subject of currency and banking. This necessity grew out of conditions which had been gradually accumulating during the preceding history of the state, and which, in the opinion of that Convention, required constitutional treatment. While the extreme tension incident to conditions then existing has relaxed with the development of a better system of finance, both Federal and state, it may not be unprofitable to examine briefly the banking policy of the state as it existed when this Convention was confronted with the important duty of trying to restrict, within safe limitations, a branch of business so intimately connected with the prosperity of the state.

The colonial legislature found it necessary to deal with questions of finance, but these questions usually related to the circulating medium and the financial obligations of the colony. As early as 1708 an act was passed against the corruption of coin, and fixing the prices at which certain

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foreign coin should be received in the colony. In 1709 the legislature levied a tax of £4,000 to pay certain war expenses, and authorized the issue of bills of credit for this amount. These bills of credit were to be in value equal to money, and accepted in all public payments, and for any fund at any time in the colonial treasury. They were also made a legal tender for all private debts, and were to be accepted the same as current coin. The legislators of that period had less trouble in dealing with the question of legal tender than their successors, the statesmen of 1861–62, who found difficulty in making the first United States treasury notes a legal tender in private transactions. There is a striking similarity in the two statutes so far apart in time. From this time until the close of the colonial legislative period in April, 1775, several statutes were passed providing for issuing, canceling, and renewing bills of credit, and the issues aggregated a large amount. They seem to have been a common form of currency during that period, and were given the value of current coin, "passing in the colony." In 1774 an act was passed relating to bills of credit issued by other colonies, and circulating in New York. The preamble recited that such foreign bills were circulating in the colony at a higher rate than at home, that they were draining the colony of gold and silver, and depreciating the New York bills of credit. The statute prohibited the circulation of such foreign bills in New York at a higher rate than the value fixed thereon where they were issued.

The revolutionary patriots found themselves without a treasury, and confronted with serious financial problems. They resorted to the familiar plan of bills of credit, and during the period preceding the organization of the state government, the provincial congresses, councils, and committees of safety authorized the issue of bills of credit, pledging the faith of the state for their payment.

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Thus, in August, 1776, the Provincial Congress authorized the issue of bills of credit aggregating $500,000 on the faith of the new state, for which as yet no government had been organized and no Constitution prepared. The bills were to contain an impression of the arms of the city of New York, and, underneath, the words "'Tis death to counterfeit."

The Provincial Convention passed several resolutions authorizing the issue of bills of credit to defray the expenses of the state in the Revolutionary War, and these bills of credit were to "pass current in all payments in this state." One of these resolutions provided that the "public faith of this state be pledged for the redemption of the said bills of credit, and that this Convention, or some future legislature of this state, will make effectual provision for that purpose." On the 1st of March, 1777, the committee of safety, composed of members of the Convention, adopted a resolution making bills of credit issued by the Continental Congress or by the late provincial congresses of New York, a legal tender in payment of all debts, public or private.

Probably the financial legislation of the colonial period remained in force after the organization of the state government by the provisions of article 35 of the first Constitution, which, among other things, continued the acts of the legislature of the colony of New York in force April 19, 1775. The same article ratified and confirmed the "resolves and resolutions" of the congresses of the colony of New York, and the Convention of the state of New York, making them a part of the laws of the state. This article brought over into the state government the financial system and also other elements of administration in force on the adoption of the Constitution, April 20, 1777; but I have not been able to discover any action by the state which recognized the bills of credit issued during the

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colonial period. The colonial treasury was not transferred to the state, and I find no evidence that the financial obligations of the colony were ever in fact assumed by the state. In the early history of the state resort was had to bills of credit, and many statutes were passed relating to this class of obligations. A statute passed in 1788 provided for redeeming and canceling certain other bills, some of which had been counterfeited, prescribed the form of the new bill, and, following the example of the Provincial Congress, the new bills were required to contain the statement, "It is death to counterfeit this bill."

In 1782 the legislature passed a statute reciting the action of the Congress in establishing and incorporating the Bank of North America on the plan suggested by Robert Morris; and the request by Congress that the several state legislatures prohibit the incorporation of any bank "during the present war." The statute then proceeded to incorporate the Bank of North America "within this state," and provided that "no other bank, public or private, shall be established within this state during the present war with Great Britain." State jealousy of Federal power is indicated by the curious clause at the end of this statute "that nothing in this act contained shall be construed to imply any right or power in the United States in Congress assembled to create bodies politic, or grant letters of incorporation, in any case whatsoever." On the 21st of March, 1791, the legislature incorporated the Bank of New York. This bank, it seems, had been doing business since 1784 under a voluntary organization. This was the first bank charter granted to a state institution. By the act of incorporation the par value of its shares was fixed at 500 Spanish milled dollars, or the equivalent in specie. Afterwards, in 1792, the state took 100 shares of the stock of this bank. The state had already, in March, 1791, taken 190

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shares of the stock of the Bank of the United States. From this time, and during several years, it was quite common for the state to become a stockholder in banks. The Bank of Albany was incorporated April 10, 1792, and the Bank of Columbia, at Hudson, March 6, 1793, and the state was authorized to subscribe to the stock of each bank.

March 21, 1801, the legislature established in this state the Federal decimal currency, and prescribed its use. March 19, 1803, the legislature incorporated the State Bank of New York, making the comptroller *ex officio* a director, and by later statutes authorized the comptroller to invest certain surplus funds in the stock of the bank, and also made the bank a depository of state funds.

In 1804 the legislature passed a significant statute "to restrain unincorporated banking associations;" the apparent object of which was to restrict free banking. The act provided, among other things, that "from and after the passing of this act, no person unauthorized by law shall subscribe to, or become a member of, any association, institution, or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of their respective acts of incorporation." The Merchants' Bank of New York and the Mercantile Company of Albany were permitted to continue business until the first Tuesday of May, 1805, but after that date "all unincorporated associations were prohibited from issuing notes or loaning money." Mr. Cambreleng, chairman of the committee on currency and banking in the Convention of 1846, in a speech on the banking article, referring to the origin of this restraining statute, said that, prior to its enactment, "the Manhattan Company, though chartered for another purpose, had assumed banking powers.

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An association had been formed in New York called the Merchants' Bank, and had been some time in operation, and another in Albany called the Mercantile Company. The influential stockholders in the Manhattan Company petitioned the legislature not to grant charters to these companies, but to prohibit all voluntary associations from engaging in the business of banking." He said this inaugurated a war between free banking and privileged corporations. Another restraining statute, still stronger, was passed in 1818, and these statutes continued in force until 1837.

Governor Tompkins, in his speech to the legislature of 1812, made a vigorous protest against the increase of banks. He discussed the subject at considerable length, pointing out the evils to the business interests of the state resulting from the overissue of paper, and consequent speculation. He said that applications were pending for the charter of banks with an aggregate capital exceeding eighteen millions, that the bank capital already authorized permitted the issue of thirty-nine millions in bank bills, and that, if the pending applications were granted, this issue might be increased to ninety-four millions,—"a sum at least sixteen times greater than the whole specie capital of the state. A failure to discharge such a debt will produce universal bankruptcy and ruin." He said the foregoing facts, and "the infatuation which has hitherto occasionally prevailed with respect to banks" presented to his imagination a "fearful prospect," and he argued with great force the importance of restricting bank charters, saying that the "vaults of banks are the reservoirs into which the specie is collected, and where large quantities of it are, at all times, more accessible by those who may wish to send it out of the country than would be the case were the specie left diffused, instead of the paper. The influence of wealth amassed and concentrated in bank stock,

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wielded under the direction of a few persons not accountable or responsible to the community for their conduct, nor restrained by any official oath, may be devoted to a sway over individual passions, sentiments, and exertions alarming in a representative government." He said a "fashionable, erroneous opinion" prevailed that there is greater sanctity in corporate, than in individual, property and rights; and that the one is less amenable than the other to governmental control, and less subservient to any paramount public good; and that, in view of the condition of commerce at that time, which was then "almost annihilated," there was no occasion, "ostensible or real, for the multiplication of banks."

The Constitutional Convention of 1821 gave little consideration to the subject of banks. They were necessarily included in the provision adopted requiring a two-thirds vote of the legislature for the creation of a corporation, and while this subject was under discussion Mr. Hunter "proposed an amendment, the purport of which was that the legislature should never, in future, grant a bank charter, except upon the condition that the individual property of all the stockholders should be holden for the redemption of all the notes or bills they might issue." The proposition was rejected.

In 1829 the banking business had evidently developed a condition which required serious attention. Governor Martin Van Buren, prompted by the approaching expiration of nearly all the bank charters, gave the subject special consideration in his annual message. He called attention to the fact that of the forty banks then in operation, the charters of thirty-one would expire within the next four years. He said that these thirty-one banks had an aggregate available capital of about $15,000,000, that the sums due to them amounted to about $30,000,000, and that the debts due from these banks to their creditors, in-

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cluding stockholders, amounted to about the same sum. He thought the subject of renewing the charters was of great importance in the existing condition of financial affairs, and he admonished the legislature to scrutinize the affairs of the banks with great care, so that the renewed charters would represent sound and solvent banks. Discussing the subject further, he suggested, especially as to new incorporations, the importance of providing more adequate protection to persons dealing with banks, by "an annual and adequate appropriation of a part of their income towards a common fund, to be placed under the control of the state." The Governor's suggestion found expression in a statute passed on the 2d of April, 1829, known as the "safety fund" act, which, among other things, provided that banks thereafter incorporated should pay into the state treasury every year ½ of 1 per cent on the capital paid in, except on stocks owned by the state. Such payments were to continue until each bank had paid in 3 per cent of its capital stock. The fund so paid in was to constitute a "bank fund," to be used in the payment of debts of insolvent banks. The act also created the office of bank commissioner, providing for three commissioners, one to be appointed by the governor and senate, and the other two by the moneyed corporations which were subject to the provisions of the statute. The commissioners were required to visit each bank at stated periods, and inspect and examine its books and affairs. In 1837 the power of appointment of the two commissioners was transferred from the banks to the governor and senate.

A statute passed in 1830 prohibited the circulation in this state of bills under $5, issued by any other state or country. In 1831 the legislature adopted a resolution "that it is the sentiment of this legislature that the char-

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ter of the Bank of the United States ought not to be renewed."

Governor Marcy, in his annual message to the legislature in 1834, discussed the subject of banks at considerable length, and made several important suggestions which may, perhaps, apply with equal force to modern corporations. Referring to the tendency to increase the number of banks as a means of profitable investment, he said that, according to the newspapers, "notices for 105 new banks, with capital amounting to about $56,000,000, have already been published, and it is probable that additions will be made to this number." Commenting on the importance of banks in carrying on the business of the country, he said that "our business transactions have been so long conducted by means of bank credits, and by the use of a paper currency, that this course has become firmly settled, and, if it were desirable, it would be scarcely possible to change its direction. Banks are now regarded as necessary establishments; but I cannot believe that they are required to the extent now asked for." Banking privileges "are a monopoly which ought not certainly to be increased beyond the actual exigencies of the public." These privileges at that time must have been valuable, for Governor Marcy said that "every charter granted on the terms heretofore imposed confers, in the prosperous condition of the state, a donation on the stockholders of a sum varying from 10 to 15 per cent on the capital of the company." Governor Marcy evidently believed that valuable franchises should not be given away, and he made a most significant suggestion, especially pertinent in these modern days of rapid multiplication of corporations. He said that "whatever value is given to the stock above the sums paid for it, in consequence of the franchises or peculiar privileges granted to the corporations, may, upon any principles of justice, be

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withheld from the subscribers, and rightfully claimed by the state; and it is a cause of regret that some provisions to effect this object had not long since been adopted." He admitted that there were some objections to appropriating to the state "the enhanced value of the stock of an institution chartered by the legislature." As a method of withholding from the original owners, for the benefit of the state, the premium on bank stock, he suggested a public sale of the stock, "reserving to the state the advance above the par value." He also suggested statutory restriction on the circulation of banks to the amount of their capital. Notwithstanding Governor Van Buren's admonition to exercise great caution in granting new charters, it seems, from Governor Marcy's message, that during the four years prior to 1834 the legislature added $9,000,000 to our banking capital.

In 1834 a statute was passed authorizing the issue by the comptroller of "certificates of stock for an amount not exceeding $6,000,000," and pledging the faith and credit of the state for their redemption. Four millions of this stock were authorized to be loaned to New York city banks, the other two millions were to be sold at auction, and the capital might be loaned to citizens of the state, excluding the first senatorial district. The causes which led to the enactment of this statute were discussed at some length by Governor Marcy in his message of 1835. He called attention to the financial troubles which he said the country had suffered in consequence of the aggressive policy pursued by friends of the Bank of the United States; and that, while the people, in electing President Jackson, had indicated their unwillingness to prolong the existence of this bank, the bank had sought, by "inflicting public distress," to reverse the popular judgment. That the bank curtailed its issues, "and withheld from the public its usual accommodations," and threatened dire finan-

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cial calamity; and that, in furtherance of this design, "the banks of this state were made the special objects of attack. Their condition was misrepresented; their ability derided; and their solvency questioned;" that, as a consequence of this attack, combined with "the actual difficulties in which we were involved," a panic was created, individual credit was impaired, public confidence shaken, and the country's resources were withheld. Acting in obedience to a high sense of duty to its constituents, the last legislature interposed in their behalf its protecting power, by enacting the above statute, authorizing the issue of six millions of state stock. He said that immediately after the enactment of this statute the panic began to subside, public confidence revived, business resumed its wonted activity, and pecuniary embarrassment passed away. Money became unusually abundant, and the people had enjoyed a high degree of prosperity. He said that the statute had not been put in actual operation, no stock had been issued or money borrowed under its authority, and none would be necessary, for the reason that public confidence had been completely restored and financial embarrassment had disappeared.

The legislature of 1834 passed an important resolution relative to the Bank of the United States, including the declaration:

"That the removal of the public deposits from the Bank of the United States is a measure of the administration of which we highly approve."

The resolution directed the senators, and requested the representatives from this state, to oppose any attempt to restore such public deposits, and condemned the efforts of the bank to force a renewal of its charter "from the fears of the people."

The legislature, in 1834, adopted a resolution directing each bank to report to the legislature on the first day of

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the next session "a statement of its bills put in circulation as money, and outstanding on the first day of December next, of each of the denominations of one, two, and three dollars." At the same session a resolution was adopted requesting the Governor "to open a correspondence with the governors of such states as he may deem proper, with a view to suppress in each, at the same time, the issue of bank bills of a denomination less than $5, and that he communicate on the subject to the next legislature." Governor Marcy, in his message to the legislature of 1835, said that the duty imposed on him by this resolution had been performed, and that he expected the co-operation of other states in the movement to remedy "the evils of a paper circulating medium, and procuring a sound currency." Referring to the resolution of 1834, requiring banks to report the amount of small bills in circulation, the Governor said that these bills then amounted to about $4,000,000, that the object of withdrawing the small bills was not to diminish the circulating medium, but to introduce gold and silver in place of the paper currency. He recommended legislation prohibiting the further issue of small bills, and providing for the gradual withdrawal of those then in circulation. He thought the state had enough banks, and recommended that no more charters be granted.

In 1835 the legislature adopted a resolution requiring each bank to report to the next legislature the amount of its circulation on the 1st day of January, 1836, stating the amount of bills of each denomination. The same year the legislature passed a law restraining the circulation of small bills after the periods therein stated.

Governor Marcy, in 1836, continued his observations on banking, informing the legislature that ninety-three banks had given notice of an intended application for a charter; but the Governor seems to have modified the

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views expressed by him in 1835, to the effect that no more banks were needed, for he now said that it is generally believed "that the present banks are unable to afford the necessary accommodations which the increased and rapidly increasing commerce and business of the country demand." He said "an unregulated spirit of speculation" had recently prevailed to an unprecedented extent, including not only transactions in the state, but also in other states, which necessitated the use of a large amount of capital, or a widely extended credit; that the foreign speculation had been the means of reducing the available capital in the state below the amount actually necessary for current business, that the "passion for speculation" prevails not only among capitalists but among merchants and traders. He admonished the legislature to use great care in determining whether there ought to be an increase in the number of banks and of banking capital, and expressed an apprehension that under the prevailing spirit of speculation the increased capital afforded by new charters would soon find its way into speculation rather than into the legitimate channels of trade and commerce, and that, if this result followed, the state would receive no substantial benefit from an increase in banking facilities. Commenting on the recent financial troubles, he observed that "our institutions have been severely tried, and have sustained themselves in a most alarming crisis; but, if their number had been much larger than it was, and credit and circulation proportionably extended, it is by no means certain that such would have been the result. The credit which sustains our paper currency rests on the belief that the banks have the ability to redeem in specie their bills in circulation, whenever payments are demanded. We do not want more banks to supply us with a paper currency, for we have enough of that already; more would not make it better, and might make it worse." He closed his con-

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sideration of this subject by expressing the hope that the utmost caution would be used in disposing of the applications for an increase of bank capital. "A material error on your part," he said, "would probably lead to results fatal to our general prosperity." Referring to the act of 1835, to restrain the circulation of small bills, he said the statute had "begun to operate on the currency, and promised to produce all the beneficial results that were anticipated."

In 1837, Governor Marcy recommended a repeal of the restraining acts of 1804 and 1818, so far as they prohibited an individual from doing a deposit or discount business. The legislature adopted the Governor's suggestion, and passed a statute accordingly. At the same session an act was passed suspending specie payments for one year, limiting the amount of bills a bank might issue or have in circulation according to the amount of capital, and prohibiting the sale of specie by banks during the suspension of specie payments.

Governor Marcy, in 1838, presented to the legislature a somewhat prolonged discussion of the financial situation. His consideration of the subject was justified by the condition in which the country found itself as a consequence of the panic of 1837. He discussed the causes of that financial convulsion, referred to its effect on the New York banks, and made some suggestions concerning the restoration of sound financial conditions. "I hold it to be the imperative duty of the legislature," he said, "to guard the public against the evils of a spurious and vitiated currency. Ours has hitherto been composed mostly of the paper issues of state banks. Such institutions having been very generally regarded not only as useful, but as indispensable to our prosperity, it was the object of past legislation to prevent the abuses incident to them, and to increase their usefulness. The law creating the safety

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fund is the fruit of this wise policy." He referred with approval to the act of 1837, suspending specie payments, regarding it as necessary for the protection of the banks. In view of the existing financial pressure the banks were compelled to suspend specie payments, and their charters would have been forfeited as a consequence of this suspension if the legislature had not afforded relief by authorizing them to suspend specie payments for one year. Referring to the special privileges possessed by banks, and to the prevailing opinion that these privileges created a monopoly, he said: "To obviate this objection, it is desirable to discontinue the present mode of granting charters, and to open the business of banking to a full and free competition, under such general restrictions and regulations as are necessary to insure to the public at large a sound currency. This can be done, either by passing a general banking law, or by an entire repeal of the restraining act. Doubts have been entertained as to the constitutional competency of the legislature to pass a general banking law, conferring corporate powers. Without entering into the argument on this question, I will only say, that I am inclined to the opinion that the legislature have the power to pass such a law; but the spirit of the Constitution requires that it should be passed as a two-thirds bill. It is proper that I should also say that this opinion is entertained with much diffidence, and is not expressed without duly considering the respectful deference justly due to the high authority by which it is opposed. If, however, you should conclude that the Constitution interposes an insurmountable obstacle to the passage of such an act, then it is suggested that you should regulate and limit, by a general law, partnerships which may be formed to conduct the business of banking, in such a manner as to secure to them the essential advantages now conferred by special charters, and subject them

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to such restrictions and regulations as the public good may require." Commenting on the effect of the financial crisis on the New York banks, he said: "The pecuniary convulsion which has shaken the whole country, owing to causes already alluded to, fell with destructive violence upon our banks. That they so well sustained themselves under the shock, and have recovered from its effects more speedily than those in most other parts of the Union, may justly be ascribed to the excellence of our banking system, and to the well-directed and persevering efforts of the managers of our banks to relieve the community from the evils of a disordered currency." The legislature of 1838 repealed the act of 1835, prohibiting the circulation of small bills, and required each bank to redeem its own small bills in specie. The same statute prohibited the further issue of small bills by a bank after 1840. The restriction on the circulation of small bills was also applied to bills issued by outside banks as well as to local banks. This statute was repealed February 21, 1839.

The legislature of 1838, adopting the recommendation of Governor Marcy, passed a free banking law. This law authorized the comptroller to cause to be engraved and printed circulating notes, "in the similitude of bank notes in blank," which were to be issued in his office. Banking associations might exchange state or Federal stock for an equal amount of these circulating notes, and such banking associations might thereupon issue the circulating notes "as money" according to the banking usages of this state. Provision was made for protesting these notes for nonpayment by the bank on demand, and for their payment by the comptroller out of the trust funds deposited with him by the bank. Banking associations, instead of depositing public stocks, might deliver to the comptroller bonds and mortgages on real estate for one half of the value of circulating notes to be taken. Per-

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sons desiring to form a banking association were authorized to make a certificate stating the required facts, and record it in the office of the secretary of state. This authorized the association to enjoy the benefits of the law, and procure from the comptroller circulating notes with which to carry on its business. The association was required to keep on hand specie to the amount of at least 12½ per cent of its circulating notes.

Governor Seward, in his message of 1839, speaking of the free banking law of 1838, said that thirty-two banking associations had been formed under it, with an aggregate capital of nearly nine millions. "It seems certain that, with a general revival of confidence in the community, associations under this law will be multiplied, converting a mass of dormant wealth into active capital, giving new impulses to industry and enterprise, and working a mighty change in the condition of this country."

In 1840 an act was passed requiring moneyed corporations to designate an agent, with an office either in New York or Albany, to honor all bills of such institutions which might be presented for redemption, and it was made the duty of such agent to redeem such bills on presentation and demand.

Governor Seward, in his message of 1841, said that in the preceding two years our currency was sustained "during a period of suspension in most other states." He attributed this advantage to the free banking system, the restored circulation of small bills, and the compulsory redemption of bank notes under the act of 1840. Governor Bouck, in his message of 1843, made some observations on the banking system. He said the safety fund had become so much impaired by bank failures that it was inadequate to meet the demands upon it. He suggested, in view of some recent notable failures, that the bank commissioners might not have been sufficiently watchful,

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and he observed that the appointment of commissioners "has not answered all the valuable ends which were anticipated from the measure." The legislature, acting on the hint of the Governor, abolished the office of bank commissioner, and transferred the inspection of banks to the comptroller's office.

The numerous failures of banks doubtless led to a proposed constitutional amendment which passed the senate in 1844, providing that the stockholders and associates of any banking corporation or association thereafter organized should be liable for its debts.

According to the comptroller's report, presented to the legislature of 1846, there were at that time eighty-one chartered banks with a capital exceeding thirty millions, and sixty-seven "free banks" or banking associations under the free banking law, with a capital exceeding twelve millions, making a total of one hundred and forty-eight banks with a capital of about forty-two and a half millions. The liabilities of these banks exceeded one hundred twenty millions, which were provided for by resources estimated at an equal amount. The circulation of these banks at that time was nearly twenty-one and a half millions.

There was some legislation concerning banking in the five years ending with 1846, most of which related to matters of detail or procedure or consisted of amendments to existing laws, but no new principles were established. The critical period in banking had apparently been passed, and the revival of business, following the panic of 1837, created financial conditions which were, in the main, satisfactory.

Thus, when the Convention of 1846 began its labors, the state had passed through a series of significant fluctuations, revulsions, and revivals in financial affairs, and a system of finance had grown up based on state banks.

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with an expansive paper currency more or less protected by specie and the faith and credit of the state, by operation of remedial protective statutes intended to safeguard the business interests of the people. From colonial, continental, revolutionary, and state bills of credit used as a circulating medium had developed a system of banking with a new form of currency, authorized, furnished, and maintained by the state. There was a safety fund to which resort might be had by creditors of insolvent banks. There was a free banking law which afforded adequate scope for business enterprise, and which made the state itself the source of bills circulated by banking associations, and these bills were presumably protected by adequate securities deposited in the comptroller's office; the state, for the better protection of business interest, had assumed supervision of all banking operations, and had established a system of inspection and reports intended to furnish to the people reasonable publicity concerning banks, and prevent disasters which might result from an unwarranted and unwatched use of banking privileges.

CANALS.

Our canals have made much history. While their placid waters have carried an immense commerce, building towns and cities, and, in the early days, pouring rich contributions into the treasury of the state, they have witnessed the contests of political factions striving for their control, the rise and fall of statesmen, and the formulation of policies of canal administration and improvement, and their failure or success. The financial condition of the state in 1845, when the new Convention was called, was almost wholly the result of the canal policy. This financial condition needed serious attention, and it was evident that there must be a modification, if not a reversal, of the policy which had permitted such an accumulation

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of pecuniary obligations; and it was clear that the time had come for radical constitutional reforms concerning legislative authority, the creation of debts, and the proper use of the taxing power. So the canals had a potent, and, in many respects, a controlling, influence in persuading the people to call a constitutional convention. Indeed, it may not be too much to say that, without the financial problems so intimately connected with the canals, a convention would not have been called.

In the article on canals in the chapter on the second Constitution I have given a brief sketch of the development of the canal system and policy of the state, with the results so far as they appear in that Constitution. It has already been observed that when the second Constitution was framed the Erie and Champlain canals had not been completed, and were not completed until four years after the Convention closed its labors.

De Witt Clinton, who was governor and canal commissioner at the beginning of active canal construction in 1817, who had retired from the office of governor when the new Constitution took effect, December 31, 1822, and had been removed from the office of canal commissioner by the legislature in April, 1824, was again elected governor in November of the latter year, and was therefore in office when the Erie canal was completed. His long study of the subject, his active interest in the various projects of internal improvement, and his devotion to a policy which he believed was of inestimable value to the prosperity of the state, gave great weight to his utterances concerning canals. His message to the legislature of 1826 was the first message after the completion of the canal, and it is important, among other things, because it marks the end of the first stage of the canal period and the beginning of another, to be characterized by still greater activity. Governor Clinton, after referring to his speech

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to the legislature of 1818, in which he had congratulated them on the "auspicious commencement and successful progress of the contemplated water communications between the great western and northern lakes and the Atlantic ocean," said that he now had the peculiar gratification to felicitate them on their completion. "On the 26th of October last, the western canal was in a navigable state, and vessels passed from Lake Erie to the Atlantic ocean. In about eight years, artificial communications, near four hundred and twenty-eight miles in length, have been opened, to the Hudson river from Lake Champlain by the northern canal, to Lake Ontario by the Oswego river and the western canal, and to Lake Erie and the other western lakes by the latter canal,—thus affording an extent of inland navigation unparalleled in the experience of mankind." He said that the canals had cost a little over nine millions, exclusive of interest. After referring to some financial details, he said that the "whole train of events associated with these works, and the auspicious consequences that have accrued, demonstrate the energy of a free and intelligent people, and their ability as well as disposition to do good;" and it was "obvious that in a few years the work would pay for itself." Referring to the celebration of the completion of the canals in New York the preceding October, he said that "the auspicious consummation of the canals naturally called forth universal expression of joy; not from a spirit of ostentation or vanity, but from a conviction that the moral impression would have a most felicitous effect in keeping alive a noble spirit of improvement, and in promoting other undertakings, and in elevating the character of the state."

An examination of the legislation of this period shows that the people had become thoroughly committed to the policy of canal communication between different parts of

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the state. In the period between the second Constitution and the Convention of 1846 the legislature ordered surveys of forty canal routes. Besides these it chartered thirty-one companies with power to construct canals, and authorized the construction of two others by private or municipal means. It actually authorized the construction of fifteen other canals by the state in addition to the great canals which were already in full operation. It should be noted that the period of greatest activity was during the ten years beginning with 1823. In this period twenty-five canal corporations were chartered, a survey of thirty routes was ordered, and the construction of eight canals authorized.

The following brief summary shows the direction of canal activity during the period between the two conventions, and if the reader will examine this list of proposed canals with a map of the state before him, he will see what a network of water ways would have covered the state if all the canals proposed had been constructed.

Surveys.

1823. (Chapter 205.) Legislature ordered a survey of the Oswego river from the head of the falls to Lake Ontario, and a report of the expense of constructing a canal on that route.

1824. (Chapter 168.) The canal commissioners were directed to make a survey and report concerning canal connections between Erie canal and Cayuga lake.

1824. (Chapter 230.) The canal commissioners were authorized to survey a route for a canal connecting the St. Lawrence river and Lake Champlain.

1825. (Chapter 236.) The Erie canal was completed this year, and a survey was ordered of sixteen proposed routes:

Seneca lake to Chemung river at or near Newton.

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Syracuse to Port Watson, Cortland county.

Chenango point through Chenango valley *via* Norwich to Erie canal.

Susquehanna river through Unadilla valley to Erie canal.

Cayuga lake to Susquehanna river at or near Owego.

Erie canal, Herkimer county, *via* upper waters of Black river to St. Lawrence river at or near Ogdensburg.

Erie canal at or near Rome, *via* the Black river to Ogdensburg.

Rochester, through Genesee valley, to Olean.

Scottsville *via* Le Roy to upper falls of Genesee river.

Champlain canal to Vermont line *via* Battenkill or more eligible route.

Lake Erie through Conewango valley to Allegheny river.

Olean to Erie canal *via* Batavia.

Portland, Chautauqua county, to the head of Chautauqua lake.

Rochester to Lake Ontario.

From Sharon, Conn., to mouth of Croton river or to city of New York.

Between Gravesend bay, Jamaica bay, Great South bay, Southampton bay, across Canoe place to Southold bay, Long Island.

From Catskill on the Hudson, *via* Catskill and Schoharie valleys to Erie canal.

1828. Concurrent resolution. Survey to be made for canal from Seneca lake through Crooked lake to Bath.

1829. (Chapter 333.) Canal commissioners to survey route for canal from mouth of Croton river *via* Croton valley to the western boundary of Sharon, Conn.

1829. Concurrent resolution. Canal commissioners to survey proposed routes from Erie canal to Allegheny river *via* the valley of the Conewango and by the Cassa-

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dauga, also by the Tonawanda, and also by the Genesee river.

1829. Concurrent resolution. Canal commissioners to survey proposed route from Rome to the High falls of the Black river.

1829. Concurrent resolution. Canal commissioners to survey proposed route from Otsego lake, in the county of Otsego, through the valleys of Susquehanna and Chemung rivers to the Chimneys Narrows in the county of Steuben, and also connecting Otsego lake with the Erie canal at or near Fort Plain, either by canal or railroad.

1830. (Chapter 66.) Canal commissioners to survey route for proposed canal from Otsego lake through the valleys of the Susquehanna and Chemung rivers to the Chimneys Narrows, in Steuben county.

1830. (Chapter 114.) Canal commissioners to survey route from Rome to the High falls of the Black river.

1830. (Chapter 234.) Canal commissioners to survey route from Rochester to Olean.

1834. (Chapter 139.) Canal commissioners to survey a canal route from the High falls on the Black river to the Erie canal.

1834. (Chapter 315.) Canal commissioners to survey route from Rochester to Olean; also a side cut from the village of Dansville to Mount Morris on the Genesee Valley canal.

1838. (Chapter 292.) Canal commissioners to survey route for canal from termination of Chenango canal at Binghamton along the Susquehanna river to the state line near Tioga point, at the northern terminus of the North Branch canal of Pennsylvania.

1839. (Chapter 306.) Canal commissioners to survey route for continuation of Chemung canal from

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Elmira to the state line near Tioga point at the termination of the North Branch canal of Pennsylvania.

1839. (Chapter 321.) Canal commissioners authorized to survey for continuation of Black River canal from Carthage to Lake Ontario and the St. Lawrence, and also to Ogdensburg. Also to survey canal route from Erie canal, at Buffalo, to the state line near Warren.

1839. (Chapter 323.) Canal commissioners to survey main or middle branch west of Sacandaga branch to the High falls in the town of Corinth, thence by the most eligible route to the Erie or Champlain canal.

1839. Concurrent resolution authorized a survey of Main and Hamburgh street canal in Buffalo.

Companies.

1823. (Chapter 190.) New York & Sharon Canal Co., to construct a canal from Sharon, Conn., to any point on the Hudson river, or in the city of New York.

1823. (Chapter 238.) Delaware & Hudson Canal Co., to construct a canal and make a complete slack-water navigation between the Delaware and Hudson rivers.

1823. (Chapter 241.) Oswego Canal Co., to construct a canal around the rapids in Oswego river.

1824. (Chapter 188.) Orange & Sussex Canal Co., to construct a canal from Columbia, on the Delaware river, through the county of Sussex in New Jersey and Orange in New York, to a point on the Hudson river.

1824. (Chapter 320.) Onondaga Canal Co., to construct a canal from a point on the line of the "great Erie canal" in the village of Syracuse to the village of Onondaga Hollow.

1825. (Chapter 205.) Granville Canal Co., to construct a canal from the Champlain canal at Fort Ann to Bishop's Corners in the town of Granville, Washington county.

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1825. (Chapter 225.) Delaware & Susquehanna Navigation Co., to improve the navigation of the Delaware and Susquehanna rivers, and to connect the two rivers by a cut, canal, or railway.

1826. (Chapter 90.) Cohoes Co., to construct canals at Cohoes for manufacturing purposes, and also to connect with the Erie and Champlain canals.

1826. (Chapter 317.) Harlaem Canal Co., to construct a canal across Manhattan Island, from a point near the entrance of Harlaem creek, in the twelfth ward, to a point on the North river, between 95th and 135th streets.

1827. (Chapter 319.) Harlem River Canal Co., to construct a canal from Spuyten Duyvil creek to Harlem river.

1828. (Chapter 87.) Black River Canal Co., to construct a canal from the Erie canal at Rome to the foot of High falls on Black river.

1828. (Chapter 181.) Wallabocht Canal Co., to construct a canal from Wallabocht bay, Brooklyn, to Tillory street road.

1828. (Chapter 219.) Long Island Canal Co., to construct a line of canals from Gravesend bay *via* Jamaica bay and Rockaway to Great South bay.

1828. (Chapter 224.) Manlius Canal Co., to construct a slack-water navigation in or near Limestone creek, or to construct a canal connecting Limestone feeder to the Erie canal with the village of Manlius.

1828. (Chapter 225.) Jefferson County Canal Co., to construct a canal from Long falls on Black river *via* Watertown to Sackett's Harbor.

1828. (Chapter 249.) Ellicott's Creek Slack-Water Navigation Co., to construct a slack-water navigation from Williamsville through Ellicott's creek to Tonawanda creek.

1828. (Chapter 315.) Junction Canal Co., to con-

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struct a canal from junction of Erie and Champlain canals at Watervliet easterly to Hudson river at the mouth of the wide "sprout or branch" to the Mohawk.

1828. (Chapter 341.) Auburn & Owasco Canal Co., to construct a canal from Owasco lake to Auburn.

1829. (Chapter 60.) Sodus Canal Co., to construct a canal from the Erie canal at Seneca river to Great Sodus bay.

1829. (Chapter 323.) Scottsville Canal Co., to construct a canal from Scottsville to the Genesee river.

1831. (Chapter 89.) Rochester Canal & Railroad Co., to construct a "side canal from the Erie canal in Brighton, to a point near the head of navigation in Genesee river, and also to construct a railroad between the same points."

1831. (Chapter 265.) Oswegatchie Navigation Co., to construct a canal from Ogdensburg to Canton *via* Oswegatchie river, Black lake, Gouverneur, and Grass river.

1832. (Chapter 53.) Oneida Lake Canal Co., to construct a canal from Erie canal to Oneida lake.

1832. (Chapter 74.) Auburn & Owasco Canal Co., to construct a canal from the Owasco lake to Auburn.

1832. (Chapter 174.) Black River Co., to construct a railroad or canal from Rome to Ogdensburg.

1835. (Chapter 24.) Peaconic Navigation Co., to construct a sloop channel in Peaconic river, Suffolk county, to the bridge at Riverhead.

1837. (Chapter 170.) Port Ontario Hydraulic Canal Co., to construct a canal from Pulaski *via* Salmon river to the village of Port Ontario.

1838. (Chapter 328.) Wallabout Canal Co., to construct a canal from Wallabout bay to Kent avenue in the city of Brooklyn.

1846. (Chapter 194.) Junction Canal Co., to con-

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struct a canal from terminus of Chemung canal, at Elmira, through Tioga valley to state line at or near Athens, Pa., to connect with the North Branch canal of Pennsylvania.

1846. (Chapter 259.) Chenango Junction Canal Co., to construct a canal from the terminus of the Chenango canal at Binghamton through the Susquehanna valley to Athens, Pa., to connect with the North Branch canal of Pennsylvania.

1846. (Chapter 311.) Northern Slackwater & Railway Co., to construct a canal from Port Kent, on Lake Champlain, to Boonville.

In addition to the foregoing charters, the legislature, in 1836, authorized Joshua Whitney and others to construct a canal from the Susquehanna river at Dry Bridge along the Brandywine creek to Chenango canal. The canal was to cross lands owned by Whitney. In 1837 the mayor and common council of Brooklyn were authorized to construct a canal from East river to Gowanus bay.

Canals Authorized.

1825. (Chapter 271.) Cayuga & Seneca Canal, state to become owner of the property of the Seneca Lake Navigation Co.

1826. (Chapter 240.) Lateral canal, from Erie canal to Montezuma salt works.

1828. (Chapter 119.) Lateral canal, from the Cayuga & Seneca canal to the village of East Cayuga.

1828. (Chapter 326.) Inhabitants of towns of Conquest, Victory, and Sterling authorized to construct a canal from the Seneca river, in Conquest, to Sodus bay, on Lake Ontario, *via* Duck lake and Sodus bay.

1829. (Chapter 72.) Chenango canal, from Binghamton through the valleys of Chenango river, Oriskany, Sawquoit creeks to the Erie canal at Utica.

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1829. (Chapter 120.) Crooked Lake canal, from Crooked lake down its outlet to Seneca lake.

1829. (Chapter 135.) Chemung canal, from head waters of Seneca lake to Elmira.

1833. (Chapter 32.) Canal commissioners to construct canal from Binghamton to Erie canal by way of Chenango and Oriskany, Sawquoit valleys, without taking water from Oriskany or Sawquoit creeks.

1835. (Chapter 230.) The Ithaca & Port Renwick Railroad Co., to construct a canal from Fall creek to the Cayuga lake.

1835. (Chapter 273.) Enlargement of Erie canal.

1836. (Chapter 157.) Canal commissioners to construct Black River canal from foot of High falls on Black river to Erie canal at Rome.

1836. (Chapter 210.) Canal commissioners authorized to construct new canal instead of enlarging present Erie canal through the village of Rome.

1836. (Chapter 257.) Genesee Valley canal.

1841. (Chapter 183.) Lateral canal, in Syracuse, on the south side of the Erie canal.

1844. (Chapter 278.) Canal board to continue enlargement of Erie canal.

In this same period, covering twenty-five years prior to the Convention of 1846, there was almost necessarily a large amount of canal legislation in addition to that already indicated. Much of it concerned the detail of canal construction and administration, all intended to perfect the canal system, and provide for the expenses incurred in carrying forward such elaborate plans for internal improvement. Among other things we note the statute limiting the rate of speed on the Erie and Champlain canals to 4 miles an hour, unless by special permission of the canal commissioners. This was probably deemed important in view of the fact that the water in

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the canals, as first constructed, was only about 3 feet deep. Several statutes were also passed in this period authorizing loans aggregating some ten millions for canal construction. In 1836 a law was passed creating the office of canal appraiser, and providing for the appointment of three appraisers by the governor and senate, for a term of two years. Prior to this time numerous special statutes had been passed providing for canal appraisers in particular cases. Under this statute the canal appraisers were to determine the damages resulting from canal construction.

The governors' messages afford an interesting and profitable field for the student of our canal history, but there is little in these messages prior to the Convention of 1846 which had any special bearing on the Constitution. The governors were accustomed to present to the legislature, with considerable detail, the history, progress, and present condition of canal affairs, with recommendations for further construction, improvement, or legislation. These suggestions were of a practical, and not of a constitutional, character, except that the rapid development of the canal system and the abolition of the tax rate in 1827, which was not resumed until 1842, gave occasion for the accumulation of a large state debt, and the payment of this debt was one of the subjects which demanded serious consideration by the legislature and the Convention. Some considerations bearing on this subject are noted in the articles on the limitation of state debts, and prohibiting state aid to corporations.

Governor Marcy, in 1834, suggested the probable necessity of the early enlargement of the Erie canal. He also said in this message that six canals had already been completed; namely, the Erie, the Champlain, the Oswego, the Cayuga and Seneca, the Chemung, and the Crooked lake. He repeated the recommendation for enlargement

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in 1835, and the legislature, at this session, passed a law providing for carrying it into effect. The canal board, under the authority of the statute, directed the enlargement of the canal to 7 feet in depth and 70 feet in width. Governor Marcy, in 1837, announced the completion of the Chenango canal, which he said would add "96 miles to our line of canal navigation."

Governor Seward, in 1840, gave the following summary of internal improvements: "Within the period of twenty-three years which have elapsed since the adoption of the policy of internal improvement, the following works have been completed, and are now in successful operation: The Erie canal, connecting the Hudson river at Troy and Albany with Lake Erie at Buffalo, 371 miles long; the Champlain canal, connecting the same noble river, at the same points, with Lake Champlain, at Whitehall, 79 miles; the Oswego canal, connecting the Erie canal at Syracuse with Lake Ontario at Oswego, 38 miles; the Cayuga and Seneca canal, opening a navigation from the lakes thus named to the Erie canal at Montezuma, 23 miles; the Delaware and Hudson canal, from Rondout on the Hudson to the Delaware river, 81 miles, and continued by railroad to the coal beds of Pennsylvania; the Crooked lake canal, connecting the Crooked lake with the Seneca lake, and thus with the Erie canal, 23 miles, with an extension to Corning, 16 miles; the Chenango canal, connecting the Susquehanna river at Binghamton with the Erie canal at Utica, 97 miles; a continuous line of railroad from Albany to Auburn, 170 miles; a similar line from Lockport to Lewiston and Buffalo, 47 miles; a railroad from Rochester to Batavia, 35 miles; a railroad from Troy to Ballston Spa, 25 miles; a railroad from New York to Harlem, 8 miles; a railroad from Brooklyn to Hicksville, on Long Island, 27 miles; a railroad from the termination of the

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west branch of the Chemung canal to the Tioga railroad in Pennsylvania, 14 miles; a railroad crossing the ridge between the Susquehanna at Owego and the Cayuga lake at Ithaca, 29 miles; and a railroad from the line of Massachusetts at West Stockbridge to the city of Hudson, 30 miles. These works constitute the internal improvements which have been made by this state, exclusive of turnpikes, macadam and common roads. They collectively exhibit 736 miles of canal, and 406 miles of railroads. All the canals, except the Delaware and Hudson, were constructed by the state, and all the railroads, together with the Delaware and Hudson, were built by incorporated associations."

Following this statement, the Governor said that the cost of all the public improvements was $12,072,032.25.

In the article on limiting state debts I have referred to the act of 1842 "to provide for paying the debt, and preserving the credit of the state." The policy inaugurated by that statute was afterwards known in executive messages, and described in the Convention, as "the policy of 1842." It re-established the state tax, contained minute directions concerning the disposition of the proceeds of the tax, and the liquidation or funding of existing indebtedness. It suspended operations generally on public works then in progress, and pledged the tax to the public creditors of the state. The effect of the act on public credit, and also on the improvements then in progress, is described in subsequent executive messages, and was an important subject of discussion in the Convention of 1846. The legislature of 1844 passed a proposed constitutional amendment providing for the confirmation of the pledges and guaranties of the act of 1842. The amendment was not passed by a subsequent legislature, and was therefore one of the constitutional reforms pending when the Convention of 1846 was chosen.

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CORPORATIONS.

The magnitude of modern corporate interests almost passes comprehension. We find trusts, corporations, associations, and partnerships on every hand, with their aggregations of wealth and energy reaching out into almost every class of business. Besides these great business enterprises, individual activities are combined for charitable, educational, social, and religious purposes. For several years corporate development was slow, but it soon received an impetus which has increased with years. I find no record of any business corporations chartered by the colonial legislature, and in the first years of the state little was done in combining capital in this form. There seemed at first great reluctance in granting corporate privileges, and few charters were granted in the first twenty-five years of our history. The first private charter under the state government was granted in 1783, and incorporated the "ministers, elders, and deacons of the Reformed Protestant Dutch Church of Tappan, or Orange, in Orange county." The first business charter was granted in 1786 to the Associated Manufacturing Iron Company of the City and County of New York. The shareholders were made liable for the debts of the company in proportion to the stock held by them. The first bank charter to a state institution was granted in 1791 to the Bank of New York. An earlier charter, 1782, had been granted to the Bank of North America, but this was a United States bank, and not a state institution.

The statesmen of the first half of the last century were jealous of the increasing number and power of corporations, and sought to restrain them by statute, and even by the Constitution, but the resistance to the growth of corporations was fluctuating and substantially futile. Corporations increased with great rapidity, and while

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the legislature occasionally resisted the granting of charters, it passed general laws which facilitated, without much restraint, the free organization of corporations. The statistical mind might derive pleasure from computation and comparison of the figures representing the number of corporations, and their aggregate capital, but these figures are not easily accessible. Hundreds of corporations have been created by special act of the legislature, thousands more have been formed under general laws, and there is no one public office where a complete record of corporate organization can be obtained. Sometimes the statutes have required certificates to be filed in the office of the secretary of state, sometimes in this office and also in the county clerk's office, and sometimes in the office of the county clerk only; and the names of the legislative corporations are scattered through the session laws. While it would be interesting, from some points of view, to know the number of corporations, the number of persons directly interested in them, the amount of capital employed in their various enterprises, and the number of persons employed by them, or otherwise directly interested in their business or operations, such statistics would be of little service in elucidating the very few provisions of the Constitution relating to corporations.

Corporations represent social and business development, and it is interesting to note the beginnings of many enterprises involving the application of wealth or energy through corporate organization. It was quite common in the early days for persons interested in a particular business or enterprise to ask the legislature for a charter, and the preambles to the early legislative charters state the reasons for the incorporation, and the objects sought to be obtained by it. It often appears from these preambles that the business sought to be incorporated had

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already become established, and while the charter was the first legislative recognition of the business or enterprise, it did not always indicate its beginning. The beginnings of the development along various lines of activity are approximately indicated in the following

First Charters.

Academy	1787	Erasmus Hall, Kings county, chartered by the Regents.
Academy	1821	Albany Female Academy.
Agriculture	1793	Society for the Promotion of Agriculture, Arts, and Manufactures.
Anti-Slavery	1812	Ontario Manumission Society.
Aqueduct	1799	Aqueduct Association of the Village of Whitesborough.
Arts	1793	Society for the Promotion of Agriculture, Arts, and Manufactures.
Bank	1791	Bank of New York.
Bible	1811	Albany Bible Society.
Blind	1831	New York Institution for the Blind.
Bridges	1801	Canajoharie & Palatine Bridge Co.
Canal Navigation	1792	Western Inland Lock Navigation and Northern Inland Navigation Companies.
Cemetery	1843	Westfield Cemetery.
Chamber of Com'rce, N. Y.	1770	Chartered by George III.
Chamber of Com'rce, N. Y.	1784	Charter confirmed.
Charity	1802	Female Society for the Relief of Poor Widows with Small Children, in New York City.
Charity School	1806	Episcopal Charity School.
Church	1783	Reformed Protestant Dutch Church.
Church	1784	General Law.
Deaf-mutes	1817	New York Institution for the Instruction of the Deaf and Dumb.
Dispensary	1795	New York Dispensary.
Education	1784	University of the State of New York.

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Education	1795	Common School Law.
Fairs	1808	Established in Dutchess county.
Ferries	1785	Across East river.
Fire Company	1797	Established in Newburgh.
Fire Department	1798	Fire Department of the City of New York.
Freemasons	1818	Grand Chapter.
Gas	1823	New York Gaslight Co.
Glass	1806	Rensselaer Glass Factory.
High Schools	1825	New York High School.
Historical Society	1809	New York Historical Society.
Insurance—Fire	1798	Mutual Assurance Co. of New York.
Insurance—Life	1801	Columbia Insurance Co.
Insurance	1802	Marine Insurance Co.
Juvenile Delinquents	1824	Society for the Reformation of Juvenile Delinquents, in the City of New York.
Law School	1851	National Law School.
Library	1792	Albany Library.
Manufacturing	1786	Associated Manufacturing Iron Co. of the City and County of New York.
Manufactures	1793	Society for the Promotion of Agriculture, Arts, and Manufactures.
Medical College	1791	Regents authorized to establish.
Missions	1798	Northern Missionary Society of the State of New York.
Mutual Benefit	1792	The General Society of Mechanicks and Tradesmen of the City of New York.
Navigation	1792	Western Inland Lock Navigation and Northern Inland Navigation Companies.
Negroes	1812	Wilberforce Philanthropic Association.
Normal School	1844	Albany Normal School.
Orphan Asylum	1807	Orphan Asylum Society of New York City.
Railroads	1826	Mohawk & Hudson Railroad Co.
Savings Bank	1819	Bank for Savings, New York.
Steamboat	1813	Lake Champlain Steamboat Company.

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Sugar Refining	1811	New York Sugar Refining Co.
Telegraph	1845	(Morse's Electro-Magnetic) General Law.
Telegraph	1848	General Law.
Theological Instruction	1817	Baptist Theological Seminary.
Turnpike	1797	Albany & Schenectady Turnpike Co.
Water	1799	Manhattan Co.

Many subjects have been added in the last fifty years, indicating a wider expansion of corporate enterprise, keeping pace with the social development of the state, and its enlarged business interests. Nearly forty subjects of corporate enterprise, with various amplifications, had been put in concrete form by the legislature prior to the Convention of 1821. While the number of corporations was quite large for that period, it does not show an undue development of corporate enterprise. This development had been resisted by the legislature and by the executive. Fifteen charters were granted by the legislature which immediately preceded the Convention, and nearly thirty-eight years had elapsed since the first legislative charter; but the extension of corporations had evidently been sufficient to excite the attention, if not the alarm, of the Convention. The debates do not show much discussion of this subject, and the result is somewhat meager. This result appears in the provisions requiring the assent of two thirds of the legislature to any bill "creating, continuing, altering, or renewing any body politic or corporate," and it will be noted that the restriction applied to municipal as well as to private corporations. The effect of this restrictive provision was to compel general laws for the creation of corporations if a two-thirds vote for a special charter could not be obtained. The policy of general laws for the creation of

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corporations was not new. That policy had been inaugurated by the religious corporations law of 1784, and renewed in early general laws relating to other subjects. The two-thirds restriction came from the committee on the legislature, and while it was under consideration, Mr. Radcliff said he thought the provision was too broad, and that he would be glad to hear the reasons which had induced the committee to propose it. Rufus King, chairman of the committee, said that the committee had looked upon the multiplication of corporations as an evil. They had been created for a great variety of purposes. These corporations were exceptions to the common law; they could not be proceeded against in the ordinary way of prosecutions against individuals, in ordinary courts of justice. Twenty years ago they were considered as heresies. The first attempts which were made to introduce them were resisted and defeated; but they had since become very common; and, he believed, were generally admitted to have produced great public mischief. The common law abhors monopolies. This was substantially all the debate on the question.

This limitation on the power of the legislature to grant corporate charters continued until the adoption of the Constitution of 1846. At that time the number of corporations had very largely increased, and the Convention devoted much time to the consideration of an article intended to regulate corporations, and limit the power of the legislature concerning them.

JUDICIARY.

There seems to be no permanency in our judicial system. Its fluctuations have been very marked, both in organization and in detail. In this respect it presents a striking contrast to the other great departments into which our government is divided. There has been little

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change in the executive from the beginning, except an occasional modification of the term, and in relation to specific powers. The legislature gradually increased in numbers under the first Constitution. In 1801 the senate was fixed at thirty-two members, and in 1821 the assembly was fixed at one hundred and twenty-eight members, and from those dates until 1895, when the first legislature was elected under the fourth Constitution, the only changes were those incident to reapportionment and alteration of senate and assembly districts. But the judiciary must necessarily lack the stability which characterizes the other departments, for the judiciary is the branch of government through which the rights of the people are principally asserted and enforced, and it must be sufficiently elastic to meet conditions presented by a growing population and constantly enlarging and shifting social, commercial, and political interests. So, from the beginning, our statesmen have manifested deep solicitude concerning the proper structure of the judiciary, and have devoted to this subject the most serious consideration.

I have already pointed out in the chapter on the second Constitution some of the influences—and I think they may fairly be called sinister influences—which produced the judicial system constructed by the Convention of 1821. Chancellor Kent and three justices of the supreme court were members of that Convention, and gave to it the results of an extended judicial experience; but their advice concerning the reorganization of the judiciary was not heeded. The inadequacy of the judicial system then constructed was pointed out by Governor De Witt Clinton in his annual message to the legislature in 1828, only five years after the Constitution had gone into full operation. He said its "radical defects" were seated in the Constitution, and were beyond legislative cognizance, except by

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proposing amendments. He said it was a "fatal error" to separate "the judges who try the fact from the tribunals that pronounce the law" by "creating circuit courts as distinct and independent forums, and not as emanations from the supreme court." He urged the legislature to "prescribe such emollients as may mitigate, if not extinguish, the evils of the system."

The subject from this point of view was not referred to again in executive messages until 1834, when Governor William L. Marcy, commenting on the judicial system, said it needed to be enlarged to meet the demands of accumulated business, and to prevent the delays which amounted to a denial of justice. At this session of the legislature an amendment was proposed, providing for two additional justices of the supreme court. Governor Marcy referred to the subject again in his annual message in 1835, and amendments were proposed, increasing the supreme court, creating a state superior court, to consist of a chief justice and four associate justices, and creating a superior court of common pleas with jurisdiction concurrent with the supreme court. Governor Marcy renewed his suggestions in 1836, saying that "something must be done for the public relief," by an amendment to the Constitution if necessary. Amendments were proposed at this session providing for reorganizing the court of chancery with five chancellors and five chancery districts, and for two additional justices of the supreme court. Again, in 1837, Governor Marcy urged the consideration of this subject, and recommended an enlargement of the supreme court and a reorganization of the court of chancery. Amendments on these subjects were again proposed, but the legislature apparently found it inconvenient or impracticable to give the subject the attention it deserved, and, on the 15th of May, passed an act authorizing the Governor to appoint three commis-

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sioners "to digest and report to the next legislature an adequate judicial and equity system." Jacob Sutherland, Thomas J. Oakley, and Daniel Cady were appointed commissioners, and their report was submitted to the legislature by the Governor at the opening of the session in 1838. They proposed several constitutional amendments for the purpose of reorganizing the judicial system, providing, among other things, for reducing the number of senators in the court for the correction of errors by one half, making only the senators of the third and fourth classes members of this court, providing for five chancellors and five chancery districts; for two additional justices of the supreme court; giving the legislature power to increase the number of chancellors and justices of the supreme court; continuing circuit courts, but authorizing their abolition by the legislature; grouping the counties in "common pleas districts," with a presiding judge in each, to be appointed by the Governor, and providing for the appointment of a commission of three members to dispose of certain pending business in the supreme court, and a like commission for the court of chancery. The commissioners' plan was not submitted to the legislature in the form of a proposed amendment, but a modified scheme was presented, revising the judiciary article, continuing the court for the trial of impeachments and correction of errors, providing for reorganizing the court of chancery and the supreme court by the appointment of not more than six assistant chancellors and not more than six assistant associate justices, creating a supreme court of common pleas with a chief justice and four associate justices, giving the judges of the supreme court and of the supreme court of common pleas power to hold trial terms, and abolishing the office of circuit judge.

Governor William H. Seward, in 1839, also referred to this subject in his first annual message, remarking that

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

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reorganizing the court of chancery, and revising the judiciary article of the Constitution.

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

Governor Seward, in his message, in 1841, continued his consideration of the judicial system, and the necessity of its revision by constitutional amendment, referring to the "defective organization of the courts of law and equity," and suggesting that the patronage and power of the chancellor was too great to be reposed in a single judge, that the supreme court was "oppressed with business," and that the common pleas "had in a great degree been deserted by suitors." He noted the difficulties attending a reorganization of the higher courts, consequent

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

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judicial powers in a body like the senate, composed largely of laymen.

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

Governor William C. Bouck, in 1843, in his first message, called attention to the suggestion by his predecessors concerning a revision of the judiciary, and urged further consideration of the subject by the legislature, observing that the Constitution had not "made adequate provision for the expansion of the judicial system with the increased population and business of the state." He said he was not in favor of "radical changes unless there is a plain necessity for making them," but "would enlarge the present system, so as to meet the public wants." The legislature gave the subject no consideration at this session. Governor Bouck, in 1844, discussed the subject at some length in his annual message, urging the importance of its immediate consideration by the legislature. He suggested an increase in the membership of the supreme court and the court of chancery. He said the court for the correction of errors had, "for a considerable time, been overburdened with business; and it has become necessary to apply some remedy without delay. It is probable that so numerous a body can never discharge all the judicial business that may be brought before it; and it seems to be pretty generally understood that there ought to be a new organization of that high tribunal." Amend-

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ments were presented at this session of the legislature providing for a supreme court to consist of one chief justice and seven associate justices, for eight judicial circuits, and for two assistant chancellors, reorganizing the court of errors so as to make it consist of eight judges, one to be elected from each senate district, giving the governor power to appoint judges of the court of common pleas and justices of the peace; increasing the associate justices of the supreme court from two to twelve; adding sixteen judges to the court of errors, four to be chosen from each of four prescribed judicial districts; relative to removal of judicial officers; providing for the election of county judges; providing for associate chancellors, and a general revision of the judiciary article. Two judiciary amendments were passed by this legislature, one of which provided for three associate chancellors, and the other for two additional justices of the supreme court.

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

I have now traced somewhat briefly the progress of the discussion and agitation concerning the reorganization of the judicial system. This discussion had continued twelve years without any practical result. But the consideration of this subject through this long period was not without effect. The bench and the bar and the people generally were studying the subject, and numerous plans of greater or less merit were brought to public attention. It was conceded that the situation demanded relief, but great diversity of opinion is manifest from the failure to pass many amendments, and from the failure to repass

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amendments which had been agreed to by a previous legislature. The result was that no progress was made except in the presentation and comparison of plans, and a general and continued discussion of the whole subject. Hence, when the Convention assembled, it was untrammeled by any attempted partial revision, and was at liberty to consider the judicial system as embodied in the Constitution of 1821, and which had continued twenty-four years without constitutional change, and construct a new system or reconstruct and revise the old one in the light of experience, and with the benefit of ample executive, legislative, and other public discussion. How much of the seed of judicial reform sown during this period of agitation bore fruit in the new Constitution will appear when the work of the Convention is under review.

LIMITING STATE DEBTS.

One of the most important constitutional reforms accomplished by the Convention of 1846 was the inclusion in the Constitution of a provision limiting the amount of state debt which the legislature can create without a vote of the people. One writer calls this "a new Bill of Rights." This opinion does not seem extravagant, for while it is not one of those fundamental rights which are deemed so important in preserving the liberties of the citizen, it was a withdrawal from the legislature of complete power over internal administration, and the restoration to the people, in their collective capacity, of the right to determine the amount and purpose of public indebtedness beyond the narrow limit fixed by the Constitution. The movement for this reform did not begin in the Convention. It had its origin many years earlier in the popular unrest caused by extravagant public improvements, the policy of freely borrowing money, and neglecting to provide for the payment either of the principal or

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interest. The legislature had attempted to dispose of the matter by enacting laws intended to provide a revenue to meet public burdens, but it had become apparent that unlimited power to create public debts should no longer be intrusted to the legislature; and the discussion of this subject in executive messages, and the presentation of constitutional amendments from time to time, was an expression of public opinion in favor of imposing an almost total restraint on this exercise of legislative power. According to the comptroller's report, the state debt in 1816 amounted to about $3,000,000, and in 1826 it was nearly $8,000,000, and had increased to a little more than this amount in 1833.

In his annual message of 1833, Governor Marcy said, concerning state finances, that "the general fund is almost exhausted by the liberal contributions it has yielded to all the other funds, by the payment of the state debts, and by furnishing, unaided, for the last five years, all the means for the ordinary and extraordinary expenses of the government. The revenue from this fund has at no time been sufficient, without the avails of a general tax, to satisfy the demands upon the treasury. In order to meet these demands, and to relieve our fiscal affairs from embarrassments, it became necessary, in 1814, to impose a tax of two mills on each dollar of the valuation of real and personal property in the state. This tax was continued until 1818, then it was reduced to one mill; and in 1824, to half a mill; and in 1827 it was wholly discontinued. When the legislature refused to continue the tax it was well understood that the general fund could not long sustain the burden cast upon it; that its capital would be rapidly reduced, and soon exhausted. Though this event has not approached so rapidly as was anticipated, it is now at hand, and this session should not, in my judgment, be permitted to pass away without

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providing the means, by the adoption of some settled plan, to satisfy the demands that must inevitably be made upon the treasury."

When the state tax was discontinued in 1827, Governor Marcy was comptroller, and objected to the new policy; and in subsequent years, as governor, he urged a return to the policy of direct taxation to meet the expenses of the government. The legislature continued the policy adopted in 1827, and levied no direct tax until 1842. "The canals are rapidly accumulating means for the extinguishment of the debt for which their income is hypothecated," and when this debt is paid the tolls may properly be used to reimburse the general fund. "The inhabitants in the districts of the state remote from the canals do not derive as much advantage from them as those in their immediate vicinity."

Governor Marcy objected to accumulating a debt and trusting to future appropriations of canal tolls for its payment, and expressed the opinion that the legislature ought to provide by taxation for the current expenses of the state government, instead of borrowing money for this purpose, with the hope that the canal tolls would sometime be sufficient to pay the debt; but it will be seen that this policy of borrowing instead of taxing was continued until 1842, when the debt had increased to almost $27,000,000. This was a period of great activity in canal construction, and it was hardly to be expected that the income from these new water ways would at once pay the sums borrowed for their construction, and there could scarcely fail to be an increase of the debt, with such large increase in expenditures, without replenishing the treasury by taxation. The indirect revenues from duties on salt and auction sales and canal tolls were admitted to be sufficient for all purposes of government. Referring to the subject of internal improvement, he said it would

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be "unwise to pause in this career," and still "more unwise to rush forward in it, accumulating burdens upon the people without securing proportionate advantages." He discussed this subject at some length, and in closing recommended the construction of the proposed Chenango canal, 95 miles in length, and estimated by the canal commissioners to cost more than $1,000,000.

In 1834 Governor Marcy suggested the necessity of the early enlargement of the Erie canal. This recommendation was adopted by the legislature in 1835, and an act passed providing for such enlargement. He said that six canals, with a total length of 530 miles, had already been completed at an expense of more than eleven and a half millions of dollars. He renewed the suggestions in his previous message that a provision ought to be made by taxation for meeting the expense incident to the public improvements, and for the support of government. Governor Marcy, in 1835, said the general fund had been reduced below $200,000. "From the origin of our government down to a late period, taxes were imposed whenever the condition of the treasury required it, to raise the means of defraying our ordinary expenses. Taxation was discontinued in 1826 [1827], not because the income of the general fund was supposed to be sufficient to meet the charges on the treasury, but with the deliberate intention of relieving the people from further burdens until the capital of that fund should be exhausted. The policy of this course was questionable. What was then foreseen by all as inevitable—the exhaustion of this fund—has happened." He urged the restoration of the general fund, either by an appropriation of canal tolls or by a general tax, and strongly objected to borrowing money without making any provision for its payment, except by relying on indirect revenues. "No government that had a proper regard for its public credit or its permanent pros-

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perity, ever contracted a public debt without providing a revenue for the payment of the interest, at least, if not for its extinguishment; and none that neglects to make such a provision, but supplies necessities, whether ordinary or extraordinary, by loans, and provides for the interest on them by new loans, can long prosecute successfully public enterprises requiring large expenditures. I therefore deem it essential to the success of the system of internal improvements, that you should, in some way, provide adequate means for paying the interest on the public debt that must be incurred by its further prosecution."

Some modern experience in public improvements curiously illustrates Governor Marcy's suggestion to the legislature that "before you authorize the construction of any public work, it will be proper for you to compare the expenditure it will require with the benefits it will confer. In relation to the former it should be borne in mind that every public work which we have executed has cost nearly double, and, in some instances, more than double, the estimate at the time it was authorized." Referring to further internal improvements, he said that no new work could be executed without using the public credit. "However high that credit is at this time, it cannot be liberally used and long upheld without some financial arrangement that will inspire confidence at home and abroad. The improvident practice of borrowing money without providing available funds for paying the interest has already been carried to a point beyond which it cannot be pushed without producing serious mischief."

In 1837 Governor Marcy informed the legislature that temporary loans had been necessary from the literature, bank, and common-school funds "in order to meet the demands of the treasury," and that new loans would have to be made to raise funds to pay these temporary loans. He said that the "future expenditure on public

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works already authorized by the legislature, including the enlargement of the Erie canal, will amount to more than $15,000,000, besides the $3,000,000 for which the state has loaned its credit to the New York & Erie Railroad Company." Governor Marcy gave this subject further consideration in 1838, continuing, in substance, the suggestions made in previous messages.

Governor Seward, in 1839, followed Governor Marcy, and pursued practically the same policy concerning public improvements. He objected to the indefinite tenure of office of the canal commissioners, in view of the large powers and responsibilities vested in them, and proposed a "board of internal improvements," to consist of one member from each of the eight senate districts, to be divided into two classes, and to hold office two years. "It is the worst economy," he said, "to devolve upon officers constituted for one department duties appurtenant to others. Its universal results are diminished responsibility and diminished efficiency in both the principal and incidental departments."

Governor De Witt Clinton, in 1822, had also proposed a general board of public improvements, to be selected from "our most enlightened and public-spirited fellow citizens," and to have charge of all internal improvements. He renewed this suggestion in 1825.

Governor Seward fully espoused the cause of internal improvements, and after reviewing the growth and enlargement of this policy from its inception under the wise leadership of De Witt Clinton, he said: "History furnishes no parallel to the financial achievements of this state. It surrendered its share in the national domain, and relinquished for the general welfare all the revenues of its foreign commerce, equal generally to two thirds of the entire expenditure of the Federal government. It has nevertheless sustained the expenses of its own ad-

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ministration, founded and endowed a broad system of education, charitable institutions for every class of the unfortunate, and a penitentiary establishment which is adopted as a model by civilized nations. It has increased fourfold the wealth of its citizens, and relieved them from direct taxation; and in addition to all this it has carried forward a stupendous enterprise of improvement, all the while diminishing its debt, magnifying its credit, and augmenting its resources." But he said, "this cheering view of our condition ought to encourage neither prodigality of expenditure nor legislation of doubtful expediency." Governor Seward seemed to be more hopeful than his predecessor of the possibility of paying the state debt from indirect revenues. He said that "taxation for purposes of internal improvement is happily unnecessary as it would be unequal and oppressive."

In 1840 Governor Seward noted a considerable increase in the revenues from the duties on salt and from auction sales, and also in canal tolls. Discussing the extension of the canal system, he remarked that "apprehensions prevail that the public credit may become too deeply involved in the prosecution of works of internal improvement." Referring to the project of enlarging the Erie canal, he said: "The act of 1835 directed the enlargement to be undertaken when the canal board should be of opinion that the public interest required the improvement, and its extent was submitted to their discretion. It will not, I hope, be deemed disrespectful to remark that the first step in this great undertaking, the delegation of the legislative power to a board not directly responsible to the people, was a departure from the spirit of the Constitution, so unfortunate in its consequences that it should remain a warning to all future legislatures. The expense of the enlargement is now estimated at $23,402,863; yet the law by which it was authorized passed without any

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estimate having been submitted to the legislature, and with scarcely any discussion. If completed on the present scale, the canal will surpass in magnitude every other national work of internal improvement; yet all the responsibilities in reference to the dimensions and cost of the enlargement seem to have been cast off as unworthy the consideration of the legislature." He called attention to the revised estimate of the expense of enlarging the Erie canal, Black River canal, and the Genesee Valley canal, made by the canal commissioners, which showed that the probable cost would be $15,000,000 more than the first estimate, which was over $15,000,000. He said that the confidence of the people in the policy of internal improvements had received a "severe shock" when this new estimate became known, and that, while the policy of continuing and completing the internal improvements already projected could not be abandoned, it would be necessary to "retrench the expenditures upon the works of internal improvements, and prosecute the system with moderation and economy." On the subject of paying for these improvements, he said: "The existing and anticipated revenues of the canals must be, as heretofore, the basis of any new loans which the legislature shall see fit to authorize, since taxation for purposes of internal improvement deservedly finds no advocate among the people." He said the state did not borrow money to pay the interest or principal of former loans. "Her income is sufficient for her wants, without taxation; the value of her productive property is double the debt she owes; her surplus income is double the interest she is required to pay; and the revenues derived from her canals, if judiciously managed, will be adequate to every enterprise which the interests of the people shall demand."

Governor Seward, in 1841, referred again to the in-

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creased estimate for the enlargement of the Erie canal, as a result of a further examination by the canal commissioners, remarking that the "same canal commissioners who had, in 1836, estimated the cost of the works which the state then assumed at fifteen and a half millions of dollars, when required in 1839 to re-examine their estimates, reported the cost of the same works at thirty and a half millions, and that consequently the debt to which the state had become committed rose from twenty millions to thirty-five millions, requiring an annual expenditure for interest of one million seven hundred and fifty thousand dollars." He characterized the error and the estimate as "extraordinary," and said that "the immediate results at home and abroad were a severe shock to confidence in the faith of the state, and alarm for its ultimate solvency."

It was evident that the state's financial affairs were rapidly approaching a crisis. The great debt which the state already owed, the heavy obligations it had assumed by the Erie canal enlargement, which had been doubled as a result of defective or careless estimates of the probable expense of that great public work, and the unfinished Genesee Valley and Black River canals, on which millions had already been expended, presented a condition that demanded immediate and perhaps radical treatment. But the legislature did not deem it wise to stop work at that time. The commissioners of the canal fund were authorized to borrow $2,150,000 for continuing the work of enlarging the Erie canal, $550,000 for the Genesee Valley canal, and $300,000 for the Black River canal,—$3,000,000 in all,—and to issue stock therefor, payable within twenty years. It is noteworthy, in view of the development of this subject in 1842, that the same statute which authorized the foregoing loan declared that "no new work shall be put under contract during the present year"

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on such canals "except such as may be necessary to render available the work now in progress, and prevent interruption to navigation." This shows that the legislature contemplated the early cessation of further public improvements until some plan should be devised by which the state debt could be either paid or funded. I have already referred to Governor Seward's criticism on the loose methods adopted by the legislature concerning public works, especially its practice of delegating to the canal commissioners power to construct such works without adequate estimates of their expense, and borrowing money freely to meet obligations that ought to have been paid promptly, either from indirect revenues or by direct taxation.

The theory that all legislative power is vested in the legislature had for many years been applied in actual legislative practice in a manner not always conducive to public interest, and which did not exhibit a clear appreciation of legislative responsibility. Some persons began to think that the legislature had too much authority, and that it should not have unlimited power to create debts, appropriate money, and impose taxes. This opinion was expressed in concrete form by a proposed constitutional amendment offered in 1841 by Arphaxed Loomis, a member of assembly from Herkimer county, and who was afterwards an influential member of the Convention of 1846, which provided that every law creating a debt against the state must specify the object of the indebtedness, must be limited to one object only, which must be specifically stated, and could not take effect until approved by the people at the next general election. The prohibition did not apply to debts created for the purpose of repelling invasion, suppressing insurrection, or defending the state in war. It will be observed that the proposition did not permit the legislature to create indebtedness within

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the moderate fixed limit to meet emergencies, as provided by the section adopted in 1846, and which has since continued in force. The proposition is significant as an attempt to vest in the people control over all legislation creating state debts. It is known in history as "the people's resolution." It is evident that public opinion was not yet ready for such a radical change of policy, for the proposition failed in the assembly by a tie vote of 53 to 53. In 1842 many citizens petitioned the legislature to incorporate the principles of this resolution in appropriate amendments to the Constitution. The resolution was again introduced, but was not passed, and not till 1844 did the legislature go so far as to propose amendments embracing these restrictions on legislative power.

Governor Seward, in 1842, in his message suggested the necessity of adopting a new financial policy. He said the estimated cost of all public improvements was more than thirty-six and a half millions, including state aid in the construction of the New York & Erie Railroad. "Large as this sum is," he said, "there is no reason to suppose that it surpasses our fiscal ability." After commenting on the value of the improvements to the state, and the probability that they would pay for themselves, he said: "The debt is large because the enterprise is great. . . . It remains for you to decide whether the indebtedness shall be made larger, or whether you will devise a different system of finance." Looking forward to the completion of the public works, he expressed the very hopeful view that they would "continue to pour into the treasury a river of tribute." The part of the Governor's message relating to state finances was, by resolution in the assembly, referred to the committee on ways and means, of which Michael Hoffman, of Herkimer, was chairman. Mr. Hoffman was also chairman of the committee on finance in the Convention of 1846. The

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committee on ways and means gave the subject full consideration, and on the 7th of March presented a report, showing the method of keeping public accounts, the various funds, the sources from which they were derived, and their application, the existing state debt, and the means available for its payment, further loans, and the "necessary course and safe policy of the state." The committee recommended that provision be made for supplying deficiencies in the general fund revenue, that further expenditures be discontinued, that a tax of one mill on the dollar be raised to provide funds for paying the obligations of the state, and the creation of a sinking fund to meet the future payment of existing obligations.

The legislature, adopting substantially the committee's suggestions, changed the financial policy by providing again for a direct tax which had been discontinued in 1827, and passed an act "to provide for paying the debt and preserving the credit of the state." The act imposed a tax of one mill on each dollar of the taxable property of the state. The entire proceeds of the tax levied in 1842, and one half of the amount annually levied thereafter, were for the benefit of the general fund, and to be used for general state purposes. The other half was devoted to canal purposes. The canal commissioners were authorized to borrow money and issue stock therefor, the proceeds to be used in discharging canal obligations already due or incurred. The new stock was not to run more than eighteen years. One significant feature of this act was the provision that "all further expenditures on the public works now in progress of construction shall be suspended until further order of the legislature," except in certain specified cases. The act pledged the tax to the public creditors of the state. This statute suspended further operations on the Genesee Valley and Black River

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canals, and work on them was not resumed until after the Convention of 1846.

Governor William C. Bouck, in his first annual message in 1843, commented at some length on the financial condition of the state, saying, among other things, that the "legislature of 1842 convened at a period of great embarrassment in the financial affairs of the state. The treasury was empty; our credit seriously impaired; the state stocks were selling at ruinous sacrifices; temporary loans were nearly at maturity; the time for the quarterly payments of interest on the public debt, amounting to more than $20,000,000, was fast approaching, contractors were pressing for payment, and the progress of the public works virtually suspended. Under such circumstances, to have continued large expenditures, or, indeed, any not demanded by imperious necessity or good economy in reference to the condition of the public works, and that good faith due to our citizens with whom the state had existing engagements, would, in my opinion, have been a wanton disregard of public duty." After giving a summary of the act of 1842, the Governor said that "the praiseworthy and patriotic exertions of the last legislature to relieve the state in the crisis of our pecuniary affairs is worthy of all commendation; and if the policy then adopted has resulted in some injury to individuals, it must be ascribed to the necessity of the case, rather than a willingness that any portion of our citizens should suffer detriment. The policy of arresting large expenditures, and providing for the prompt payment of the interest and a gradual diminution of the state debt, has exerted a salutary influence in reviving our credit. The question of a direct tax, rendered necessary by the exigency of our affairs, has been clearly approved by the people, but direct taxation should not be regarded as a permanent measure of finance for the purpose of con-

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structing public works, but as one of a temporary nature, called for by an existing emergency. All future appropriations should be made with reference to as speedy a relinquishment of the tax as the public credit and the general welfare of the state will permit." Governor Bouck, in 1844, again referred to the act of 1842, and the conditions which made the policy of that statute necessary. He said that in judging of the policy of this act "it is necessary to bring into view our situation at the time it was adopted. The debt of the state had reached a frightful magnitude; the public credit had greatly declined, and was still sinking; contractors were unpaid, and suffering by the failure of the state to fulfil its engagements to them; and demands for the payment of temporary loans to the amount of more than a million and a half were about to be made upon an empty treasury. Indeed, the state was rapidly approaching a disastrous crisis in its pecuniary affairs. The sudden suspension of our public works alone would not then have rescued us from our difficulties. Our necessities required loans, and they could not be made without doing something to revive and invigorate our credit. This was effectually done, not only by arresting the progress of our public works, but by resorting to taxation, and by pledging the avails of the state tax and the surplus income of the canals, to the public creditors. Such were the objects of the law of 1842, and the wise policy of the measure has been vindicated by its happy results." The legislature at this session proposed a constitutional amendment confirming the pledges and guaranties of the act "to provide for paying the debts and preserving the credit of the state," passed in 1842; also an amendment limiting the aggregate debts in any one year to $1,000,000, without a vote of the people, providing for the creation of a sinking fund, and the payment of the debt and interest in eighteen

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years. These propositions, except the first, became a part of the Constitution, and were embodied in §§ 10 and 12 of article 7 of the Constitution of 1846.

Governor Wright, in 1845, referred to the financial amendments proposed by the legislature of 1844, and, after discussing the terms of the amendments, said: "The recent free use of the public credit in over-hastening loans for state works, and in lending to irresponsible corporations, the embarrassed condition of our finances, and the consequent call for direct taxation to restore public confidence, have doubtless given rise to these proposed amendments, as they did give rise to the law of 1842, which the first amendment proposes to surround by a constitutional sanction. The manner in which that legislation was received by the people, although imposing a direct tax upon all their taxable property as its first provision, the salutary influences it so promptly exerted upon public and private credit, and the triumphant manner in which its provisions and policy have been sustained by the people whenever the wisdom and soundness of either have been brought in issue at any subsequent election, present a more forcible argument in favor of the first of these amendments than any it would be in my power to offer." Governor Wright, in this message, makes the following statement of the reasons for the proposed amendment limiting the power of the legislature to contract a debt exceeding $1,000,000 without the consent of the people: "The second is manifestly intended, as it appears to me to be wisely framed, to secure the people against a like hazard and loss for the future, and their credit from further over-use and consequent depression. The provision requiring each law to provide for a loan for a single object only is necessary to enable the freeman at the polls to form a distinct and satisfactory opinion upon the propriety of the contemplated expend-

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iture, and to express that opinion in an intelligible and unequivocal manner. It strikes also effectually at one of the most universal causes of complaint and dissatisfaction growing out of the recent appropriations for our works of internal improvements. I refer to the charge, whether well or ill founded, that combinations of local interests are formed on the part of friends of different works having no natural or necessary connection with each other, and that, in this way, loans are authorized, and appropriations secured, which the intrinsic merits and strength of no single work in the combination could command." After stating the admitted principle that, in a government by party, the political majority in the legislature is responsible for the laws enacted, and after discussing the efforts of parties to gain political advantage, and the temptation often afforded the minority to induce the majority to enact objectionable laws,—a temptation which, the Governor said, is not always sufficiently resisted,—he remarked that if the amendment be adopted "no contest can take place offering party advantage, as to the objects of expenditure to be embraced in any proposed law, or as to the amount which it shall appropriate; and every member will be required to meet and justify his own vote before his own constituents, whether he belongs to the majority or minority of that body; because those constituents will be called upon directly to vote upon the same question. The requirement that a tax shall be imposed by every such law, sufficient to meet the interest upon the loan to be made, is but preserving the same safe precaution which marked our early legislation of this character. Then the state possessed rich revenues which it could spare, and they, together with certain specified taxes, were pledged. Now, as has been seen, all its revenues applicable to these objects are encumbered to their full extent by existing debts, and the only pledge

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it can make to fortify and sustain its credit is the one here proposed. This the citizen should understand at the time he votes upon such a law; and to make it certain that he will understand it, he should be called to vote for the tax as well as the loan. It may appear to some as going too far, to require that the tax should be sufficient to redeem the principal of the debts within a specified time, as well as to pay the current interest. If the object of expenditure be one not expected to yield revenue, then the provision is clearly right and absolutely necessary. If it be one from which a return of revenue is anticipated, and that anticipation be disappointed, as has been the case with most of the lateral canals, then the provision is equally right and necessary. And if the anticipated revenue be realized, then the debt will be sooner paid, and the tax imposed be but partially required, or collected; while, in any event, the people will be protected from a load of unexpected debt and unforeseen taxation."

Referring to the pledge in the Constitution to secure "the payment of the old canal debt, and protect the citizens and the property of the state from taxation," the Governor further remarked that "if that pledge was wise, it would seem to be equally as wise that another efficient barrier should be interposed between the taxpayers of the state and the unrestrained power of the legislature to contract debts upon their credit and at their risk. That this power may be abused, we now know. That it has been abused, the people now feel; and it cannot be a matter of surprise if they shall be found to demand protection against future abuses." Referring to public discussion of the proposed amendments, the Governor said: "So far as my observation and means of information enable me to speak, these proposed amendments have been very broadly and fully discussed before the people during the late canvass, have taken deep hold of the

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public mind, and have been received with strong favor."

The legislature did not pass these amendments again, probably for the reason that it decided to submit to the people the question of holding a constitutional convention. If such a convention were authorized, all pending amendments to the Constitution, and the whole subject of constitutional reform, could be submitted to a convention chosen expressly for this purpose, and would be likely to receive more careful and more satisfactory consideration than could be given by the legislature, which was charged primarily with other duties, and not chosen with special reference to constitutional revision.

Notwithstanding the suspension of public works by the act of 1842, the legislature of 1845 seemed unwilling to let the matter rest and abide the action of the constitutional convention. It passed a bill in relation to canals, which, among other things, made appropriations for continuing certain work on the Genesee Valley and Black River canals. Governor Wright, in a message which bears the same date as the convention act, May 13, 1845, vetoed the bill. The Governor here again reviewed at considerable length the financial history and policy of the state, and objected to the bill principally for the reason that it was a deviation from the policy established by the suspension act of 1842; that it was a violation of the pledges contained in that act and in other statutes relating to state obligations; and that to postpone the payment of these obligations, and thereby resume the construction of public works, was not only a direct violation of pledges, but "unwise and impolitic in reference to the true interests of the people of the whole state." The bill was not passed over the veto. Thus the Governor compelled the state to adhere to the policy of 1842; at least, until the subject could receive consideration by the constitutional convention. The passage of the con-

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vention act placed the whole subject in abeyance for the time being, and transferred the responsibility from the legislature to the convention.

STATE AID TO PRIVATE ENTERPRISE.

This subject has an interesting history. The policy of rendering state aid to private business illustrates the paternal character of government in the early years of the state. It was founded on the conception that it was the duty of government to promote the prosperity of all the members of the state, and that for this purpose the state might use all its powers, even to the extent of appropriating money from the common treasury, in fostering laudable enterprises, in which a considerable number of the people were interested. It is, perhaps, a natural evolution from the earlier forms of government which was possessed and exercised by one person only. The state, as a political entity, stands in the place of the monarch in earlier forms of government, and may do whatever a wise and beneficent ruler should have done under the old system. This conception makes the body politic a body corporate, treating the state as a great political corporation, of which all the inhabitants are members. The paternal character of legislation is peculiarly manifest during the colonial period, and in the early years of the state; indeed, in these modern times, with a more accurate conception of the true theory of government, the paternal idea still prevails, and the laws proposed in the legislature as well as many of those enacted testify to the continuing belief that the legislature can do almost anything.

The policy of aiding private enterprise by giving state funds or loaning state credit began moderately, and the first instances seem reasonable when judged from the condition of public affairs at that time; but the practice,

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once inaugurated, found new, more frequent, and varying opportunities, and long before the Convention of 1846, it had assumed proportions which showed that unless it were discontinued or modified, the financial credit as well as the good name of the state would be seriously impaired. In 1790 the legislature incorporated the New York Manufacturing Society. The preamble to the act states that certain persons who had "associated for the laudable purpose of establishing manufactories and furnishing employment for the honest, industrious poor," had sought incorporation "to enable them more extensively to carry into effect their patriotic intentions." The state treasurer was authorized to take 100 shares of stock and use public funds for that purpose. The preamble gave the company a benevolent and patriotic character, and it was thought reasonable to invest a small amount of state funds to aid in furnishing employment for industrious poor.

In the article on canals, in the chapter on the second Constitution, I have shown the development of the canal policy down to the completion of the Erie canal in 1825. The hesitating policy of the state relative to canals there clearly appears, beginning with the assembly resolution in 1784, declaring it inexpedient to engage in a canal enterprise at public expense. In 1792 the state made a "free gift" of $25,000 to the Western and Northern Navigation Companies, one half to each, to enable those companies to construct canals in the valleys of the Mohawk and upper Hudson, and gave further aid in later years to the Western Company. In 1798 the Niagara Canal Company was incorporated, with a substantial gift of state lands and other privileges; the attempt to induce the Federal government to undertake the construction of the Erie canal also indicated the canal policy of that period. Not until 1812, twenty years after the first gift

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to the original companies, was the policy inaugurated of constructing a canal at state expense. The aid to the navigation companies in 1792 was a direct effort to promote an enterprise of great public utility, and the subsequent absorption by the state of the interests of the canal companies, and the continuation of canal construction by the state, was a recognition of the fact that the enterprise was too great for private capital. In 1797 the state began its policy of aiding banking corporations by subscribing for fifty shares of stock in the Bank of Albany. The state took stock in several other banks in the next few years, and this practice continued until 1818. In 1827 the state loaned the Delaware & Hudson Canal Company half a million dollars.

In 1836 the legislature authorized the issue of $3,000,000 of state stock to the New York & Erie Railroad Company, to aid in the construction of its road, and pledged the faith and credit of the state for the payment thereof. Eight other railroad corporations were aided by the state before the power to grant such aid was forbidden by the Constitution.

The statutes prior to the Convention of 1846 show state aid to thirty-three corporations, many of them receiving aid more than once. These enterprises included banks, bridges, canals, charity, hospitals, infirmaries, institutions of learning, manufacturing, mining, navigation, railroads, and turnpikes. The policy of rendering state aid to private enterprises was not only the subject of frequent legislative action, but it also received executive approval. The governors' speeches and messages contain frequent references to this subject, and executive discussion and recommendations concerning it doubtless reflected the general public sentiment of the time.

Governor George Clinton, in 1794, referring to the aid rendered to the Western and Northern Navigation

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Companies, said that these companies would 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. Governor De Witt Clinton, in 1819, recommended several colleges and charitable institutions to the patronage of the legislature. In 1820 he said that Union, Hamilton, and Columbia colleges had received $720,000, and recommended further assistance from the legislature. In 1826 he urged further appropriations for colleges and for "societies for the exaltation of literature and science."

Governor Martin Van Buren, in 1829, discussing the subject of state aid, said that "in relation to the policy of applying such portions of the means of the state (including a judicious use of its credit) as can be spared from other necessary objects, to works of internal improvement, there cannot, I think, be any serious diversity of opinion amongst us. . . . It will doubtless be attentively considered how far the public burdens arising from the construction of works of this character may be relieved and the efforts of the state judiciously aided by the encouragement of individual associations for the same purpose." He then referred to the large loans to the Delaware & Hudson Canal Company, which he thought would be paid in full. Governor Enos T. Throop, in 1830, said the loan to the latter company had enabled it to complete its work. Governor Marcy, in 1833, renewed the recommendation of his predecessors concerning aid to colleges and charitable institutions.

In 1832 the New York & Erie Railroad Company was incorporated to construct a "single, double, or treble railroad or way from the city of New York to Lake Erie; commencing at the city of New York, or at such point in its vicinity as shall be most eligible and convenient there-

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for, and continuing said railroad through the southern tier of counties by way of Owego in the county of Tioga, to the shore of Lake Erie, at some eligible point between the Cattaraugus creek and the Pennsylvania line." The state, by the act of incorporation, reserved the right to buy and own the road, thus repeating a provision contained in the first railroad charter, which was granted to the Mohawk & Hudson Railroad Company, in 1826. In 1834 the legislature directed the Governor to appoint an engineer to survey a route for this road, as prescribed in its charter, and to file a map and profile of the survey in the office of the secretary of state, with a statement of the estimated cost of constructing the road. The act appropriated $15,000 for the expense of this survey. This statute committed the state to the policy of aiding railroad construction, and it is evident that the statesmen of that period considered railroads and canals as parts of the system of communication, which included also turnpikes, ferries, bridges, and common highways. Governor Marcy, in 1835, announced the completion of the survey, and, commenting on the desirability of constructing the road, said it passed through "an interesting and rapidly improving section of the state." He said also that by means of the road, communication with the West "would be opened earlier in the spring and continued later in autumn than it now is or can be by the Erie canal." The Governor evidently thought the road could not be used through the winter months. Governor Marcy referred to the subject again in 1836, remarking that, in view of the magnitude of the undertaking, the public benefits it will confer, and the interest manifested by the people in the sections through which the road will pass, the company would probably again ask state aid. The legislature at this session authorized the issue of $3,000,000 of state stock to aid in the construction of the road.

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This was a large loan, and it is clear, from subsequent reference to it in executive messages and elsewhere, coupled with the embarrassments which the company suffered for a while, that it had a very significant influence in changing the policy of the state concerning state aid to railroads; and when the Convention of 1846 was called the major part of the railroad debt was represented by the loan to the New York & Erie Railroad Company.

Governor Seward, in 1839, advocated the policy of aiding private enterprise engaged in internal improvement. He called attention to three projected lines of railroad, one passing through the northern counties to Lake Ontario, one running through the central part of the state, near the line of the Erie canal, and the other connecting the east and west through the southern tier of counties. He said that state aid had already been granted to the central and southern roads, and commended to the legislature the consideration of such measures "as would secure their completion without delay." It is evident that there was a growing opposition to granting state aid to private corporations. Governor Seward, in 1840, recognized this opposition, and said that "the policy of loaning the credit of the state to such associations is condemned with unmeasured severity, and you will be required from some quarters to repeal all the laws by which such loans have been authorized." After referring to the history of the policy, and citing some instances of its application, he said that "capital to an amount equal to the sums for which the credit of the state is pledged has been derived from Europe. Upon the inducement held out by the legislature it has been paid to citizens of this state, and expended by them in the construction of works of internal improvement." Governor Seward vigorously opposed the repeal of the statutes granting state aid, and objected to any legislation which would impair the credit of the state, or

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impeach the good faith and intelligence of the people. He said that the statutes relating to internal improvements had settled certain principles which he enumerated, including the principle that "it is not only the right but the bounden duty of the legislature to adopt measures for overcoming physical obstructions to trade and commerce in this state, and for furnishing to each region, as far as reasonable, practicable facilities of access to the great commercial emporium of the Union, fortunately located within our own borders. That the legislature may direct the construction of such works at the expense of the state, or authorize their construction by associations, and may aid them by loans of the credit of the state upon conditions of perfect indemnity." In 1841 he said the state had aided in the construction of the New York & Erie, Auburn & Syracuse, Ithaca & Owego, and Catskill & Canajoharie Railroads.

In 1842 Governor Seward, with his accustomed eloquence and energy, urged the continuance of the policy of internal improvement to which the state had long been committed, saying that the "progress of civilization is always indicated by the condition of those interior communications, by means of which political and social relations are formed, supplies exchanged, and defense established." He said further that the policy included the construction of railways, as well as canals, and that it was our established "policy to render these facilities of communication more perfect, so as to increase their usefulness, and to extend them into regions partially or wholly denied their benefit, and thus remove inequalities of local advantage, and produce harmony and mutual affection." After presenting commercial and social reasons for this policy he said it was "thus that internal improvement contributes to ameliorate the condition of society and establish the sway of democratic power." He recognized the fact that

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the people did not all favor this policy, but thought the opposition to it relied "not so much on abstract principles as on objections against particular enterprises and customary forms of prosecuting them." According to his view, the opposition embraced "those who object to a direct engagement of the state in such undertakings,—those who maintain that corporations ought not to be trusted with them,—those who deem it wrong for the state to give or lend aid to such associations, —those who object to spending revenues held for the general benefit in constructing roads and canals,—those who deny the right of government for such purposes or the expediency of such a mode of finance; and those who maintain that taxation ought always to be resorted to when improvements are undertaken." The Governor here tersely stated the most formidable opposition, involving questions of power as well as questions of expediency. That the opposition had become powerful is manifest from the attention given to it by the Governor, and his effort to counteract its influence, and refute its arguments. It indicated a rising storm which was soon to sweep away the policy of devoting state funds or credit to the advancement of private enterprises. Governor Seward closed his discussion of this subject with a suggestion, very like a complaint, that the opponents of the present policy "do not agree, nor consider it important to agree, upon any fiscal scheme" as a substitute for the policy which they propose to abrogate, "while justice to our predecessors, whose projects it belongs to us to execute, requires us to remember that there has never been a railroad or canal the feasibility or the usefulness of which was not, in its early stages, sincerely and vehemently questioned."

In March, of the same year, Governor Seward sent a special message to the legislature, transmitting a letter

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from the president of the New York & Erie Railroad Company, from which it appeared that if legislative aid were longer withheld the company must desist from the prosecution of its enterprise, "the laborers employed must be discharged; the interest on the three million state loan, which will accrue on 1st of April next, will remain unpaid; the contingent debt will fall immediately upon the treasury; the capital invested in the enterprise by our fellow citizens will be lost; the New York & Erie Railroad, in its scarcely half-completed condition, be exposed to auction at the suit of the state; and the just expectation of immeasurable benefits to result from the enterprise will be suddenly and hopelessly disappointed." The Governor said "that the responsibility of conducting the enterprise to an early consummation" rested not with the company, but with the state. "The association can only be regarded by the people as an agent of the legislature." The legislature did not grant the aid desired, but extended for two years the time fixed by the charter for the completion of the road. In his August message Governor Seward renewed his recommendation that further aid be granted this company.

Governor Bouck said, in his message of 1843, that the credit of the state, amounting, in the aggregate, to $5,235,700, had been loaned to the "Delaware & Hudson Canal Company, New York & Erie, Ithaca & Owego, Catskill & Canajoharie, Auburn & Syracuse, Auburn & Rochester, Hudson & Berkshire, Tonawanda, Long Island, Schenectady & Troy Railroad Companies, and the Tioga Coal, Iron Mining, and Manufacturing Company." That "the New York & Erie, the Ithaca & Owego, and the Catskill & Canajoharie Railroad Companies had failed to pay the interest on their loans from the state, and the two latter roads have been sold at auction, and the sale of the former was postponed until

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the first Tuesday in May next." After describing with some detail the condition of the New York & Erie road, and the question of its construction, he recommended that its sale be suspended, and that the state lien be made subordinate to future claims created in raising funds for the completion of the road. The legislature adopted the Governor's suggestion, and passed an act postponing the sale of the road until 1850, giving the company seven years in which to complete the road, and making its new bonds a lien on the road prior to the state lien given by former statutes.

Governor Wright said, in 1845, that more than three fifths of the debt chargeable on the general fund had been contracted "by loans of the credit of the state to railroad corporations, which have wholly failed, and thrown the amount upon the general fund." He recommended the arrest of the process of further increasing the state debt. In 1845 the legislature passed an act for securing the state loan to the New York & Erie Railroad Company, of $3,000,000, by first mortgage bonds on the road. Governor Wright, in 1846, again considered the financial situation, and recommended that the "indebtedness of the state should not be increased; that the revenues of the respective funds should be so strengthened as to render them sufficient to meet current calls, to pay the interest on the debts, and to make annual contributions to a sinking fund such as would extinguish the principal within a reasonable period; and that, while the redemption of the pledges contained in former laws, authorizing loans of money, should require it, the whole of the revenues, beyond the payment of current and necessary expenses, should be appropriated to the payment of the portions of the debt falling due, rather than to any new expenditures."

As a result of the legislation, discussion, and agitation

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concerning state aid to private enterprises, the subject of prohibiting or restricting such aid was ripe for action when the convention met on the 1st of June, and it is not surprising that a stringent constitutional prohibition received its unanimous approval.

SUFFRAGE.

Governor Seward, in 1839, in his annual message, pointed out certain abuses of the right of suffrage, declaring that "anarchy will surely follow the discovery that the ballot boxes are an uncertain organ of the will of the people. Conscientiously holding the principle of universal suffrage, and indulging no apprehension of its practical operation, if fairly carried out, with proper safeguards against its abuse, I am yet free to confess my fears that it will prove a fatal franchise unless such safeguards be applied." Governor Seward referred to this subject again in 1840, remarking that the "acquiescence required of the minority cannot be expected to be rendered with cheerfulness, if it be at all questionable whether the public will is truly expressed," and advising such safeguards as would insure the absolute freedom and integrity of elections.

In 1841, Governor Seward renewed his consideration of the subject, suggesting that disfranchisement be made a penalty for bribery at elections. "In establishing universal suffrage, we have brought into operation a new element of government. It is the equal distribution of political power among all the citizens over whom power is to be exercised. Universal suffrage is the condition by which we secure universal acquiescence in the laws. But it is a mighty element of power, and requires the most perfect safeguards to secure its conservative and rightful action." Governor Seward's suggestions concerning the elective franchise bore fruit in the new Constitution,

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as will appear when the suffrage article is under consideration. In 1837, a constitutional amendment was presented to the legislature, authorizing qualified voters to vote for presidential electors, governor, and lieutenant governor, in any town or ward in the state, "if such elector is prevented, by necessary business, from offering his vote in the town or ward in which he resides." At different times, beginning with 1837, numerous petitions were presented to the legislature for an amendment of the Constitution, abolishing all distinctions in the right of suffrage, based on color.

B. The Convention and its Work.

The discussion and agitation of the subject of constitutional reform, which had continued many years, bore little fruit. The repeated recommendations of the governor, especially concerning the necessity of changes in the judicial system, were unheeded. The radical differences of opinion concerning the kind and effect of needed amendments seemed to render changes in the Constitution impracticable, if not impossible. After long delay and discussion, and after it had become apparent that the legislature or successive legislatures could not or would not agree on proposed amendments, the people took up the matter, and petitions from twenty-four counties were presented to the legislature of 1844, praying for the passage of a law authorizing the people to vote on the question of calling a convention to revise the Constitution.

Governor Silas Wright referred to these petitions in his message of 1845, and suggested that a convention could be avoided if the legislature would give prompt and careful attention to the amendments then pending. The legislature did not adopt the Governor's recommendation, but acted on the expression of popular opinion indicated in the numerous petitions for a convention. On

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May 13, 1845, an act was passed "recommending a convention of the people of this state." The act provided for submitting to the people, at the annual election in November, 1845, the question whether a convention should be held to revise and amend the Constitution. The act also provided that, if the majority were in favor of a convention, a special election should be held on the last Tuesday of April, 1846, for the election of delegates, equal in number to the members of assembly, and to be chosen in like manner; and the delegates were to meet in convention in Albany, on the first Monday of June, 1846. The convention was authorized to submit to the people the result of its work, either as a whole, in a revised constitution, or by submitting separate amendments.

The convention bill seems to have been made a party measure in the legislature of 1845. In the senate the bill passed by a vote of 18 to 14, and in the assembly by a vote of 83 to 33. According to the newspapers of the period there was strong partisan opposition to the bill in the legislature, but evidently this opposition did not seriously affect public opinion; the result shows nearly 86 per cent of the entire vote in favor of a convention. There was little opposition to the bill at the polls. Governor Wright, in his message of 1846, said: "The people of the state have, with an unanimity almost unknown in the history of our elections, decided in favor of the proposition to hold a convention to consider of alterations and amendments to the Constitution" of the state. A state census was taken in 1845, and the legislature, on March 30, 1846, reapportioned the members of assembly, and by a statute passed April 22, 1846, provided that the delegates to the convention should be chosen according to such reapportionment.

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The following is the list of delegates chosen to this convention:

Albany (city and county).—Ira Harris, Peter Shaver, Horace K. Willard, Benjamin Stanton.

Allegany.—William G. Angel, Calvin T. Chamberlain.

Broome.—John Hyde.

Cattaraugus.—George A. S. Crooker, Alonzo Hawley.

Cayuga.—Elisha W. Sheldon, Peter Yawger, Daniel J. Shaw.

Chautauqua.—George W. Patterson, Richard P. Marvin.

Chemung.—William Maxwell.

Chenango.—John Tracy, Elisha B. Smith.

Clinton.—Lemuel Stetson.

Columbia.—Ambrose L. Jordan, George C. Clyde.

Cortland.—John Miller.

Delaware.—David S. Waterbury, Isaac Burr.

Dutchess.—Charles H. Ruggles, Peter K. Dubois, James Tallmadge.

Erie.—Horatio J. Stow, Absalom Bull, Aaron Salisbury, Amos Wright.

Essex.—George A. Simmons.

Franklin.—Joseph R. Flanders.

Fulton and Hamilton.—John L. Hutchinson.

Genesee.—Moses Taggart, Samuel Richmond.

Greene.—James Powers, Robert Dorlon.

Herkimer.—Michael Hoffman, Arphaxed Loomis.

Jefferson.—Alpheus S. Greene, Azel W. Danforth, Elihu M. McNeil.

Kings.—Henry C. Murphy, Tunis G. Bergen, Conrad Swackhamer.

Lewis.—Russell Parish.

Livingston.—William H. Spencer, Allen Ayrault.

Madison.—Benjamin F. Bruce, Federal Dana.

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Monroe.—Frederick F. Backus, Harry Backus, Enoch Strong.

Montgomery.—John Bowdish, John Nellis.

New York (city and county).—Charles O'Conor, Henry Nicoll, Samuel J. Tilden, Benjamin F. Cornell, Campbell P. White, Alexander F. Vache, Lorenzo B. Shepard, John A. Kennedy, John L. Stephens, Robert H. Morris, William S. Conely, David R. Floyd Jones, Solomon Townsend, John H. Hunt, Stephen Allen, George S. Mann.

Niagara.—Hiram Gardner, John W. McNitt.

Oneida.—Charles P. Kirkland, Hervey Brayton, Edward Huntington, Julius Candee.

Onondaga.—William Taylor, David Munro, Cyrus H. Kingsley, Elijah Rhoades.

Ontario.—Alvah Worden, Robert C. Nicholas.

Orange.—John W. Brown, Lewis Cuddeback, George W. Tuthill.

Orleans.—William Penniman.

Oswego.—Orris Hart, Sereno Clark.

Otsego.—Levi S. Chatfield, David B. St. John, Samuel Nelson.

Putnam.—Gouverneur Kemble.

Queens.—John L. Riker.

Rensselaer.—William H. Van Schoonhoven, Perry Warren, Abram Witbeck.

Richmond.—John T. Harrison.

Rockland.—John J. Wood.

St. Lawrence.—Bishop Perkins, John L. Russell, Jonah Sanford.

Saratoga.—James M. Cook, John K. Porter.

Schenectady.—Daniel D. Campbell.

Schoharie.—William C. Bouck, John Gebhard, Junior.

Seneca.—Ansel Bascom.

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Steuben.—William Kernan, Robert Campbell, Jr., Benjamin S. Brundage.

Suffolk.—Churchill C. Cambreleng, Abel Huntington.

Sullivan.—William B. Wright.

Tioga.—John J. Taylor.

Tompkins.—Thomas B. Sears, John Youngs.

Ulster.—George G. Graham, James C. Forsyth.

Warren.—William Hotchkiss.

Washington.—Edward Dodd, Albert L. Baker.

Wayne.—Ornon Archer, Horatio N. Taft.

Westchester.—Aaron Ward, John Hunter.

Wyoming.—Andrew W. Young.

Yates.—Elijah Spencer.

The Convention met on the 1st day of June, 1846, and organized by electing John Tracy, of Chenango, president, and James F. Starbuck, of Jefferson, and Henry W. Strong, of Rensselaer, as secretaries. Routine matters usually incident to such a convention received prompt attention. Standing committees were appointed, and various subjects embraced in the Constitution were distributed and submitted to them for consideration. Numerous proposed amendments were offered and referred to appropriate committees. The Convention at once addressed itself to the great task committed to it by the people, and was soon engaged in active, and sometimes prolonged, discussion of the topics to be included in the Constitution which it sought to frame. These discussions evinced a wide knowledge of public affairs, an intelligent appreciation of the problems to be solved, and the patriotic desire to adjust or readjust the principles of constitutional government to existing conditions, many of which were new, and had developed during the previous seventy years of our history. It was a transition period. The time had apparently come for a radical de-

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parture from many of the governmental policies then in force, and an expansion and enlargement of popular rights, with the corresponding restriction of legislative and executive power.

The conditions that made these changes desirable often developed very slowly, and I have tried to show in preliminary articles the processes of this evolution, and the reasons for proposed constitutional reforms. The preliminary articles and the articles on the same subjects in this chapter are together intended to show the history of the constitutional provisions adopted by the Convention, except that, in a few cases, the historical development will be found in the chapter on the Constitution of 1894. Several important subjects which appear in the earlier Constitutions are considered in that chapter, for the reason that little change was made in the provisions relating to them by the Constitution of 1846. They were revised, sometimes with important modifications and additions, and new provisions were expressed in what was intended to be their final form, by the Convention of 1894. That chapter, therefore, seems the most appropriate place for a sketch of their historical development.

This Convention was a strong body. While few of its delegates possessed the large experience in public service that was such a marked feature of the Convention of 1821, yet many had enjoyed abundant opportunity to study the great questions which then agitated the state, and several of them had occupied high official positions. But here, as in many other deliberative bodies, men discovered and developed talents which they were not supposed to possess, and they unexpectedly became leaders of the Convention. The debates in a body like this do not always disclose with certainty the working capacities and abilities of the members. A large part of the real work is done in committee and by private discussions

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among members. The general discussions in the Convention were limited to a comparatively small number. Someone has taken the trouble to ascertain that in the Convention of 1821 only forty-three out of one hundred and twenty-six members participated in the debates. I have not made a statistical examination of this subject, but the proportion does not seem much if any larger in the Convention of 1846.

The Convention of 1821 was distinctively a farmers' convention. Sixty-eight of its members were classed as farmers, and their influence on the deliberations of the Convention, and also on the character of the work accomplished, was often a matter of comment by other members of the Convention. Thirty-seven delegates in that Convention were classed as lawyers. This number included Chancellor Kent, several judges of the supreme court, and many distinguished members of the legal profession. While their number was small, their high character and eminent abilities gave them a wide influence in shaping the policies of the Convention.

Forty-eight members of the Convention of 1846 were lawyers, and forty-two were farmers. This slight preponderance of lawyers is perhaps due to the fact that one of the most important reasons—and some delegates regarded it as the chief reason—for calling the Convention was the acknowledged necessity of reorganizing the judicial system of the state. Several other occupations were largely represented, but there was no antagonism of interests in the Convention. All seemed moved by a sincere purpose to frame a constitution that would unify and solidify all interests, and neither foster nor permit the encouragement of classes.

Education and inherited tendencies have such a deep influence in forming opinions that it is worth noting in connection with this Convention that seventy-seven of

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its members were natives of New York, thirty-nine were natives of New England, nine were natives of other states, while only three were of foreign birth. In the Convention of 1821, sixty-six delegates were natives of New York, while forty-eight were natives of New England.

BILL OF RIGHTS.

The committee on the Bill of Rights proposed several important additions to existing constitutional provisions, suggesting some new principles and transferring others from statutes. Among the new ones was a proposed section as follows: "Men are, by nature, free and independent, and in their social relations entitled to equal rights." An amendment to make the section apply to political as well as social rights was rejected by a vote of 33 to 42. One delegate proposed to strike out this section, and insert, for a substitute, the statement in the Declaration of Independence concerning inalienable rights; but this was rejected. It was objected against this section that it was a mere abstraction, and it was stricken out.

The second proposed section declared that "all political power is inherent in the people." Mr. Hunt proposed as a substitute the following: "The rights of men are the gifts of God, and are sacred. The first duty of government is to protect them; the second, to let them alone." This amendment was withdrawn, and the original section was stricken out.

Mr. Worden said, in explaining the article, that the words "the judgment of his peers," had been omitted from the section relating to disfranchising citizens, because such a clause was meaningless. In convention he proposed a long substitute; in substance, that the citizen's rights should not be taken away except on the verdict of a jury, rendered in due course of law, in a civil action, or

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in a prosecution in pursuance of some general law of the land. The proposed amendment was rejected.

The committee proposed to continue the constitutional provision guaranteeing trial by jury. Mr. Jordan proposed to amend the section by prohibiting the judge on the trial from arguing, advising, instructing, or expressing any opinion upon any matter of fact on the trial of any issue in any civil cause. This was rejected. The Convention adopted a proposition made by Mr. O'Conor, to extend the section to any new court thereafter organized, and rejected Mr. Bascom's proposition to give the legislature power to fix the number of jurors, and also an amendment suggested by Mr. Ruggles, dispensing with trial by jury in cases involving less than a specified amount. The argument was that cases involving trifling amounts should not require a jury trial, thus taking men from their business, sometimes for days, when the amount involved was only nominal. It was urged that the legislature ought to have the right to restrict trial by jury in such cases, or direct that they be tried without a jury. Mr. Jordan moved to add the clause allowing parties in civil cases to waive trial by jury. This was agreed to, and became a part of the Constitution. A proposed amendment giving the legislature the right to fix the number of jurors in justices' courts at six was rejected. The 5th section, relating to excessive fines, was agreed to without change.

When the section relating to religious profession and worship was under consideration, Mr. Harris proposed the following amendment: "And the legislature shall provide by law for the effectual protection of the rights of conscience, so that in the exercise thereof no person shall suffer in person or estate." Mr. Harris, in support of this amendment, said that it was proposed in behalf of the Seventh-Day Baptists, who, he said, were annoyed

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and embarrassed by having suits brought against them on Saturday, the day which they observed as the Sabbath. This amendment was at first agreed to, but afterwards rejected. The Convention amended the section by inserting a clause relative to the competency of witnesses. The subject is further considered in a note to the section on religious toleration, in the fourth volume.

The provision included in the first and second Constitutions, prohibiting clergymen from holding office, was omitted from the Bill of Rights, in the report of the standing committee. While this report was under consideration, Mr. Danforth, of Jefferson, moved to restore the provision contained in the earlier Constitutions. This was opposed. Mr. Patterson, of Chautauqua, said he supposed the time had gone by when any class of citizens was to be proscribed. He thought we should extend equal rights to all, and that our liberties would not be endangered by placing clergymen on an equal footing with other professional men. Mr. Salisbury denounced the exclusion of clergymen as an "odious distinction" in the Constitution. Mr. Taggart also objected that the constitutional provision placed "a large class of citizens of the highest character on a footing with the felons condemned in state prison." Mr. A. W. Young also opposed the exclusion. Referring to the suggestion that the calling of clergymen was such that they could not inform themselves on political subjects, he said he knew of many from whom we might learn lessons of statesmanship. Mr. Crooker made the principal speech in favor of restoring the exclusion, urging that the provision was wise and patriotic; that the people and the priesthood were content with its provisions, and that he was jealous of the power of the priesthood. He said he did not believe that clergymen, as a class, were safe depositories of power; that their peculiar calling unfitted

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them for the duties of legislation and administering the laws in secular offices with impartiality. That they already wielded a tremendous power in local elections, and that their influence was not always well and wisely directed, and that the provision of the Constitution was necessary to the protection of the clerical profession. The Convention, by a vote of 77 to 33, refused to continue this prohibitory provision against clergymen, which had been adopted by the framers of the first Constitution, and for seventy years remained a part of our fundamental law.

It is worth noting here, as showing the evolution of the policy of the law concerning the separate property of married women, which first found statutory expression in the so-called married woman's act of 1848, that the committee on the Bill of Rights proposed to include in the Constitution a clause on this subject, which was once agreed to by the Convention. As finally perfected by the committee on revision, the clause read: "All property of the wife, owned by her at the time of her marriage, and that acquired by her afterwards, by gift, devise, or descent, or otherwise than from her husband, shall be her separate property." Then followed the provision requiring the legislature to enact laws concerning such separate property, as well as property held by the wife with her husband. Charles O'Conor opposed the amendment, saying that "he regarded this as the most important section we had adopted,—as one fraught with consequences more serious and important than any other,—perhaps, than the whole Constitution together. If there was anything that ought not to be touched, if it could be avoided, it was the sacred ordinance of marriage, and the relations that grew out of it. The difference, he said, between the laws of Great Britain and those of most other nations consisted in this: that the laws of that

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country were founded on the Gospel precept that they twain should be one flesh,—recognizing the husband as the head of the household, and merging the existence of the wife so thoroughly as that, in contemplation of law, she could hardly be said to exist. Regarding the condition of those countries where the wife had a separate estate from the husband,—where she might be a trader in partnership with other persons in business,—where she was, in fact, a sort of partner with her husband, having interests often in collision with his,—regarding all this in contrast with the condition of marriage where it existed according to the principles of the Gospel, he was no true American who desired to see our condition, in this respect, changed. Diverse interests must necessarily grow out of such a relation, controversies would arise, and husband and wife would be armed against each other, to the utter debasement of that sentiment which they should entertain towards each other, and to the subversion of the felicity of the married state." Mr. Morris, replying to Mr. O'Conor, said "he was not surprised that this doctrine of identity of man and wife was to be sustained only by the laws of England,—laws under which men once sold their wives,—under which a husband could flog his wife with a stick as large as the judge's thumb,—a law which was well said to unite men and women for better or for worse,—which, literally construed, gave the men all the benefit and the women all the evil,—or rather, which proceeded on the assumption that the harmony of a family consisted in the man's pocketing all the cash. Mr. Morris adverted to the fact that, by our law, property could be settled on the wife and her children, beyond the reach of the husband and his creditors; and that this precaution against the profligacy of the husband had not only been acquiesced in by the public, but that it had been found to be a most

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wise provision." The debate was continued by other delegates, and some amendments were offered, but the section was finally rejected by a vote of 50 to 59.

The next day Mr. St. John submitted a proposition securing to married women the rents and profits of real estate, and prohibiting any law authorizing the taking of such rents or profits for the husband's debts without his consent; this was rejected; also Mr. Townsend's proposition to provide for a homestead exemption to the value of $600.

One of the clauses in the two-thirds section in the Constitution of 1821 required the two-thirds vote of the legislature to pass bills creating, altering, or renewing bodies politic or corporate. While this provision was in force it was the subject of frequent judicial discussion. The cases involving a construction of the statutes affected by the two-thirds rule as applied to corporations will be found in a note to the section in the Constitution of 1821. This provision was omitted from the Constitution of 1846.

A section was proposed, prohibiting the imprisonment of witnesses in criminal cases for want of bail, and authorizing the legislature to provide for their temporary detention when necessary, and for their prompt examination. This section was not adopted, but the principle stated in it was expressed in an amendment to a section relating to excessive bail, by the addition of the words "nor shall witnesses be unreasonably detained."

The provisions relating to the common and colonial law, and the acts of the legislature, and contracts with Indians, were continued from the Constitution of 1821 without change.

While the section of the earlier Constitutions, relating to royal grants and charters, was under consideration, Mr. Murphy offered an amendment that "such charters

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to bodies politic or corporate, made by the King of England, shall have no other or greater effect by virtue of this section than similar charters granted by law in this state." This proposed amendment was objected to on the ground that it might have some effect on bodies in the city of New York. The city of New York had certain privileges that might be abrogated by the passage of this amendment. Columbia College and the New York Hospital were also in possession of privileges derived from such charters. The amendment was rejected.

AGRICULTURAL LEASES AND OTHER TENURES.

The anti-rent disturbances and the agitation caused by the attempted enforcement of onerous conditions in leases, the recommendations contained in executive messages, and the proceedings in the legislature concerning tenures, with all which the members of the Convention were familiar, made it possible for them to agree on needed constitutional changes without the protracted discussion that attended the consideration of many other subjects. Beginning with the act concerning tenures, passed in 1787, already noted in the preliminary sketch on agricultural leases, and continuing through the provisions relating to feudal tenures in the revised statutes, the abolition of distress for rent, and the taxation of reserved rents by the statutes of 1846, the legislature had already accomplished substantially all the reform needed to dispose of feudal tenures and their incidents, and if the act limiting the duration of agricultural leases to ten years, passed by the assembly in 1846, had become a law, nearly all of the relief sought by the tenants in the manorial districts would have been obtained by legislative action.

The committee to whom this subject was referred made a report on the 16th of September, abolishing

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feudal tenures, limiting leases of agricultural land to ten years, and prohibiting fines, quarter sales, and other charges or restraints on alienation of land. When this subject was taken up for debate, additional provisions were proposed, excepting rents or services certain from the abolition of feudal tenures, and declaring all lands to be allodial. There was some debate on the question of incorporating in the Constitution the provision abolishing feudal tenures, principally on the ground that such tenures had already been abolished by statute, and that there was no danger that the legislature would restore them. It was urged, on the other hand, that such tenures should be specifically abolished, or their abolition confirmed by the Constitution itself, and the character of the title to land held by the people expressly declared, so that the question could never arise again. The debate was brief and without special incident.

In the course of the discussion Mr. Simmons, of Essex county, remarked that "he could tell a man from a feudal region by the very expression of his countenance." Mr. Van Schoonhoven said it was a mistake to suppose that there were no advocates of feudalism among us. "It had been openly advocated by a writer of great eminence and reputation." He thought the question should be set at rest by the Constitution. Mr. Harris, of Albany, thought that, while it might not be necessary to adopt such a prohibition, it was important to secure against feudalism the "moral influence of such a declaration; that the system was not congenial with our institutions, and ought to be utterly eradicated from among us." Mr. Jordan, of Columbia, "confessed that he participated in the feeling which pervaded this whole region, and, he might say, in the feeling that pervaded the whole state, that it was inconsistent with the spirit and genius of our institutions that men should hold their farms, on

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which they were to sweat and toil, subject to the superior dominion of a lord, who, for the mere pride of being their lord, and not for any pecuniary interest growing out of this relation, had determined to hold to his dominion over this property." Mr. Jordan alluded to some of the terms of the leases: "You shall not entertain a stranger in your house over twenty-four hours without giving notice to the landlord in writing." "You shall build a barn on the premises within one year, shingled with straw, and floored in a particular manner." "You shall set out 200 apple trees, and when one of them is destroyed you shall immediately replace it," be it in summer or winter. "You shall pay so much towards supporting such minister of the Gospel as the landlord shall provide to cure the souls of his tenantry." "You shall go to my mill," etc., etc., and "for any violation of these conditions you shall forfeit your title."

The section limiting agricultural leases was opposed by many delegates, on the ground that it restricted leases throughout the state, simply because of conditions existing in a few manorial districts. The Convention once agreed to extend the time from ten to twenty-one years, but later receded from this position, and fixed the time at twelve years. Mr. Brown, of Orange, opposed this section, remarking that the project was one "which no man in his senses out of an anti-rent district would for a moment think of." Mr. Worden contrasted the agricultural conditions in eastern and western New York, remarking that in the western part of the state the superior condition was due to the fact that it was free from the curse of any of the incidents of feudal tenure, and that the western farmer was lord of the soil he cultivated. Mr. Loomis "sustained the section, as in harmony with the true policy of our government, which was to favor the free alienation of property, and to dis-

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courage the accumulation and perpetuation of large estates in particular families." On motion of Mr. Harris the limitation was fixed at twelve years, and the section was then adopted by a vote of 46 to 33. The next day the section was under consideration again on a proposition to limit the term to seven years. This was rejected, and the section was again adopted by a vote of 58 to 49. This vote shows a quite decided opposition to the principle of the section.

On motion of Mr. Ruggles the Convention agreed to incorporate in the Constitution the provision of the revised statutes, declaring that "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."

The sections relating to tenures appear in the first article of the Constitution.

SUFFRAGE.

The committee on the elective franchise made a report containing, in substance, the following propositions: The general right of suffrage was limited to white male citizens, twenty-one years of age, sixty days' citizenship, one year inhabitancy, and six months in the county. Persons may, by law, be excluded from the right of suffrage if convicted of bribery, larceny, or other infamous crime. After 1855, persons might, by law, be excluded from the right of suffrage who could not read the English language.

"For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence, while employed in the service of the United

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States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum, at public expense; nor while confined in any public prison.

"Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established."

Elections were to be by ballot. Every voter was eligible to every office, but no person was eligible to a local office who was not an elector in the district in which he resided. United States officers were ineligible to any office in the state. In addition to the general report, the committee submitted a section for separate action by the people, giving to colored persons the same right of suffrage as whites. Mr. Dorlon submitted a minority report covering the first section only, omitting the word "white," and conferring the right to vote on each person who had paid a tax the preceding year, or who could read the English language.

When the report was taken up for debate, Mr. Bruce offered an amendment striking the word "white" from the first section. This led to a serious and prolonged debate. It is evident that public opinion did not favor general suffrage. Mr. Russell, of St. Lawrence, made a speech against the motion to strike out "white," in the course of which he said there were more single women in the state,—two to one in number to the negroes, and of infinitely greater intelligence,—and they were excluded from all participation in the elective franchise. For one, he knew that nine tenths of the people in St. Lawrence county—abolitionists and all—were opposed to the admission of the negroes to the right of suffrage. They believed the Almighty had created the black man

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inferior to the white man,—that the history of the world had shown him incapable of free government. They believed the people of our own white race were the only ones capable of self-government; that if the negroes should be admitted, our republic would soon be degraded to a level with those of Mexico and South America. He felt bound, as representing the constituency of St. Lawrence, to say to this race, "We cannot admit you to be voters. If so, we must admit you to an equal seat with us in the jury box, and to hold office." He agreed in this perfectly with his constituents. This was the only issue in St. Lawrence at the convention election. He was interrogated on this subject, and informed them expressly that he should vote against suffrage to the negro. He denied that this was the expression of a prejudice. It was but the expression of the sentiment of the Almighty, who had ordained the colored man to be inferior to the free white race. Mr. Strong, replying to Mr. Russell, said: "The gentleman, in his rage, said if we gave the negro the right of suffrage he would have the right to sit in the jury box. He must be a curious lawyer if he does not know that a negro can now sit in the jury box." Mr. Strong said further that the question was one that could be put down by main force, but it would return with ever-increasing strength, until right should be done to all classes of the citizens of the state. Mr. Kennedy, representing the standing committee, said that the subject had received careful consideration, and a full opportunity had been given to those who felt an interest in the subject to lay their views and wishes before the committee. Among others, a delegation from the colored population had appeared before the committee. He said that he could not concur in the view expressed by some delegates, that the elective franchise was a right. "Rights are emanations from nature; born with him to whom

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they belong, and alienable only for offenses against society; and this, under all forms of government. But, on the contrary, privileges are acquired: conventionally, or by grant of the governing power. When long possessed, they are sometimes denominated civil rights; but they never become naturalized. The elective suffrage is a privilege,—a franchise,—a civil right, and not a natural right; and the governing power may limit, restrict, or extend the exercise of it in such manner as to it may seem wise and proper; and it is in duty bound to confer it only on such as can, in the exercise of it, best subserve the objects of good government. Those persons having the control and responsibilities of government resting upon them have the sole right to determine, in their discretion, who shall participate with them in its exercise. Any deviation from this rule is revolutionary. Civilized society throughout the world has, with a few excepted cases, connected with the right of descent, limited political privileges to mature age and the male sex. By this restriction, the governing power in this state is in the possession of about one fifth of the population. If this sovereignty is too much concentrated for the general welfare,—if a necessity has arisen for its enlargement,—let it not be by amalgamating with us a people who are foreigners in our midst. The females of mature age, of our own race, are entitled to a preference when we are prepared to make such an extension."

Mr. Hunt said the doctrine of his constituents and of himself was this: "We want no masters, and, least of all, no negro masters, to reign over us. We contend for self-government. We hold that no man who is not a part of the Republic's self—who is not a bona fide citizen—shall have any voice in the state. Negroes are aliens, but no longer idolators,—no longer naked savages. They have made much progress in the arts of

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learning of a superior race." He predicted that the practical effect of negro suffrage in New York city would be to exclude the race from Manhattan Island. Mr. A. W. Young said the word "colored" does not appear in the Declaration of Independence. He said that colored people were as independent as immigrants from foreign countries, and were as much entitled to the elective franchise. Mr. Rhoades, replying to Mr. Hunt, said that in the city of New York the colored population were not even permitted to drive a cart. They were degraded to the lowest point in that city. Mr. Waterbury said that if the pending proposition were adopted, it would place the state on the same footing as Vermont, Massachusetts, and Rhode Island. He said, further, that the argument that because a race of men is marked by a peculiarity of color, and crooked hair, they are not endowed with a mind equal to another class who have other peculiarities, is unworthy of men of sense. Mr. Stow said it was a fundamental error to suppose that the elective franchise was a right. If it were a right, then it should be granted to "all,—of both sexes, of all conditions and ages, whether aliens or citizens." He said the elective franchise was a matter of policy and expediency, and not of abstract right. Mr. Dana pointed out that in 1777, "during the Revolutionary struggle, the Constitution made no distinction between the colored and the white man in regard to the right of suffrage; but in 1821, a three years' residence and the possession of a freehold of the value of $250 were required of the colored men, by which almost the entire population were deprived of that precious right. Only one thousand of them voted in 1845, when some two thousand of them were taxed." Mr. Bruce's amendment to strike out the word "white" was defeated by a vote of 37 to 63.

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Mr. Swackhamer said he was in favor of striking out the clause requiring a citizenship of sixty days, and also the property qualification. He said that the colored race were either entitled to vote on the same terms with the whites, or not at all. His constituents were of the opinion that the colored men were not capable, and should not have the right to vote; and however strong his sympathies might be for the African race, he did not hesitate to express that opinion. Mr. Waterbury said he was advised that the colored people preferred to vote under the property qualification, rather than not vote at all; and while he was opposed to a property qualification, he should vote to retain it, believing it to be the wish of the colored people. Mr. Harrison said that all attempts of legislation to raise the blacks to a social equality with the whites would be utterly nugatory; that they were an inferior race to the whites, and would always remain so. A proposition was submitted to continue the right of suffrage to colored persons who possessed the property qualifications required by the Constitution of 1821—namely, a freehold estate of $250—at the time the new Constitution should take effect, but prohibiting direct taxation of colored persons who were not entitled to vote. This was rejected.

After considerable debate, the Convention declined to recommend equal suffrage to colored persons, but continued, without change, the provision on this subject contained in the Constitution of 1821. The Convention also submitted a separate amendment providing for equal suffrage to colored persons, with the provision that, if adopted, it should become a part of the suffrage article of the new Constitution.

The Constitution of 1821 prescribed no period of probation for naturalized voters. A foreigner might have been naturalized even on election day, and was imme-

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diately entitled to vote. The Convention of 1846 changed this rule, and imposed a period of limitation, requiring a citizenship of ten days before election. There was a strong sentiment in favor of a longer limitation. The standing committee on the elective franchise reported a provision requiring a voter to have been a citizen sixty days before election. While this provision was under discussion, a motion was made to strike out the sixty-day limitation. It was urged, in support of this motion, that there was no reason why a person who had become a citizen after five years' probation should be compelled to wait sixty days longer before he could vote; that there ought not to be a delay in the right to vote one moment longer than the law of Congress required, and that such delay was a restraint on the exercise of the franchise. The advocates of the probation directed attention to the struggle by both parties to get foreigners naturalized on the eve of an election, and to the bad effect which this struggle had upon the foreigner himself, in improperly influencing his first vote; that "men who were poor, were taken by partisans on the day before the election, or even the same day, up to the courts, where their papers were made out free of expense, and they were hurried to the polls to deposit their votes;" and that such a probationary period was necessary to protect the purity of the franchise, and to protect the foreigner himself from undue influences which otherwise would be brought to bear upon him in giving his first vote. The motion to strike out the sixty-day limitation was at first lost by a vote of 48 to 48. A proposition was submitted, fixing the probationary period at ten days. A motion to strike this out was lost by a vote of 51 to 59, and this limitation was included in the section as finally adopted. We shall see hereafter that this limi-

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tation was extended to ninety days by the Convention of 1894.

There was some discussion and considerable difference of opinion concerning the proper length of residence of voters in the state and in the county and election district, but the discussion has no special interest now. The result was a provision requiring the voter to have been an inhabitant of the state one year, and a resident of the county four months, and for thirty days a resident of the district from which the officer is to be chosen for whom he offers his vote.

The proposed section providing that after 1855 no person should vote who could not read the English language provoked considerable discussion. Several amendments were offered, among them one imposing a disqualification only on persons born after the Constitution took effect. This, it was said, would not disfranchise the present voters. One delegate proposed that the word "Dutch" be added, so that a voter might be permitted to read the English or Dutch language; and, in support of his amendment, called attention to the fact that, by the terms of capitulation at the conquest of New York in 1664, Dutch residents were to be protected in all their rights. The debate on this section did not take a wide range, and few delegates participated in it. One amendment required the voter to be able to read and write, without limiting him to any particular language. The principal argument in favor of this qualification was that the best interests of the state demanded it, and that the intelligence of the voter was the true foundation of the right of suffrage. Mr. Greene said: "The right to vote is not a natural or inalienable right, but is a right conferred by the government on its members for a specific reason; *viz.*, that of choosing the officers whose duty it is to perform the various functions of govern-

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ment. The voter, therefore, is the agent or the representative of the government, to perform this very important and responsible trust. Is it not, then, important, in order to a right and proper discharge of this trust, that the agent should possess intelligence? It will be perceived that the act of conferring the privilege to vote upon a person imposes, at the same time, a serious obligation. The voter, in the discharge of his duty in depositing his vote in the ballot box, does not act for himself merely, but, in addition to his obligation to the government, he is acting as the immediate representative of some five or six persons who have not the right to vote. These persons have claims upon the voter. Their rights are to be affected by the vote he casts. They therefore have a right to demand that the voter should be intelligent. It is, therefore, for the interest of the voter, that the government should require of him at least so much intelligence as to be able to read and write." The proposition to impose an educational qualification on voters received only six votes.

The proposed section making every elector eligible to every office, and requiring every local officer to be an elector in the locality from which he is elected, was stricken out; also the proposed section making United States officers ineligible to an office in the state.

THE LEGISLATURE.

The Convention made no change in the structure of the legislature, continuing the provision that the senate should consist of thirty-two members and the assembly of one hundred and twenty-eight members. The principal interest concerning the legislature, in the Convention of 1846, related to the reorganization of the senate districts. The standing committee on the legislature reported a plan for single districts, reducing the term

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from four years to two years. The committee's plan provided for electing the senators by classes, one half to be chosen from the odd-numbered districts in one year, and the other half from the even-numbered districts the next year. Mr. Richmond proposed to increase the number of senators to thirty-nine, making the term three years, electing one third each year. He urged, in support of his plan, that an apportionment with thirty-nine senators would be more just than could be made with thirty-two. Mr. Chatfield proposed to give the legislature power to increase the number of senators, after an enumeration, to any number not exceeding forty-eight. Mr. Tilden also favored an increase in the membership of the senate, and believed that two senators should be elected from each district, for two years.

Several delegates, in the course of the discussion, showed the injustice of large fractions in the senatorial apportionment, the excess in some cases being 16,000, and in others the deficiency was as great. It was admitted that some of the larger inequalities would disappear if the number of senators were increased, and that the inequality could also be eliminated to a large degree by dividing counties in the formation of senate districts; but Mr. Taylor, chairman of the committee on the legislature, stated that if the Convention adhered to county lines in the formation of senate districts, inequalities, and, in some cases, great inequalities, would be the inevitable result. Ira Harris was opposed to dividing counties, and suggested that, by a moderate increase in the number, some counties could be made into single districts. Mr. Nicoll suggested a senate of forty members, Mr. Worden proposed to increase the senate to fifty, and the assembly to one hundred and fifty. The vote to increase the senate to forty-eight was lost, 29 to 78. The vote on the proposition to increase the senate

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to forty-two was lost, 23 to 84. The vote on a senate of forty members was 47 to 63; on a senate of thirty-nine members, 42 to 67; on a senate of thirty-six members, 44 to 62; and the proposition to fix the number at thirty-two was carried by a vote of 63 to 43. The proposition to elect senators by single districts was adopted by a vote of 79 to 31.

On the question of excluding aliens, paupers, and persons of color, not taxed, from the basis of representation, there was considerable discussion. There was little difference of opinion concerning paupers, but the views of the members of the Convention of 1821 relative to the exclusion of aliens were reiterated in this Convention; that is, the alien population being at first concentrated in large cities like New York and Brooklyn, and being fluctuating, it might be possible, if they were included in the representation, that New York would gain a member of the legislature, while the alien population on which this gain was based would soon be scattered to all parts of the country. Mr. Worden argued that the proper basis of representation was the body of voters. In the chapter on the Convention of 1821 the change of policy from a representation based on electors to a representation based on inhabitants has been noted; and in the Convention of 1846 there was no serious consideration of a proposition to return to the early basis of representation, although several delegates believed that the electors formed the proper basis. Only twenty delegates were in favor of striking out the word "aliens;" only thirty-one were in favor of including persons of color, not taxed.

There was some difference of opinion as to the length of term of senator, but the proposition to continue it at four years received only seventeen votes; forty-two voted for a three-year term, but the term was fixed at two

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years by a vote of 80 to 23. There was considerable discussion on the question of electing senators by alternate districts; but, by a vote of 100 to 12, the Convention decided to elect all the senators at the same time.

The committee proposed an assembly of one hundred and twenty-eight members. Mr. Taggart moved that the assembly be composed of one hundred and thirty-six, Mr. Richmond proposed to make it one hundred and forty-four, Mr. Murphy, one hundred and forty-eight; but all the propositions for a larger number were rejected. An amendment proposed by Mr. Marvin, giving the legislature, after the enumeration of 1855, power to increase the senate to fifty, and the assembly to one hundred and fifty, members, was rejected by a vote of 35 to 70.

The Convention for the first time introduced into the Constitution the plan of electing members of assembly by single districts. It will be remembered that, under the Constitution of 1821, and the apportionment acts under that Constitution, the members of assembly were chosen by counties, and not by districts. A proposition had been submitted to the legislature before the Convention of 1846 was chosen, for the election of members of assembly by single districts. That proposition was renewed in the Convention, and adopted with little dissent. A suggestion was made that the districts be constructed according to a ratio of population, without regard to county lines, thus carrying into the construction of assembly districts the principle adopted in the case of senate districts; but the Convention decided to adhere to the policy of the earlier Constitutions, making the county the unit of assembly representation. The question of single senate and assembly districts had been publicly discussed before the Convention assembled, and many local nominating conventions had adopted resolutions

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favoring such single districts. In addition to this, circulars had been sent to candidates for the Convention, in which they were asked to express their views on the question of single districts. The opinion was freely expressed in the Convention that there was a popular expectation that single districts would be established for both branches of the legislature. The committee on the legislature reported a plan for assembly districts to be fixed by the legislature, with a proviso that no town or ward should be divided in the formation of a district. The Convention struck out the prohibition against dividing a ward, but declined to strike out the like prohibition against dividing a town. While the method of dividing counties was under consideration, Mr. Cook, of Saratoga, proposed that the division of the counties into districts be made by boards of supervisors, instead of by the legislature, on the ground that these boards were more familiar with the local situation and conditions, and were better qualified than the legislature to make a just and satisfactory division of the county. Mr. Murphy proposed that the division of the county into assembly districts be made by a convention composed of commissioners, one to be elected from each election district. The Convention preferred Mr. Cook's plan, and it was adopted.

It was also proposed to give the legislature power to redivide the county where it appeared that the assembly districts had been created by the board of supervisors "with any reference to political or partisan objects." An amendment was offered to substitute the supreme court for the legislature, but both suggestions were rejected. We shall have occasion to note hereafter that the provision giving the supreme court power to review an apportionment was included in the Constitution by the Convention of 1894. Mr. Rhoades proposed that "mem-

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bers of assembly may be chosen from any portion of the county in which such districts are situated, but shall be residents of the county." He said there was then no prohibition. They might go out of the county for a member; but the habit of not doing so had almost acquired the force of law. If the inhabitants of a county desired to go out of an election district in search of a candidate they should have a perfect liberty to do so. That they should have the whole range of the county in choosing a candidate for the assembly. Mr. Nicholas said: "If the Constitution sanctions the selection of candidates out of the districts where they are to be voted for, it must defeat the principal objects of the single district system, which are to prevent political combinations in large counties, and to bring the candidate and his constituents nearer together, so that candidates may be generally known within their district." Mr. Rhoades's proposition was rejected.

In 1858 the seat of John G. Seeley, who had been elected to the assembly from the 4th district of New York, was contested by James Dolan, on the ground that Seeley was not a resident of the district, and therefore not eligible. While the contest was pending before the assembly committee on privileges and elections, the assembly, by resolution, asked the opinion of the attorney general on the question of Mr. Seeley's eligibility. Lyman Tremain, then attorney general, in response to the assembly resolution, reported that, in his opinion, "there is nothing in the Constitution or laws of this state which prohibits the people in any assembly district from electing a member to represent them in the assembly of this state, who resides in another district." The assembly committee concurred in this view, and Mr. Seeley was permitted to retain his seat. It should be noted, however, that the contest involved a question of fact whether

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Mr. Seeley was a resident of the district. On this question the committee took testimony, and in its report said that, while the question of residence was immaterial, the evidence abundantly established the fact that, at the time of the election, Mr. Seeley was a resident of the district within the meaning of the term "resident," "as used in all statutes upon the subject of elections and qualifications of voters." Mr. Tremain, in his opinion, stated that one of the members of the Constitutional Convention of 1821 was elected from a county in which he did not reside. He probably referred to Martin Van Buren, who resided in Columbia county, but was elected a delegate from Otsego. Mr. Tremain also said that, in electing delegates to the Convention of 1846, part of the people of Chemung voted for a delegate who resided in another county. Mr. Tremain might have added the Convention of 1801, to which Aaron Burr, a resident of New York, was elected a delegate from the county of Orange. De Witt Clinton is also said to have been elected a delegate to this Convention from a county in which he did not reside; and this gives occasion to observe how history is sometimes written. According to Hammond's "Political History of New York," vol. 1, p. 164, Mr. Clinton was a resident of New York city, and was elected a delegate from Kings county; Mr. Jenkins, in his "Lives of the Governors of New York," p. 223, says that Mr. Clinton was elected a delegate from the county of Kings, "in which he then resided;" while the record of the Convention states that he was a delegate from the county of Queens, and the same statement appears in the "Albany Register" of October 16, 1801.

The subject of the compensation of members of the legislature was the occasion of considerable discussion in the Convention. The plan proposed limited the members to a fixed *per diem* compensation for ninety days,

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with mileage. It was conceded that the compensation allowed to members of the legislature was small, and a statement by one delegate, based on figures obtained from the comptroller's office, showed that the average amount paid to the members of the legislature, including mileage, was about $450. Acting on this information a proposition was made that a fixed salary be paid, and $500 was suggested as a proper amount, but the provision finally adopted fixed the compensation at $3 a day, and limited the aggregate amount to $300, besides mileage.

THE EXECUTIVE.

The committee on the executive submitted a report providing in substance that the executive power should be vested in a governor, chosen for two years, and also in a lieutenant governor, to be chosen at the same time and for the same term. 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 at the time of his election. He was vested with the general powers specified in previous constitutions. His salary was fixed at $4,000. The state was also to pay "rents, taxes, and assessments on his dwelling house." He was also to be allowed $600 annually for his private secretary. The lieutenant governor was to be acting governor in case of vacancy in the office of governor, or in the case of the governor's inability or absence. This provision was continued from previous constitutions. The lieutenant governor was to receive $6 per day and mileage while acting as president of the senate. The committee's plan also prohibited the governor and lieutenant governor from holding any other office of "trust, honor, profit, or emolument under this state, or of the United States, or any other state of the Union, or any foreign state or gov-

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ernment." The governor was authorized to deliver fugitives from justice to the government of any foreign country where the offense was committed; and might also call on the militia to aid sheriffs in executing process. He might remove sheriffs, but was deprived of the power to remove county clerks and registers. The provision of the second Constitution was continued, relative to the presentation of bills to the governor for his approval, and his action thereon, with the further provision that if, on final adjournment of the legislature, within ten days after a bill had been delivered to the governor, the bill had not been signed, the legislature might pass such a bill at the next session, and if so passed by a majority of both houses it should become a law without the governor's approval.

Mr. Morris, chairman of the committee, on presenting the report, made a statement explaining it by giving the sources of its provisions. Many of its provisions were taken from previous constitutions, without change; some were new, and some were taken from statutes. At the same time he presented a long section as a proposed substitute for the section relative to the governor's action on bills. This proposed section contained, in substance, the provisions of the like section in the regular report, with an additional provision giving the governor ten days after final adjournment of the legislature in which he might act on bills left in his hands. This suggestion is probably the origin of the provision adopted in 1874, giving the governor thirty days after the adjournment to act on bills. This new section also proposed to permit the legislature to pass a vetoed bill at the next session, and, if again passed, such a bill should become a law notwithstanding the objections of the governor. This was a very curious provision, for it might permit the second passage of a bill by an entirely new legisla-

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ture, and with a new governor, who would have no power to act on it, and such a bill so passed would have the same effect as if passed over the veto of the governor who vetoed it.

While the proposition prohibiting the governor from holding any other office or public trust was under consideration, Mr. Tilden called attention to the fact that this would exclude the governor from holding any office, such as acting as regent of the University, trustee of the State Library, trustee of public buildings, and trustee of some of the institutions of learning. He said he could see no good reason why the governor might not properly hold these positions.

The proposition to abolish the office of lieutenant governor found some favor, its advocates urging that the office was unnecessary, and that a large majority of the other states of the Union did not have such an office. The proposition was defeated, but the vote is not given. It was also suggested, during the debate on the first section, that the date of holding elections for governor should be changed so that the governor and the President of the United States would not be elected at the same time. The proposition to strike out the word "native" from the Constitution, relative to the eligibility of the governor, was adopted with only two dissenting votes. There was a long debate on the other qualifications of the office of governor, prescribed by § 2. Many amendments were suggested, the purport of which was to remove any restrictions on qualifications except that of citizenship, but all amendments were finally rejected, and the section was permitted to stand as reported.

While the pardoning power was under consideration an amendment was proposed to the effect that notice of application for pardons, reprieves, or commutations should be published two weeks before the hearing. This

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was negatived. Mr. Harrison proposed to restrict the governor's pardoning power in the case of conviction for murder, by providing that where, in such a case, the governor had commuted the sentence to imprisonment for life, no pardon should afterwards be granted, except on proof of innocence or insanity of the convict at the time the crime was committed, or irregularities or mitigating circumstances. The case was to be sent to the senate for its action. This would have given the senate the pardoning power in these cases. This proposition was rejected. Another proposition requiring the governor to give notice of the application for the pardon to the judge who tried the case, or the district attorney, and file the evidence used on the application with the secretary of state, was rejected by a vote of 38 to 42. The Convention also rejected a proposition that, if the legislature should abolish capital punishment, the governor should be deprived of the power of pardon or commutation without unanimous consent of the legislature; another prohibiting the governor from granting a pardon on condition that the convict should leave the state or the United States; and another, giving the legislature power to control the executive action in cases of conviction for murder. The proposition to give the governor the right to deliver up fugitives from justice to foreign countries was rejected. It was urged against it, that it was obnoxious to the Constitution of the United States, and was therefore beyond the jurisdiction of an individual state.

STATE OFFICERS.

The standing committee on state officers other than governor, lieutenant governor, and legislative and judicial, reported in favor of the election by the people of the secretary of state, comptroller, treasurer, attorney

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general, and state engineer and surveyor. The report also provided for the election of three canal commissioners and three inspectors of state prisons. The state engineer and surveyor was required to be a practical engineer, and must have been in actual pursuit of his business or profession for seven years next preceding his election. The report fixed the salaries of state officers, providing also for the expenses of those whose business required them to travel through the state. From the various state officers were made up a canal board, the commissioners of the canal fund, and commissioners of the land office.

While the article on state officers was under consideration in the Convention, Mr. Marvin moved, as a substitute for the provision relating to salaries, a clause requiring the legislature to fix the salaries, and prohibiting their increase or diminution during the term for which an officer was elected. Mr. Marvin's proposition was adopted in substance. The speaker was excepted from the operation of this provision, at the suggestion of Mr. Crooker. A proposition was made to elect a state superintendent of common schools for two years, with a salary of $2,000. This was rejected. The provision that the state engineer must have seven years' experience was stricken out, and the qualification was simply that he must be a practical engineer. A suggestion which found tangible expression in constitutional amendments adopted in 1876, creating the offices of superintendent of public works and superintendent of prisons, was made by Mr. Loomis, who proposed to create a commissioner of public works, to be elected by the people for a term of two years, and who should have charge of the "department heretofore belonging to the surveyor general, and also of the records, documents, and business in the comptroller's office pertaining to the canals, and state prisons,

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public buildings and lands." The Convention declined to adopt this suggestion. The section relative to the office of surveyor general was stricken out.

PRISONS.

On the subject of prisons the Convention confined itself to the question whether a provision should be adopted providing for the election of state prison inspectors, or whether they should continue under control of the legislature, without constitutional restriction. The first state prison law (1796) authorized the construction of a state prison at New York and another at Albany. The governor was authorized to appoint not exceeding seven inspectors, who, together with the justices of the supreme court, made rules for the government of convicts, and the regulation of prison affairs. The governor was also to appoint a keeper of each prison. By the revision of 1828 the inspectors were given power to inquire into all matters connected with the government, discipline, and police of the prisons, the punishment and employment of prisoners, the monied concerns and contracts for work, and the purchase and sale of articles; and they were required to examine into the improper conduct alleged to have been committed by the agents or subordinate officers. In 1835 each prison was placed under the direction of a board of five inspectors. They were authorized to issue general and special orders, and make rules to be in force until the next meeting of the board of inspectors. By the act of 1844, establishing the Clinton prison, the agent was to be appointed by the governor, with powers similar to those of other prison agents, and the governor, attorney general, and comptroller were to perform the duties of inspection charged upon the inspectors of other prisons.

In the Convention of 1846 the committee on state

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officers reported a section providing for the election of three inspectors of state prisons, to hold office three years, and so classified that one would be elected each year. They were to have charge and superintendence of the state prisons, and appoint all officers therein. Mr. Tallmadge moved to strike out the section. He thought the whole matter should remain with the governor and legislature, who would manage it wisely. Mr. Perkins thought that power like that vested in the inspectors should be derived directly from the people. The management of the prisons had given great dissatisfaction. "The inspectors had been political partisans, and the government and patronage of the prisons had become not only a party matter, but the cause of faction in the same party, in almost every instance. In the neighborhood of the Auburn prison, for instance, conventions were got up to nominate inspectors in the first instance, and then another convention to instruct the inspectors whom they should appoint for their subordinates. Such a government as this, over such important establishments as our prisons, should not be tolerated, and the only remedy for the evil was a popular election." Mr. Stetson thought that prison discipline and management were in a very imperfect state. The system of inspection had never worked well, and it might be found necessary to dispense with it. He objected to making it permanent in the Constitution. Mr. Morris, who had been recorder of New York, objected to fixing in the Constitution any principle which recognized the present state prison system. He said the present state prison was nothing but a school to educate villains. Mr. Chatfield said that, if the system was as bad as represented, the most effective way to reform it was to bring the election of inspectors home to the people. Mr. Loomis also opposed the amendment. The motion to strike out was lost by a

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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

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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

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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

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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

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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

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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

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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

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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-

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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

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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

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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

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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.

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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

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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

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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

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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

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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

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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-

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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

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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

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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

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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

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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

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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-

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tion, was there any legislation on this subject. In that year a tribunal of conciliation was erected in the 6th judicial district, with a judge, to be appointed by the Governor and senate, and with a provision for two arbitrators in each county, to sit with the judge. The statute was limited in its operation to the term of the first judge, which was three years, and was repealed in 1865. The statutory provision for arbitration, which has been in force many years, probably affords all the tribunals of conciliation that are needed under our judicial system.

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

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CANALS.

The Convention of 1846 had to deal with serious financial problems. When the Convention assembled on the 1st of June the state had a canal debt exceeding seventeen and a half millions, a contingent debt of nearly a million and three quarters, and a treasury debt of a little more than $5,800,000, making a total indebtedness of twenty-five and a quarter millions. It will be observed that more than two thirds of this indebtedness had been incurred in the construction and maintenance of canals. More than five millions were the direct result of the policy of loaning the credit of the state to corporations. The Convention was confronted with the problem of the adjustment and payment of this large debt. It was believed by many that it could be paid from canal revenues, although it appeared that the lateral canals which had then been constructed would be a burden instead of a profit to the state for several years. The act of 1842, coupled with the gratifying receipts from canal tolls, was already gradually diminishing the state debt. This debt was nearly twenty-seven millions in 1842. It rose to twenty-eight millions in 1844, but had fallen to twenty-five and a quarter millions when the Convention began its labors.

The guaranties of the act of 1842 were legislative guaranties only, and the only absolute protection against legislative alteration or encroachment was that afforded by the Constitution of 1821, and its amendments. The Convention was very decidedly in favor of paying the debt from the proceeds of canal revenues, without taxation, so far as this could be practicably done within a reasonable time, and the chief controversy over the canal article in the Convention related more to detail than to matters of principle.

The subject of canals was intrusted to the committee on canals, internal improvements, public revenues and

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property, public debt, and the powers and duties of the legislature in reference thereto, and the restrictions, if any, proper to be imposed upon the action of the legislature in making donations from the public funds, and making loans of the moneys or credit of the state. This committee was composed of Michael Hoffman, Samuel J. Tilden, John Gebhard, Jr., John Hunter, William H. Spencer, Alpheus Greene, and Samuel Richmond. It was the general finance committee of the Convention, and was charged with the duty of proposing constitutional limitations on subjects concerning which the legislature had previously been free; such as the payment of the state debt, the limitation of future indebtedness without a vote of the people, and making donations or loans of state credit to corporations.

The committee submitted its report on the 30th of July, proposing the following canal article:

"1. After paying the expenses of collection, superintendence, and ordinary repairs, ($1,500,000) one million and five hundred thousand dollars of the revenues of the state canals shall in each fiscal year, and at that rate for a shorter period, commencing on the first day of June, one thousand eight hundred and forty-six, be set apart as a sinking fund, to pay the interest and redeem the principal of that part of the state debt called the canal debt, as it existed at the time aforesaid, and including three hundred thousand dollars then to be borrowed, until the same shall be wholly paid; and the principal and income of the said sinking fund shall be sacredly applied to that purpose.

"2. In liquidation of the state claims for advances to, and payments for, the canals, ($672,500) six hundred seventy-two thousand and five hundred dollars of the revenues of the said canals shall, forever, in each fiscal year, and at that rate for a shorter period, commencing on the first day of June, one thousand eight hundred and forty-six, be paid into

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the treasury for the use of the state; and if the payment of that sum, or any part thereof, shall be delayed by reason of the priority established in the preceding section, the amount so delayed, with quarterly interest thereon, at the then current rate, shall be so paid out of the said revenues as soon as can be done consistently with such priority.

"3. The surplus of the revenues of the canals, after paying the said expenses of the canals and the sums appropriated by the two preceding sections, shall, in each fiscal year, be applied to the improvement of the Erie canal, in such manner as may be directed by law, until such surplus shall amount, in the aggregate, to the sum of ($2,500,000) two million, five hundred thousand dollars.

"4. Of the sum of six hundred and seventy-two thousand, five hundred dollars, required by the second section of this article to be paid into the treasury, ($500,000) five hundred thousand dollars shall, in each fiscal year, and at that rate for a shorter period, commencing on the first day of June, one thousand eight hundred and forty-six, be set apart as a sinking fund to pay the interest, and redeem the principal, of that part of the state debt called the general fund debt, including the debt for loans of the state credit to railroad companies which have failed to pay the interest thereon, and also the contingent debt on state stocks loaned to incorporated companies which have hitherto paid the interest thereon, whenever and as far as any part thereof may become a charge on the treasury or general fund, until the same shall be wholly paid; and the principal and income of the said last-mentioned sinking fund shall be sacredly applied to the purpose aforesaid; and if the payment of any part of the said five hundred thousand dollars shall at any time be deferred by reason of the priority recognized in the second section of this article, the sum so deferred, with quarterly interest thereon, at the then current rate, shall be paid to the last-mentioned sinking fund, as soon as the sum so deferred shall be received into the treasury.

"5. The claims of the state against any incorporated company to pay the interest and redeem the principal of the stock

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of the state, loaned or advanced to such company, shall be fairly and duly enforced, and not deferred, released, or compromised; and the moneys arising from such claims shall be set apart and applied as part of the sinking fund provided in the fourth section of this article.

"6. If the sinking funds, or either of them, provided in this article, shall prove insufficient to enable the state, on the credit of such fund, to procure the means to satisfy the claims of the creditors of the state as they become payable, the legislature shall, by equitable taxes, so increase the revenues of the said funds as to make them respectively sufficient perfectly to preserve the public faith. Every contribution or advance to the canals or their debt from any source other than their direct revenues shall, with quarterly interest, at the rates then current, be repaid into the treasury, for the use of the state, out of the canal revenues, as soon as it can be done consistently with the just rights of the creditors holding the said canal debt.

"7. The legislature shall not sell, lease, or otherwise dispose of any of the canals of the state, so far as the same are now finished and navigable; but they shall remain the property of the state, and under its management forever."

On the 17th of August, before the consideration of the canal article was begun in committee of the whole, former Governor Bouck proposed several amendments embodying the following principles:

Prohibiting the increase of the present state debt, unless to repel invasion or suppress insurrection.

Creating a general fund, to be composed of auction and salt duties, and all moneys not otherwise specifically appropriated.

Reserving $420,000 annually from canal revenues, after providing for canal maintenance, to constitute a sinking fund for the payment of the principal and interest of the general fund and the railroad debts.

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Setting apart annually $1,275,000 from canal revenues for the payment of the canal debt.

Authorizing the legislature to apply the residue of canal revenues to meet deficits in the general fund, for the expenses of government, the payment of the public debt, or for the completion of the Genesee Valley and Black River canals.

Authorizing the legislature to make temporary loans, not exceeding $1,000,000, to meet deficits in revenues or for expenses not provided for.

Prohibiting the creation of any other debt by the legislature exceeding $5,000,000, except to repel invasion or suppress insurrection.

Requiring a two-thirds vote for the creation of such a debt, and its payment within twenty years.

Prohibiting the reduction of existing canal tolls before the payment of the canal debt, after which the tolls might be reduced 30 per cent; appropriating annually from subsequent net canal earnings $800,000 for the general fund, $800,000 for the common-school fund, and the remainder for internal improvements.

Prohibiting any direct tax for internal improvements.

Authorizing loans for the payment of outstanding state stocks.

Mr. Angel proposed to abolish the distinction between the canal fund and the general fund, to create a state fund, embracing everything, and grouping all state obligations under the head of state debt. He also proposed to set apart $1,600,000 annually from the net canal revenues for a state debt sinking fund. The net residue of canal revenues was to be used for the enlargement of the Erie canal, and the completion of unfinished canals; any remaining residue was to be used in liquidating the state debt.

Mr. Ayrault proposed a plan differing somewhat from any of the others, including a sinking fund of $1,500,000

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for ten years, and afterwards $2,000,000 for the payment of the state debt; authorizing the legislature to use all other receipts, whether from canal revenues or otherwise, for general state purposes.

Mr. Chamberlain presented a plan quite similar to that proposed by Governor Bouck, but providing for a sinking fund of $1,500,000 annually for twelve years and of $2,000,000 afterwards.

The debate on the canal article began on the 11th of September. It was opened by Mr. Hoffman, chairman of the committee, in an elaborate speech, full of statistics and financial detail. He evidently appreciated the difficulty of making the subject attractive, for, near the close of his speech, he referred to the "empty seats" in the convention chamber, and said that "scarcely a quorum had listened to his exposition." Nevertheless, it was an interesting speech. Mr. Hoffman spoke as an expert, arranging with great effect the facts and figures relating to existing financial conditions. His experience as a member of the legislature of 1841–42 and 1844, when so much important financial legislation was enacted, and his service as canal commissioner, had especially fitted him for the task now imposed on him as chairman of one of the great committees of the Convention, to explain the financial history of the state, and elucidate the policy which the committee deemed essential to provide for paying the state debt and preserving the good name and credit of the state. It seems clear that his presentation of the subject made a deep impression on the Convention. The committee's plan, in its general outline, was adopted by the Convention, although modified in some important details; and, while Mr. Hoffman was tenacious of his opinions, it was not the tenacity of a bigot, for, after a prolonged debate, covering nearly two weeks, he voted for a material modi-

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fication of his plan, submitted by Mr. Loomis, one of his colleagues from Herkimer county.

The debate took a wide range, covering the whole field of canal history, and involving a discussion of policies, principles, political parties, and individuals. Many delegates acknowledged their original opposition to the canal policy, but had changed their views on being satisfied that the canals had demonstrated their utility. A few delegates were still opposed to canals, and expressed a willingness to see them sold. But the debate was not all statistics or dry history. Declamation and panegyric relieved the monotony of schedules and computations; praise of the founders of the canal system, its beneficent results, and prophecy of still greater achievements were mingled with grave discussions of sinking funds and rates per cent. For instance, the record tells us that "Mr. Tallmadge depicted the joyful hallelujahs through this state on the passage of the first boat from Buffalo to Albany: mothers standing on the banks, and dating the ages of their children from that day; and contrasted this feeling with the funeral dirge that would be heard through the state if the policy should now be changed." Another delegate, with exuberant fancy, said that "from the very moment that the billows of the Erie dashed over the waves of the Hudson, down to the present, we have had one continued and uninterrupted tide of prosperity." Sometimes a discussion seems to have had a depressing effect. Thus, after one speech, it is said that "some delay occurred, but no one was ready to take the floor. The chairman caused the section to be read, but still all were silent. After further delay the section was passed over *sub silentio.*"

The first two sections were "passed over" without amendment. The 3d section, authorizing the use of surplus canal revenues for the enlargement of the Erie canal,

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provoked considerable discussion. Friends of the unfinished Genesee Valley and Black River canals thought these canals ought not to be abandoned, but should be completed. The motion to strike out the section was defeated, as were also motions to include the Genesee Valley and Black River canals. There was considerable discussion over the 5th section, relating to enforcement of claims against corporations, which will be found in the article on state aid to corporations. The 6th section, relating to deficiencies in sinking funds, received little attention in the preliminary consideration of the article.

The 7th section, providing that "the legislature shall not sell, lease, or otherwise dispose of any of the canals of the state, so far as the same are now finished and navigable, but they shall remain the property of the state and under its management forever," was opposed by the friends of the Genesee Valley and Black River canals. Mr. Patterson of Chautauque, moved to strike out the words "so far as the same are now finished and navigable." This amendment was vigorously opposed by Mr. Hoffman, who said that if the state should decide not to finish the Genesee Valley and Black River canals the legislature ought to be at liberty to sell them, and so possibly permit their completion by private enterprise. The Convention did not sustain the canal committee in this branch of its report. The Genesee Valley canal had already cost $3,794,000 and the Black River canal, $1,544,000. According to the estimates it would require only a comparatively small amount to complete both canals. The Convention thought that the state ought to avail itself of the expenditures already made, and by a vote of 44 to 34 sustained Mr. Patterson's motion to strike out the exception, which would have permitted the sale of these canals.

After going through the report in a general discus-

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sion, apparently taking observations of the whole field, but without reaching any definite conclusion, the Convention addressed itself seriously to the task of devising a plan for paying the state debt, preserving and expanding the canal system, and disposing of surplus canal revenues. The canal committee proposed to set apart $1,500,000, from canal revenues annually, as a sinking fund for the payment of the canal debt. Several sums were named by delegates as a proper amount to be set apart for this fund, but after considerable debate the Convention adopted a plan proposed by Mr. Loomis, appropriating $1,300,000 for the sinking fund until 1855, and after that $1,700,000 until the debt should be paid. The 2d and 3d sections of the committee's plan, appropriating $672,500, to be used in liquidating state debts, and authorizing the expenditure of $2,500,000 for the improvement of the Erie canal, were stricken out, and a section proposed by Mr. Loomis was adopted, setting apart $300,000, afterwards increased to $350,000, for the purposes specified in § 1, and also creating a further sinking fund of $1,500,000, annually, for the payment of other state debts and obligations.

The Convention also adopted, by a vote of 62 to 55, a section proposed by Mr. White, of New York, setting apart $200,000 from surplus canal revenues for state expenses, and appropriating the remainder of the canal revenues for the enlargement of the Erie canal and the completion of the Genesee Valley and Black River canals. This section was afterwards amended by adding a clause providing that, after the state debt had been paid, and the enlargement of the Erie canal and the construction of the Genesee Valley and Black River canals had been completed, $672,500 should be appropriated annually from the canal revenues for the expenses of the state government. The committee's section providing for

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equitable taxes to meet deficiencies in canal revenues was adopted without change.

The canal article adopted by the Convention appears in full in another part of this work. The article, as a whole, preserved the credit of the state, pledged its revenues for the redemption of all state obligations, provided for the enlargement of the Erie canal and the completion of the Genesee Valley and Black River canals, authorized direct taxation to meet deficiencies, and prohibited the sale or other disposition of the canals.

LIMITING STATE DEBTS.

In the preliminary article on this subject I have already set forth at some length the evolution of the theory that the legislature ought not to possess unlimited power over appropriations and taxation. The policy of internal improvements, beginning with the construction of the Erie canal, and the expansion of that policy in the construction of other canals, and in state aid to numerous corporate enterprises, taken in connection with the discontinuance of a direct tax, in 1827, which was not resumed till 1842, made possible the accumulation of a large state debt; and the prodigal expenditures for further improvements, authorized by the legislature in the unrealized hope that the receipts from canal tolls and other indirect sources would furnish sufficient means for the payment of all obligations, had, some time before the Convention, brought financial affairs to a condition which demanded radical treatment in order to save the good name and credit of the state.

The act of 1842, resuming direct taxation, providing for payment of the state debt, and suspending work on public improvements, has already been noted. Discussion of the subject in the legislature, in executive messages and otherwise, had developed a desire for consti-

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tutional reform by restricting legislative action concerning debts and taxation. The legislature of 1844 had responded to this demand for reform by adopting for submission to the next legislature, and ultimately to the people, a proposed constitutional amendment based on the Loomis "people's resolution" of 1841, limiting state debts created by the legislature to $1,000,000, except to repel invasion or suppress insurrection, without a vote of the people. The delegates to the Convention were therefore familiar with the history of this subject, with the discussion incident to it, and with the pending propositions for reform. Several of them had occupied important official positions many years, and had participated in the formulation and application of the state's financial policies during the preceding quarter of a century. They thoroughly understood the situation and the great problems presented for their solution. They addressed themselves to their task with courage and intelligent patriotism, and the results of their labors must forever stand as a shining example of the wisdom, integrity, and high moral purpose of a free people, confronted with conditions that threatened the very life of free institutions; and the provisions on this subject incorporated in the Constitution show that the people did not hesitate to resume power once surrendered to the legislature, thus limiting representative authority, and restoring to the people themselves power which they had learned could not be safely intrusted to their representatives.

On the 30th of July the finance committee submitted a report embodying, in substance, the amendment relative to limiting state debts, proposed by the legislature of 1844, but distributing the subject in three sections. According to the proposed plan the legislature might contract debts aggregating $1,000,000 for either or all of the following purposes: namely, to "meet casual deficits

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or failures in revenues, or for expenses not provided for;" and the legislature might also, without limit, contract debts "to repel invasion, suppress insurrection, or defend the state in war." These propositions were adopted without debate. A debt beyond the limit stated, or for other purposes, could not be contracted without the previous assent of the people, expressed at a general election, approving a law "for some single work or object, to be distinctly specified therein," and providing for paying the debt within eighteen years. The section requiring the submission of such a law elicited considerable discussion. Mr. Hoffman, chairman of the committee, said the section had been regarded as a "serious change in our form of government." "He spoke of the disposition of all free governments to contract debt, as their besetting sin, against which it was indispensable to guard, if we would avoid taxation, direct or indirect. Unless some check was placed upon this dangerous power to contract debt, representative government could not long endure. Without some check, you would have debt, and this debt would be fastened upon the surpluses of your canals; and those who, with him, favored a free transportation and travel, would guard against debt, which, more than anything else, would form iron bars to trade. He proceeded to point out the operation of the section. The submission principle was so guarded that the representative must indorse the act submitted as right and proper. The obligation to submit laws to the people at a general, rather than a special, election, would also secure the masses against a surreptitious decision. Again, the law was to be three months before the people prior to an election; and this, too, would prevent the people being taken by surprise. Again, if the law was modified or repealed, the tax must remain to sponge out the debt." He believed "the committee were

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unanimous in the opinion that the industry and labor of the state should be defended as strongly as was now proposed; at least, against extravagant expenditures, and taxation in consequence of it."

Mr. Shepard proposed an amendment which, in effect, would have prevented the people themselves from contracting any debt beyond the limit, or for any purposes other than those above stated. He thought the government should not run in debt, except in those particular cases. Mr. Bascom objected to the section as unnecessary. He preferred to leave the power of taxation with the legislature. "He believed the time had gone by when, in view of the great resources and wealth of this state, it would be necessary to create new debts. Much less did he believe it would ever be necessary to set in motion this cumbrous machinery to create a debt. When it should become absolutely necessary to raise money, let it be done by direct taxation." He said the section changed our representative government into a democracy. Mr. Loomis opposed the Shepard amendment. "Is it for us to say in advance that the people shall not impose on themselves debt and taxation, if they think the emergency requires it?" He doubted the power of the people to restrict themselves and the future in this way. He thought that even if the Constitution should declare that the state should not contract a debt beyond $1,000,000, the people, nevertheless, would have the sovereign power to contract such a debt, and could ratify a legislative act for that purpose. This illustrates the principle that there is a "higher law," even above the Constitution, and that, in an emergency, the people may preserve the state, notwithstanding the restrictions written in the Constitution. Mr. E. Huntington moved to strike out that part of the section requiring the submission of the law to the people. Mr. Russell opposed the Huntington amendment. He

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said that the principle recognized here was in practice in all our towns, and the people, in their primary capacity, voted taxes on themselves to the amount of millions, in the aggregate, every year. This power to tax could not be lodged in safer hands than in the hands of those who had to pay. Mr. Patterson favored the Shepard amendment because he thought there would never be occasion to contract a state debt for a purpose not provided for in the sections already adopted. He thought that after the present debt was paid the canal revenues would be sufficient for all purposes.

"Mr. Worden opposed the section, as implying an admission that the experiment of a republican, representative, responsible form of government, after a trial of more than seventy years, had proved a failure, and was not to be trusted in the exercise of an essential function,—that the people were not capable of judging of the action of their representatives, and of correcting their errors. He regarded the proposition, if carried out, as calculated to lull the people into a false security, and to disarm them of that vigilance in regard to the action of their representatives that was essential to the preservation of public liberty. He protested that under the system which had been so long in practice in this state, and under the legislation which had been so much censured and denounced, the state of New York had made unparalleled progress in all the elements of wealth and greatness; that there never was a time when the people were not capable of appreciating and of approving or condemning the action of their representatives, and, for one, he was not willing to place a stigma upon the intelligence of the people, and upon representative government, by voting for any such provision as this. . . . While the members of the legislature acted upon their individual responsibility, they would be cautious in their

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acts; but relieve them from that responsibility by giving to the people the approval of all laws to create debt, and this conservative feature of our government is gone, and log-rolling would be open and bold in the halls of legislation, invited by this very provision."

Mr. Hoffman, replying to Mr. Worden, said the "article was founded upon the belief that the people knew as well as their representatives what was best for themselves. Log-rolling would be prevented by the provision that but one law should be submitted to the people at the same time." Mr. Simmons objected to making the legislature "a mere committee that should report in due order under particular directions. The Erie canal had been built with money borrowed in Europe, by which the great West had been rendered prosperous. He should not consent to carry this question to the polls, by which isms would only be perpetuated by appeals to local feelings." Mr. Huntington's motion to strike out that part of the section requiring a submission of the law to the people was defeated by a vote of 34 to 70. Mr. Shepard's amendment, prohibiting any debt except for the purposes above specified, was rejected by a vote of 31 to 73. The section was then adopted by a vote of 72 to 36.

STATE AID TO PRIVATE ENTERPRISE.

The discussion and development of this subject anterior to the Convention has already been shown in this chapter, and the facts there set forth were amply sufficient to convince the Convention that the state had already gone too far in its policy of granting aid to private enterprise. It was now clear that the state, as a political agent, organized for purposes of government, should not engage in private business, nor assume the financial responsibility of corporations by affording them aid from

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the public treasury when it was impossible, or, at least, impracticable, for the state to exercise any substantial supervision over the affairs of the corporation; so, when the finance committee proposed a section prohibiting future aid to corporations, it received the unanimous approval of the Convention; indeed, so thoroughly had the subject been worked out that the Convention scarcely took time to debate it. The record of the Convention on this subject is so short that I quote it in full:—

"The section was read, as follows:

" 'The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or incorporation.'

"Mr. Swackhamer moved to add after the word 'credit' the words 'money or property.'

"Mr. Hoffman opposed the amendment, saying that if the state had money to lend, it should be allowed to lend it; if property, to sell it.

"Mr. Swackhamer did not suppose the state would have money to lend very soon. But he withdrew his amendment.

"Mr. O'Conor moved to add to the end of the section the following:

" 'Nor shall any gift of public moneys or property be made except as a reward for military services, or by the release of escheats or forfeitures.'

"Mr. Russell thought the section sufficiently guarded. And if it should turn out, after the payment of the public debt, that the state should be in possession of large revenues, it might be that the state might think it right to make donations to some sections which had built their own works at their own expense.

"Mr. O'Conor would not press the amendment if there was a single objection to it.

"The section was adopted unanimously."

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The finance committee also reported a section which was included in the canal article, providing that "the claims of the state against any incorporated company to pay the interest and redeem the principal of the stock of the state loaned or advanced to such company shall be fairly and duly enforced, and not deferred, released, or compromised; and the moneys arising from such claims shall be set apart and applied as part of the sinking fund provided in the 4th section of this article." This section provoked very animated debate. Many delegates were wholly opposed to it, expressing the opinion that it would be a hardship on corporations, some of which had been unfortunate, but not dishonest, and that the legislature would have full power to deal with these corporations according to its best judgment. Mr. Chatfield said "he regarded this section as an evidence of returning sanity, and that the day of madness had gone by. He had the honor of a seat in the assembly when this madness was at its height. At that time but two instances had occurred in which the credit of the state had been loaned to corporations. These were the Hudson and Delaware canal and the Erie railroad loan; but these were sane and safe loans compared with those of 1840 and 1841. He looked back now with astonishment at those periods, when these lobbies and even this hall were thronged with cormorants, asking the legislature to give them leave to thrust their hands up to the elbows into the public treasury. The people of his county, at the time, deprecated these loans as the worst of all the bad legislation of that period, and he had no doubt that they expected and demanded that we should interpose some barrier between them and the legislature on this subject." Mr. F. F. Backus proposed to amend the section by making it apply to claims against individuals as well as claims against corporations. This amendment was rejected. A prop-

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osition was adopted, amending the section by striking out the words "duly" and "deferred," leaving claims to be fairly enforced, and giving the legislature power to defer the enforcement, but not to release or compromise the claims. This amendment was adopted by a vote of 37 to 34. After having been thus amended a motion to strike out the whole section was defeated by a vote of 35 to 39.

TAXATION.

"Every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

Mr. Hoffman, chairman of the committee on finance in the Convention of 1846, commenting on this section, said that its purport was to secure a statement of tax and the object to which it was to be applied in the law itself, that the people might know for what their burthens were imposed, without consulting other statutes.

I find no other discussion of this section by the Convention.

APPROPRIATIONS.

"No money shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

In discussing this subject Mr. Hoffman, chairman of the committee, seemed to regard the Erie canal as the

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general source of future revenue, and "that whatever debts were created would be fixed eventually on the navigation" of that canal. Continuing, he said that "every friend of cheap transportation would see that, if intended to guard these canals against tolls and taxes, it must be done by a fair restraint on the legislative power to create debt. He held that every administration, state and municipal, should collect and pay as it went. If that rule could not be enforced, every administration would leave burthens for the future, and severe taxation or repudiation, the meanest of all things, must come out of it. He desired to establish the doctrine of specific appropriations, so as to oblige the legislature to look over the state expenses every two years, and to fix upon the face of the statute what money shall be paid out each year. This was necessary in a free, responsible, representative government. As the law now stood, the executive government might go on for years without the legislature, the power and the duty to pay all demands against the treasury being vested in the public officers, and if there was no money in the treasury they could go into the market and borrow, and borrow again to repay. The limitation of two years he thought advisable, because the senate was to be a new body every two years. This would oblige every new legislature to see what money went for this and that object, and the people, by reading the statutes, would get some idea of the money expended annually in carrying on the government." Replying to a question, he said that "if a party having a claim against the state neglected for two years after the money was appropriated to come and get it, a new appropriation must be made." He also said that appropriations for schools and academies must be made every two years, or they might be constitutionally pledged; also appropriations must be renewed every two

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years on contracts which had a longer time to run, or where payments had been pledged for a term of years. He said he "regarded this as one of the most important provisions that could be inserted in the Constitution. The object of the section was to prevent the legislature from pledging the revenues for more than two years in advance, and compel them to review them every year, to ascertain what appropriation would be necessary. He had not been able, from his knowledge of the subject, and from consultation with officers of government here with him, to find out any better method of compelling the legislature to perform with wisdom and careful attention this great work, which was the most necessary in order to secure a safe, responsible, and free government." He said the provision would oblige the public officers in regard to trust funds, "to come forward and say what they produced, ask what appropriations they wanted, so that the legislature every year might appropriate, and the public know what they appropriated."

There was little opposition to the section, and, after a brief discussion, it was adopted without a count.

CORPORATIONS.

On the 2d of July the standing committee on corporations made a report embracing the following proposed sections:—

"1. Special laws, creating incorporations or associations, or granting to them exclusive privileges, shall not be passed. But the legislature may pass general laws by which any persons may become incorporated on complying with the provisions to be contained in such laws. And all corporations shall be subject to all such general laws as the legislature may, from time to time, enact, not inconsistent with the provisions of this Constitution.

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"2. Every corporation for purposes of gain or benefit to the corporators or shareowners shall cause the names of all its stockholders and officers, and the places of their residence, and an estimate of the value of its property, estimated and appraised as the legislature shall by law direct, and the aggregate amount of all its debts and liabilities, absolute and contingent, to be published at stated periods, as often as once in each year, in a newspaper published in the vicinity of its place of business. And any such corporation shall not become indebted to an amount greater than its capital stock actually paid in, together with the undivided net profits thereon invested and employed in the business of such corporation, or actually on hand in cash or good securities for such purpose. But this shall not be construed to limit the hazards of any insurance company.

"3. Every corporator or shareholder in any incorporation for gain or benefit to the corporators or shareholders, except insurance, and except for purposes specified in the next section, in case such corporation shall become insolvent, shall be liable for the unsatisfied debts and liabilities of such corporation, contracted while he was such corporator or shareowner, to an amount in the same proportion to the whole unsatisfied liabilities that his stock or share shall bear to the whole stock. But such personal liability shall not extend to any indebtedness or liability the payment of which shall have been deferred more than one year by contract with the creditor, or which shall not have been demanded by suit within one year after it becomes due.

"4. Every corporator and shareowner in any corporation for a public railway, canal, turnpike, bridge, plankway or other franchise of public way, or for any telegraphic or other means of communicating intelligence for public use, shall be liable for the debts and liabilities of such corporation to the extent provided in the last preceding section, except as to debts for money borrowed, for land purchased or taken by authority of law, or for iron for railroads.

"5. Lands may be taken for public way for the purpose of granting or demising to any corporation the franchise of way

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over the same for public use, and for all necessary appendages to such right of way. Such grants and demises shall be made in such cases and on such terms and conditions as the legislature may deem for the public good; but no such grant or demise shall extend beyond fifty years in duration.

"6. All corporations and associations to be created or formed after the adoption of this Constitution shall be subject to the provisions herein respecting corporations."

Mr. Loomis, chairman of the committee, opened his remarks on the report by the statement that the question concerning the relation of incorporated companies held a prominent place among the causes which led to the Convention. He said the granting of special privileges to corporations was contrary to the law of equality, and that the immunity from loss enjoyed by a corporation also created an inequality between the corporation and individuals. He said that it was not surprising that public attention had been called to the matter, and "especially when the business these corporations have carried on is a great portion of the business of the country, having at its disposal so large a proportion of the then active capital, and affecting not only private relations, but the political institutions of the country." After discussing at some length the details of the proposed corporation article, he said that the committee had not deemed these corporations an injury to the public, but, on the contrary, an essential benefit. They viewed them as very useful institutions for the employment of capital, the development of enterprise, and to carry on the business which requires greater capital than individuals or limited partnerships can conveniently furnish.

The committee proposed a plan of free organization of corporations under general laws, giving persons of small means as well as men of wealth an opportunity to combine their capital for business purposes, and without

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granting special privileges. The 1st section, which required corporations to be formed under general laws, elicited considerable discussion, including the subject of municipal as well as private corporations. An amendment was adopted excluding municipal corporations from the operation of the section, and another intended to permit the organization of societies without full corporate powers. The section as thus amended was adopted by a vote of 65 to 32, and was in the following form, the additions being indicated by italics:

"Special laws creating corporations or associations, *other than for purposes exclusively municipal*, or granting to them exclusive privileges, *except as provided in this article*, shall not be passed. But the legislature may pass general laws by which persons may become incorporated, *or be entitled to any privileges of corporations*, on complying with the provisions to be contained in such laws. And all *such* corporations and *associations* shall be subject to all such general laws as the legislature may, from time to time, enact, not inconsistent with the provisions of this Constitution."

While the 2d section was under consideration a proposition was made, but rejected, which prohibited the taking of private property for corporate use without the owner's consent. Mr. Rhoades proposed to authorize the legislature to confer special privileges on any corporation after its formation under the general law. Mr. Ayrault proposed to exclude from this special power, corporations formed for trading, banking, or manufacturing purposes. Mr. Strong thought the Convention would see cause to regret tying down the legislature by an iron rule, so that they could not grant a charter in a special case. The amendment offered by Mr. Rhoades was rejected. The 2d section proposed by the

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committee was stricken out because it was deemed to be legislative matter.

The 3d section, relating to the liability of the stockholders, provoked a lively discussion. It was urged, on the one side, that the liability of the corporation should be limited to its capital, and the public should be left to deal with the corporation "on the credit of the capital and the integrity of those who managed it;" on the other side, the necessity of some degree of liability of the stockholders was deemed indispensable for the protection of creditors, and it only remained to determine the extent of this liability. The section was adopted by a vote of 49 to 45.

Mr. Richmond objected to the 4th section because it created an unwarrantable distinction between the corporations mentioned in it and those included in § 3. He said the corporations mentioned in § 4 were to receive special exemptions; this he regarded as "favoritism, and highly objectionable." The section, as amended by striking out the last clause, beginning with the word "except," was adopted by a vote of 44 to 42. Mr. Cambreleng objected to §§ 3 and 4, and proposed the following substitute, which he said was derived from the general manufacturing act of 1811: "Every corporator and shareowner in any incorporation for gain or profit to the corporators or shareholders shall be individually responsible to the extent of his share or shares of stock in any such corporation or association, for its debts and liabilities." But, owing to a parliamentary technicality, this proposition was not entertained. While § 5, relating to taking private property for public use, was under consideration, Mr. Jordan offered a substitute to the effect that special laws might be passed for this purpose "on just compensation first being made therefor;" also authorizing the transfer of public lands to corporations

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or individuals for a public purpose, and the grant of franchise by special law in cases not included in the general law. Mr. Jordan said he understood the term "exclusive privilege" to mean only that when a franchise of way is given, no other company shall occupy the same track or channel; but not that the route is granted exclusively to one company. "We do not intend that the legislature shall not have the right to allow another track to be made alongside of the first. The right to take tolls upon a railroad or canals is a franchise, and the right of way is of no use unless this franchise accompanies the act of incorporation." Mr. Loomis offered a substitute for Mr. Jordan's substitute, vesting in the legislature complete power to pass special laws granting franchises, and providing for taking private property for public use. Mr. Stetson said that Mr. Jordan's substitute would permit special charters. Mr. Murphy observed that the Constitution "should be so plain and simple that at least those who frame it would understand it," and suggested that, in view of the difference of opinion as to the meaning of the proposed section, the provision in the 1st section, prohibiting special charters, ought to be eliminated. Mr. Kirkland said the substitutes and the original 5th section ought all to be stricken out. "Gentlemen cannot explain their own amendments, and they should therefore be rejected for uncertainty." The Convention rejected both substitutes and the original section. The proposed § 6 made all corporations thereafter formed subject to the provisions of the article. This section was objected to as unnecessary, and the Convention accepted a substitute proposed by Mr. Kirkland, defining the term "corporation," and authorizing actions by or against a corporation in any court.

After five days had been spent considering the cor-

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poration article the Convention reconsidered the 1st section, and so opened the whole discussion again. The Convention apparently did not know its own mind. Mr. Loomis, chairman of the committee, said the matter had assumed a singular aspect. He said that in a very full house, and after ample discussion, they had adopted the 1st section, struck out the 2d, and brought up on the 5th,—a section which was necessary to carry out the 1st,—and finally, with a bare quorum present, had struck it out. He was unwilling to see the Convention turn right about, and in an hour undo all it had been a week in doing. After further debate the following substitute for the 1st section, proposed by Mr. Marvin, was adopted by a vote of 53 to 50:

"The legislature may pass general laws authorizing persons to be erected into a body corporate for banking, manufacturing, religious, and such other purposes as the legislature may deem safe and practicable, and under such restrictions and conditions, and with such powers and limitations, as shall be provided in such laws; but no law shall embrace more than one species or class of corporations, nor shall the legislature grant any special act of incorporation in any case provided for in such general laws."

The Convention had now adopted, in different forms, the policy of requiring the organization of corporations under general law; but the two sections adopted at different stages of the discussion, and intended to accomplish this result, were quite dissimilar. The first required general laws covering all cases, and prohibited any special law. The second specified the classes of corporations which should be included in a general law, leaving the legislature free to act by special law in other cases. The remarks already quoted from Mr. Loomis, the progress of the debate, and the action of the Con-

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vention after a discussion running through six days, show that the Convention had become involved in a tangled web of varied and inconsistent arguments, suggestions, amendments, and counter-amendments. Mr. Loomis had already tried to extricate the Convention from this situation by a motion to refer the whole subject to a special committee; but his motion was not then in order. At this juncture, after the adoption of the Marvin substitute, Mr. Tilden came to the rescue, and moved to refer the whole article to a select committee, with instructions to report the next day. This committee was composed of Mr. Tilden, Mr. O'Conor, Mr. Loomis, chairman of the standing committee, Mr. Ayrault, and Mr. Marvin. The next day, according to instructions, the select committee reported a short article, intended to cover the whole subject. This article included a few general principles, and omitted the legislative detail so prominent in the standing committee's report. The new report indicated the change of policy on the subject of general laws, for, while it authorized general laws, it also permitted special laws in the discretion of the legislature; it left to the legislature the subject of the liability of stockholders; it defined the term "corporation," and authorized actions by and against corporations in any court.

Mr. Tilden and Mr. Loomis joined in a minority report from the select committee, recommending a section making stockholders in business corporations, except for insurance, liable for debts to an amount, in addition to their stock, equal to the nominal value thereof; but the Convention did not accept this proposition. While the report of the select committee was under consideration, a section was adopted requiring laws amending special corporation laws to be passed by a majority of the members of the legislature; but later, when the report of the

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committee on revision was presented, this section was stricken out, for the reason that a section had been adopted providing that all laws must receive the vote of a majority of all the members elected to each house.

The result of the consideration and discussion of the subject of corporations is stated in three short sections; and although these sections appear in their proper place in the Constitution of 1846, as adopted, I give them here in full to show the change of policy by the Convention, and also the effect of elimination and compression in framing a constitution:

"Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

This section was modified from a substitute which Richard P. Marvin proposed for the original 1st section. It will be observed that, while the section provides for organizing corporations under general laws, this is no more than a constitutional recommendation to the legislature. One delegate declared, in the course of the debate, that there ought to be an "open door" for the legislature in special cases; and the Convention, after vigorously advocating and adopting the policy of total prohibition of legislative power to enact special laws creating corporations, retraced its steps and left the whole subject to "the judgment of the legislature." This "judgment," which is only another word for legislative discretion, is beyond judicial control; and so, while we have numerous general laws under which corporations may be organized, the legislature frequently exercises the power of creating corporations by special law.

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"2. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

This section was proposed by Charles O'Conor. It is only a constitutional recommendation, for while it, in terms, contains an injunction that the legislature shall provide for the payment of such dues, such an injunction cannot be enforced, and the legislature may, according to its own discretion, regulate the liability of stockholders. The change of attitude by the Convention concerning the liability of stockholders was very marked. It had already adopted the policy of fixing such liability in the Constitution, as stated in the original report; but, at the last, it had abandoned this policy, and concluded to leave the whole subject to the legislature. Mr. O'Conor, in his remarks after the presentation of the select committee's report, said "the select committee were unanimously in favor of some suitable provision to secure the creditors of all corporations, particularly those for pecuniary gain to the corporators. But they found it difficult to prescribe in advance the precise extent to which they should be liable by an inflexible constitutional rule, applicable to all classes of corporations, without sacrificing to mere uniformity all other considerations of public policy. The committee believed that some discretion should be left to the legislature to adapt the measure of liability to each particular class of corporations. He confessed that he came here in favor of personal liability to the utmost limit; but he had been compelled to perceive, from the light that had been thrown upon the subject here, that it would be unwise to fix this unchangeable rule in the Constitution." In describing his own change of opinion on this question, Mr. O'Conor doubtless spoke for many others, for the section proposed

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by him on the liability of stockholders was adopted by a vote of 70 to 25.

"3. The term 'corporation,' as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons."

This section is important for purposes of definition, and also because it prevents legislative discrimination concerning actions by or against corporations.

There is no more striking instance in the history of this Convention, illustrating the suggestion that the committee proposes and the convention disposes, than the result of its labors on the corporation article. The standing committee had worked out an article with great care, and presented a plan prolix in detail, but intended to accomplish a radical reform in the treatment of corporations. The article, having been beaten into shape on the anvil of debate, came forth materially modified and reduced, and, after all that can be said of it, presenting no principle binding on the legislature. The work of the Convention, however, on this subject, occupies a conspicuous place in our constitutional history; for while it was not deemed wise at last to prescribe cast-iron legislative restrictions concerning the organization and powers of corporations, enough was included in the provisions finally adopted to establish a policy of corporate organization under general laws, with a suggestion to the legislature that special laws for this purpose should not be passed except in unusual cases. The result accomplished by this Convention is also important from another point of view: it has been permanent. Two constitutional conventions and one commission

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since then have had power to change the provisions relating to corporations, but the sections adopted by the Convention of 1846 have not been disturbed, and still stand in their original form.

BANKS.

I have already given a sketch of the development of our banking and currency system from an early colonial period, closing with 1846. Many things interesting in a study of the subject of banking were necessarily omitted from that sketch, which was intended to include only legislation and executive discussion especially pertinent to the establishment of principles. The foundations of our banking system were quite firmly established, and its operation was well understood, when the Convention of 1846 was called. The Convention acted conservatively and with an evident purpose not to disturb our financial policy, but rather to preserve it by a few reasonable constitutional safeguards. The Convention, without changing the banking system, put enough of it into the Constitution to place it beyond the effect of legislative fluctuation, and to insure its continuance.

The committee on banking and currency presented a report on the 29th of June, proposing an article on this subject, including the following propositions:—

Prohibiting the legislature from granting any special bank charters, and requiring banks to be incorporated under general laws.

Prohibiting the suspension of specie payments by any person or association or incorporation issuing bank notes of any description.

Making stockholders in any future bank or association personally liable for its debts.

Requiring the registry of bank notes, and pledges of property sufficient to redeem them in specie.

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Prohibiting, after 1855, the issue of bank notes intended to circulate as money, except under the foregoing restrictions.

Revoking, after 1855, all perpetual charters conferring banking powers.

The committee also recommended the abrogation of the provision of the existing Constitution, which required a two-thirds vote of the legislature for the incorporation of a bank.

The banking article did not elicit a prolonged discussion. The principal speech was made by Mr. Cambreleng, chairman of the committee, and this speech was an able and exhaustive presentation of the subject of currency as an indispensable element in carrying on the operations of society. He treated the subject historically, noting the attempts of different governments to debase the currency, and the disastrous consequences resulting therefrom, the establishment of the modern banking system, the long and finally unsuccessful struggle to establish a paper currency without a coin foundation, the surrender of the advocates of paper money to the inexorable logic of specie values as the only substantial foundation on which any safe currency system could be constructed, the creation of banks under the direct supervision, guaranty, and control of the government, with ample provision for the redemption of circulating bills, and the reasons which seemed to demand some constitutional protection of the New York banking system, which had come up through half a century of slow and even painful evolution. In the course of his speech he said that the question of currency was one of the most important that could be brought to the attention of the Convention, involving, as it did, the interests of every member of the community. "We have, through the agency of moneyed corporations, attempted, for more

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than half a century, to substitute our own measure of value for one recognized in all civilized countries and in every age of the world as an universal standard." He reviewed the history of the Bank of England, which, he said, was founded on a government loan. He noted the revulsions and panics, and the frequent and long-continued suspensions of specie payments which England suffered for a century and a half as a consequence of its attempt to maintain a paper currency not redeemable in coin, and the change of policy begun in 1844, by which the issue of paper currency by the Bank of England was limited to its government securities, coin, and bullion, and prohibiting the creation of further banks of issue. It may be noted here that the English policy, here briefly outlined, had been in part inaugurated in New York by the safety fund act of 1829, and the free banking law of 1838.

Continuing the discussion, Mr. Cambreleng said that "a commercial credit, though sustained by government, can never permanently contend with the universal coin of the world." Commenting on the unsuccessful attempts to establish a permanent paper currency in this country, he said that in 1837 every bank in the country suspended payment; that it was an "absurd fiction that one dollar in specie could redeem five or six dollars in paper currency. . . . . Speculation and revulsion are destructive of labor. They raise prices without increasing quantities or wages of labor. While they give no additional employment, they increase the expense of living; the succeeding panic brings all industry to a stand, and leaves the artisan, mechanic, and laborer without employment, and their families without bread,—suffering all the pangs of famine in a land overflowing with every blessing which can contribute to the comfort and happiness of man. Such is the harvest which labor

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everywhere reaps from the paper system. Government dare not debase its coin; but banks are invested with the sovereign privilege to depreciate the currency at their discretion. . . . . Free trade in the issue of paper money has never succeeded anywhere, and will inevitably fail here. . . . . Neither banks nor bankers can anywhere be trusted with the power to create money, without abusing it." He then explained at some length the provisions of the article as reported by the committee, with amendments proposed by him. After a brief discussion by other members of the Convention, in which no intention was manifested to change the banking policy of the state, except as to a few details, an article was adopted, containing the following propositions:

Requiring banking corporations to be formed under general laws; prohibiting the suspension of specie payments; requiring the registry of bank notes, with adequate security for their redemption; making stockholders in a bank personally liable to the amount of their stock for any debt contracted after January 1, 1850; giving billholders preference over other creditors of the bank.

These provisions were embodied in article 8, of the Constitution of 1846.

CITIES AND VILLAGES.

The committee on municipal corporations reported an article, providing that private property should not be taken for municipal purposes in cities and villages, unless the compensation were first determined in a judicial tribunal by a jury of twelve; local assessments should not be made except on the application of a majority of all the owners of lands to be affected, and also on a two-thirds vote of the common council or board of trustees; no debt should be contracted by a city or village, except to suppress insurrection, or to provide against an exist-

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ing pestilence or casualty, unless authorized by act of the legislature, for some single object or work, and which act must provide for raising the necessary tax, and paying the debt within twenty years. Such a law was to be irrepealable until the debt was paid, and could only become effectual upon the approval of a majority of the electors of the city or village.

Mr. Murphy submitted a minority report containing an important provision that "no charter or special act for the incorporation of any city or village shall be granted, but general and uniform laws shall be passed for the incorporation of cities, and like laws for the incorporation of villages, subject to such alterations as the legislature shall, from time to time, deem proper to make. The boundaries and limits of the territory included within any city or village corporation shall be determined in such manner as the legislature shall prescribe." Mr. Murphy also proposed that all local assessments be paid by general tax. This report followed the majority report in substance on the subject of taking private property for public use and municipal indebtedness. Mr. Allen also submitted a minority report containing, in substance, the principles stated in the majority report and in Mr. Murphy's minority report, with some variations of detail.

Mr. Murphy, in support of his amendment prohibiting special charters for cities and villages, spoke at some length, presenting the principal argument on this proposition. He said he "believed the grossest violations of personal rights were to be found in our municipal corporations," which resulted from the practice of "creating these corporations, and investing them with their power by single and separate acts." He said we had adopted in this country the "same form of legislation for the government of cities as was in use in Europe,

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without having regard to the difference between the fundamental institutions of the two countries. Charters of cities were originally nothing but grants of immunities and privileges by virtue of baronial prerogative. They were intended to exempt the inhabitants from personal service to the lord, and were usually purchased by payments of money. They conferred the power of local government; and the corporation thus created exercised the same absolute power within the territory that the lord had done before. Hence grew up in them customs against common right, forbidding the practice of any trade except by certain individuals, and directly contravening the rights of the many. Thus, the free cities, as they were called, became the refuge of the worst evils of the feudal system, which they served to break up. These charters are essentially feudal instruments. The prerogative of granting them, which was at first only exercised by the lords, came to be exercised by the King. This was, however, only a change of the creating power; and there it has continued ever since in Europe. The powers conferred have been the same as were exercised by the misnamed free cities. In the same form the system was transferred to this country. The charters of New York and Albany will furnish a sufficient illustration of this remark. They were granted by the colonial Governor in the name of the King. That of New York, granted by Montgomrie, provided that no person, not being a free citizen of the city, shall at any time hereafter use any trade or occupation within the city and its precincts, or shall sell or expose to sale any goods or commodities by retail, in any house or place, except in the times of public fairs." He said some persons asserted that this provision was still in force and was not affected by the erection of the state government and the adoption of the Constitution, and cited the report of the

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comptroller to the common council of New York, in 1841, "that the charter of New York is a constitution of a body politic, erecting the city of New York into a free city of itself. Her independent sovereignty in her local matters is older than that of the state itself. That charter still stands, as much a protection to her citizens from state encroachments as it was before the Revolution from the exactions of the British Crown." This charter was obtained, like the charters of the free cities of the feudal times, by the payment of money,—one thousand pounds having been paid the Governor for it. Such pretensions as were here set up for that instrument of course could not be tolerated. He alluded to the New York charter to show how we had borrowed from Europe. "The form of city organization thus introduced in the colony has been kept up by the legislature; and though that body has not been guilty of granting privileges as absurd as the colonial government, yet it has retained the form of special legislation in regard to such organizations. Each city still has its separate charter, and no uniformity exists in the powers conferred upon them, such as prevails in regard to the towns and counties of the state. It is to this practice of the olden time that we must attribute the idea of special charters, which have come to be considered so necessary for cities and villages, and not to any actual necessity for them. It may well be asked why a city, more than a town or county, should have a particular organization of its own, distinct from other cities. A general law might provide different organizations for different amounts of population." The last remark is especially pertinent to the later development of this subject, for the Constitutional Convention of 1894 divided cities into three classes, according to population, conferring different powers on the several classes, and, by chapter 414

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of the Laws of 1897, villages were divided into four classes, with varying powers, dependent on the population. Mr. Murphy said, further, that "the great object to be obtained by a general law is to secure the wisdom of the whole state, or, at least, of all the parts of the state interested in it, for the formation of that law; and to prevent those incongruities which special legislation presents, and which are the causes of many of the evils under which our cities are laboring in regard to debt and assessments. The design of state government is not only to protect from powerful neighbors, but to concentrate the experience and wisdom of a greater number of persons for the common benefit, by wise laws. Special legislation defeats this design. Localities for which this legislation is made do not derive the benefit of the wisdom of the whole legislative body." He said that local bills received little attention in the legislature, except from members directly interested. As a result of this neglect "opposite and dangerous principles are put into the statute book, and the wholesome and beneficent provisions of an united action on the part of the legislature for a long period are oftentimes lost." He then pointed out the differences and inconsistencies in the charters of several cities on specified subjects, arguing that these differences were unreasonable and unnecessary; and, in answer to the suggestion that different localities might need different local powers, he said that a general law might contain provisions applicable to one city which would not be applicable to another, but which might not be used; and referred to the statutes conferring various powers on towns, but some towns might not use all the powers and might not need them. In these instances these powers were dormant as to a particular town or as to particular circumstances. The same principle might be applied in the case of a general law for the incorpora-

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tion of cities. In answer to the suggestion that an attempt to bring all the cities to the same form of government would interfere with the franchises granted to some of them, he said that there should be no "privileges or immunities exercised by one city which should not be enjoyed, if required, by the others. But a more satisfactory answer probably is, that so far as those franchises have a permanency of profits, and thus partake of the character of private property, this provision would not interfere with them; and so far as they may be political, and, therefore, public, and relate to the exercise of the sovereign power, they are and should be revocable at pleasure. It must be the law in this country that, while the rights of private property are sacred, political power, on the other hand, conferred by the legislature, is a public trust, resumable by it at pleasure." He said that towns were governed by a general law, even though erected by special statute; and, citing the statutes of several states relating to the method of organizing municipal corporations, he remarked that different circumstances of different places did not present obstacles to a uniform organization.

The subject of the incorporation of cities and villages seems to have received very little consideration, and was finally disposed of by a section proposed by Mr. Murphy, which became § 9 of article 8. The minority reports are significant because containing the germ of the policy of general laws relating to villages; and the prohibition against special laws incorporating villages, proposed by Mr. Murphy and Mr. Allen, was incorporated in the Constitution in 1874. The like prohibition against special laws incorporating cities has not yet been made a part of the Constitution, and probably cannot be.

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EDUCATION.

The standing committee on education and common schools submitted a report embracing several propositions relating to common schools, which may be summarized as follows:

The proceeds of certain state lands and the common-school fund should be and remain a perpetual fund, the interest of which should be inviolably appropriated for the support of common schools.

The legislature was directed to keep this fund securely invested.

The United States deposit fund, received under the provision of the act of Congress of 1836, was also to be used for the support of common schools.

Appropriations already made were continued for the period specified in the appropriation acts.

The literature fund, as such, was to be discontinued after 1847, and appropriations for that purpose were to be made from the United States deposit fund, unless otherwise directed by the legislature.

The committee also proposed the following section, to be separately submitted to the people:

"The legislature shall, at its first session after the adoption of this Constitution, and from time to time thereafter, as shall be necessary, provide by law for the free education and instruction of every child between the ages of four and sixteen years, whose parents, guardians, or employers shall be residents of the state, in the common schools now established, or which shall hereafter be established therein. The expense of such education and instruction, after applying the public funds, as above provided, shall be defrayed by taxation at the same time, and in the same manner, as may be provided by law for the liquidation of town and county charges."

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This section is significant as showing an intention on the part of some members of the Convention to put the common schools into the Constitution; but this purpose was not accomplished, because the Convention finally declined to adopt the provision.

Two minority reports were submitted by members of the committee on education, one of which proposed to add the literature fund to the common-school fund stated in the majority plan, and both minority reports proposed to take $50,000 annually from the revenues of the United States deposit fund, to be added to the capital of the common-school fund, and both minority plans prohibited loans of school funds to literary institutions, or to towns and villages. The section was submitted again while the subject of education was under consideration, and the last part, relating to taxation and the method of paying expenses of the schools, was omitted. In this amended form the proposition was rejected by a vote of 39 to 56.

The following section was agreed to by a vote of 57 to 53:

"The legislature shall provide for the free education and instruction of every child of the state in the common schools now established or which shall hereafter be established therein."

The companion section to the foregoing was proposed by Mr. Ruggles, and adopted by a vote of 82 to 26, in the following form:

"The legislature shall, at the same time, provide for raising the necessary taxes in each school district, to carry into effect the provisions contained in the preceding section."

The Convention evidently changed its mind about establishing a system of free common schools, for, in the

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afternoon of the same day, the two sections relating to this subject were stricken out by a vote of 61 to 27. The reported debates do not show any reason for this change, and I have not been able to discover the motives that led the Convention to decline to submit this question to the people. Whatever the reasons may have been, the Convention missed an opportunity to incorporate in the Constitution the principle of universal education, and thus to have become the pioneer in establishing the policy conceived by John Jay while the first Constitution was in process of construction, but which he was unable to formulate by reason of his enforced absence from the Convention when the Constitution was finally adopted. The Constitution proposed by the Convention of 1867 contained a provision commanding the legislature "to provide for the free instruction in the common schools of this state of all persons between seven and twenty years of age;" but there was no opportunity for a separate expression of popular opinion on this proposition, and it shared the fate of the Constitution, which was all rejected except the judiciary article. The ultimate honor was therefore reserved to the Convention of 1894 to include in the Constitution the children's Bill of Rights, thereby securing to them forever the privileges of "a system of free common schools, wherein all the children of the state may be educated." All the provisions of the report of the committee were condensed into one section, article 9, providing for the preservation of the capital of the common school fund, the literature fund, and of the United States deposit fund, and for the appropriation of the income of these funds for the purposes of public education.

The Convention apparently did not consider education one of the most important subjects, for while the report of the standing committee was submitted on the 22d of

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July, it was not taken up for consideration until the 1st of October, and was then considered only briefly, but the subject was not disposed of until the 8th, the day before the Convention finally adjourned. While the Convention took high ground at the outset, by proposing to establish in the Constitution a system of free common schools, it almost immediately retraced its steps, and decided to leave the whole subject to the legislature, except as to the funds already mentioned.

Mr. Bowdish made a long speech in favor of free schools, in the course of which he said he was in favor of establishing, by constitutional provision, some principle which should be the basis of free schools. "The formation of those opinions which create our laws is dependent on a judicious education; and those laws form the morals and habits of the people. . . . I utterly repudiate, as unworthy of an American freeman, the idea that we should not open wide the field for the encouragement of science and literature, by establishing such a system of schools as will afford an opportunity for all classes to become educated, embracing the high and low, the rich and the poor. . . . The child of the woodland cottage, and that of the princely mansion, should, if possible, be educated together, that all might have an equal opportunity of rising to eminence and to fame. . . . The great fundamental principles of American liberty, of equal laws and equal rights, should be discussed and taught every child in our land." Mr. Worden said that all were agreed on the great principle that every child in this state should receive an education in our common schools, but he thought the details should be left to the legislature. Mr. Hoffman proposed a section which was adopted by a vote of 104 to 3, and became § 1 of article 9 of the Constitution, and was the only provision relating to education proposed by the Convention.

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LOCAL OFFICERS.

The standing committee on local officers made a report, fixing the term of office of sheriffs, clerks, district attorneys, registers, and coroners at two years, thus reducing the term of office of sheriff, clerk, register, and district attorney one year. The Convention continued the term at three years. The county was not to be responsible for the acts of the sheriff. The governor was given power of removal of sheriffs, clerks, registers, and coroners. While the election of sheriffs was under consideration, it was proposed to make the under sheriff and all deputy sheriffs ineligible "within one year preceding the election at which the sheriff is to be chosen." After some discussion, developing into strong opposition, the proposition was withdrawn. District attorneys were removable by the county court. The Convention transferred this power of removal to the governor. The board of supervisors was to fix the number of the superintendents of the poor, so that one superintendent would be elected each year. This section was stricken out. County treasurers were removable by the board of supervisors. This section was stricken out. The section providing for the election of mayors was stricken out. This had the effect to abrogate the amendments adopted in 1833 and 1839, providing for the election of mayors.

A very important section relating to the election of local officers, which became § 2 of article 10 of the Constitution, and has been the subject of frequent judicial construction, was adopted with little debate. Indeed, there was no debate as to the general merits and purposes of the section. A manifest purpose of the section was declared to be to vest the power of choice either in the people of a locality or in local authorities, and to deprive the governor or legislature of any appointing power in these cases. The term "authorities" was not defined, and

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there was no discussion as to its meaning, nor as to what local officers would be deemed "authorities" under this section.

The Convention rejected an amendment prohibiting the legislature from establishing any fees of attorneys or counselors, but authorizing the recovery of fixed amounts as expenses of the successful party.

MILITIA.

This subject received scant attention from the Convention of 1846. The militia provisions of the Constitution of 1821 were continued, with a few changes. Under the former Constitution a person who had conscientious scruples against bearing arms might have been excused on payment of a sum equal to the expense of maintaining an able-bodied man, which, in effect, required the person excused to hire a substitute. This specific provision was omitted in 1846, and the excuse was to be granted on terms to be prescribed by law. Under this authority the legislature passed a militia enrollment law in 1847, providing that a person subject to military duty might be exempt therefrom on payment of $.75 annually to the town collector of taxes. Under the Constitution of 1821 brigade inspectors were appointed by the governor and senate; by the new Constitution they were to be chosen by the field officers of their respective brigades. While the militia article was under consideration, a proposition was submitted, providing for electing the commissary general by the people. This was opposed as contrary to the general policy and best welfare of militia administration, and it was rejected by a large vote.

FUTURE CONVENTIONS.

It has already been noted that the Conventions of 1801, 1821, and 1846 were called by the people themselves, who

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voted on a proposition for a convention, submitted and recommended by the legislature.

The Convention of 1821 was especially charged with the duty of providing a plan for amendments to the Constitution, and a provision was accordingly adopted, authorizing the legislature to submit proposed amendments to the people. This plan did not go far enough, for it did not provide for conventions. The legislature could still decline to recommend a convention, or defer action indefinitely, even if there were a general public demand for such a convention. The only other remedy left was a general convention, called by the people, without special legislative sanction, by a voluntary election of delegates chosen to revise the Constitution. This method, while legitimate as the last resort of a free people, is, nevertheless, revolutionary in form, and it has not been resorted to since the first Constitution, which was necessarily made by a convention so chosen. The first and second conventions were twenty-four years apart; the second and third, twenty years; and the third and fourth, twenty-five years.

The committee which had this subject in charge in the Convention of 1846 provided for a convention once in twenty years, and required the legislature to submit to the people at intervals of twenty years the question whether a convention to revise the Constitution should be held. When the subject was under consideration in the Convention, Mr. Crooker moved to strike out the section providing for a convention once in twenty years. Mr. Bascom objected to the motion, saying that "it asserted a great principle that all power was inherent in the people, and that once in twenty years they might take the matter into their own hands. Without this provision the legislature might be continually tormented with applications to amend." Mr. Crooker said that "love of

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change was peculiar to man, but the public mind should be pervaded with the necessity for change, before it should be acceded to." Mr. Marvin, chairman of the committee, said: "The section simply provided that the Constitution should be brought into review once in twenty years, and did not prevent a convention at any other time. And once in twenty years, if the people were satisfied with the Constitution, they could indorse it, and the state of things would continue." Mr. Russell moved to strike out the provision authorizing the legislature to call a convention; his motion was defeated by a vote of 22 to 68. Mr. Crooker's motion to strike out the twenty-year provision was lost by a vote of 5 to 89.

Mr. Ruggles submitted a proposition that "the next convention for amending or altering the Constitution shall be composed of two separate and distinct bodies of men, sitting in separate chambers, without whose concurrent assent no amendment or change in the Constitution shall be made." Mr. Bascom suggested that it would be in keeping with this resolution to require also the approval of the governor. It is worth noting that twenty-nine delegates favored a convention to be composed of two branches, but the resolution was lost by sixty-four adverse votes. The vote required in the legislature for its approval of a proposed amendment was reduced from two thirds, as required by the second Constitution, to a majority.

CONCLUSION.

Early in October the Convention concluded its deliberations. The Convention had power to submit to the people the results of its labors, either as a whole or in parts. It determined to submit the Constitution as a whole. Distinctive parts, like the judiciary article, might probably have been submitted separately, but in many

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other respects, in view of the rearrangement of the Constitution, such a submission would doubtless have created confusion if some parts had been adopted and others rejected. The proposed Constitution was essentially new. Only eleven sections of the Constitution of 1821 were continued unchanged. Some other sections were continued with modifications, but those modifications required popular approval, and it was not deemed practicable to submit the instrument in parts. The people were therefore asked to consider and approve or reject the Constitution as a whole. One provision, not a part of the Constitution, was submitted separately. This related to the qualifications of colored voters, and, if adopted, would have conferred on colored persons the same right of suffrage possessed by whites, and would have added a section to the article on the elective franchise. Its rejection left the proposed Constitution intact. The convention act required the new Constitution to be submitted at the general election in November, 1846. As the Convention prolonged its deliberations into autumn, several delegates frequently expressed anxiety concerning the short time that would be given the people for consideration of the Constitution before being required to vote on it.

The newspapers of the day, however, furnished information concerning the work of the Convention, and when it adjourned the people probably understood the principal features of the new Constitution.

The Convention adjourned on the 9th of October, a little more than three weeks before election day. Just before adjournment it directed the comptroller to print 20,000 copies of the new Constitution and the Convention's address to the people, together with the Constitution of 1821, which were to be distributed by members of the Convention and county clerks. The new Con-

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stitution was also to be printed once each week in the state paper, and notices of its submission were required to be published in every newspaper in the state each week until election. Notwithstanding the compromises adopted in framing the new Constitution, it was not satisfactory to all the delegates. On its final adoption the vote was 104 to 6. An engrossed copy of the Constitution was signed by nearly all the delegates, and delivered to the secretary of state, to be filed in his office.

The new Constitution was approved by the people November 3, 1846, by a vote of 221,528 to 92,436; and the section granting equal suffrage to colored persons was rejected by nearly the same vote,—85,306 to 223,834.

"The constitution will not march" was Carlyle's comment on the constitution proposed by the French Constituent Assembly, in 1791, for, said he, a constitution must either image the habits and beliefs of the people, or express their rights and mights. That constitution did neither; the old habits of France were gone, and the new rights and mights had not yet been ascertained. The constitution lacked the energy and power of national life and experience adapted to constitutional forms and restrictions, so it could not march. The Constitutions of New York could and did march. They represented the habits and beliefs of the people, with new rights, evolved from old forms and experiences. It has already been noted that, in its general effects, the first Constitution marked a transition scarcely perceptible from colonial to state conditions. Each subsequent Constitution has been an expansion of the first, not simply marking new and antagonistic methods, with their consequent confusions, but broadening the lines on which the Constitution marched as it carried the hopes and destinies of a free people.

The delegates to the Convention of 1846, with few

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exceptions, while not approving every detail, believed that the Constitution contained an expression of the essential principles on which a state government should be based, and was sufficient for its needs. They had, as they believed, perfected the organization of government, with the proper distribution of powers among the several departments, with adequate limitations, and had provided ample administrative machinery.

Mr. Hoffman said that while the Constitution contained some defects, it "contains more excellent matter, got together by this convention, than any constitution in the whole earth." Mr. Harris said the Constitution was the "best that was ever framed." Mr. Worden regarded the Constitution, as a whole, as an "improvement on the science of government, throwing, as it did, upon the people, the responsible duty of keeping their own government under their own control, and of preserving and perpetuating their own rights and liberties." Mr. Cambreleng said this was the "first constitution ever formed that rested, not nominally, but in fact, on a popular foundation,—which made the legislative, judicial, and executive departments distinct in reality as well as in name, and all of them springing directly from the people." Mr. Morris said "the Constitution was based on the principle of the intelligence and capacity of the people for self-government." Mr. A. Huntington said he was satisfied with the instrument as a whole, and that when our institutions were "skilfully organized under its great outlines, much benefit would result from it to the community at large." Many other delegates expressed their approval of the instrument, and commended it to the favorable consideration of the people.

Charles O'Conor, however, did not join his associates in their approbation of the Constitution. He thought, especially as to the judiciary article, that the "Convention

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had altogether failed to present to the people a constitution which would meet the exigencies of the times, or, in any degree, remedy the difficulties in this respect, which led to the calling of this Convention; that it did not, in any moderate degree, meet his approval, and was a most signal failure." Mr. Stow thought the Constitution "would not meet the first expectations of the state or the country." Mr. O'Conor, Mr. Stow, and four others voted against the Constitution.

The Convention presented to the people an address prepared by Michael Hoffman, containing a brief statement of the reforms accomplished by the new Constitution. The address stated that the delegates to the Convention "have reorganized the legislature; established more limited districts for the election of the members of that body, and wholly separated it from the exercise of judicial power. The most important state officers have been made elective by the people of the state; and most of the officers of cities, towns, and counties are made elective by the voters of the locality they serve. They have abolished a host of useless offices. They have sought at once to reduce and decentralize the patronage of the executive government. They have rendered inviolate the funds devoted to education. After repeated failures in the legislature, they have provided a judicial system adequate to the wants of a free people, rapidly increasing in arts, culture, commerce, and population. They have made provision for the payment of the whole state debt, and the completion of the public works begun. While that debt is in the progress of payment, they have provided a large contribution from the canal revenues towards the current expenses of the state, and sufficient for that purpose when the state debt shall have been paid; and have placed strong safeguards against the recurrence of debt, and the improvident expenditure of the

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public money. They have agreed on important provisions in relation to the mode of creating incorporations, and the liability of their members; and have sought to render the business of banking more safe and responsible. They have incorporated many useful provisions, more effectually to secure the people in their rights of person and property against the abuses of delegated power. They have modified the power of the legislature, with the direct consent of the people, to amend the Constitution from time to time, and have secured to the people of the state, the right once in twenty years to pass directly on the question whether they will call a convention for the revision of the Constitution." The address closed with the statement that "if the Constitution now proposed be adopted, the happiness and progress of the people of this state will, under God, be in their own hands."

The Constitution as a whole took effect January 1, 1847; but in many respects its operation was postponed until a later date. The reorganization of the judicial system required an election of judges before it could be put into operation. Provision was therefore made for the election of judges early in the spring of 1847, and the new judges were to assume the duties of their office on the 1st Monday of July. Senators, under the Constitution of 1821, were regularly elected in 1846 for four years, from the eight districts into which the state was then divided; at the same time the new Constitution was adopted, under which the senate districts were reconstructed by providing for elections in single districts, and reducing the term to two years. The terms of senators elected in 1846 were abridged by the new Constitution, and expired at the end of 1847. At the November election, that year, senators were to be chosen under the new plan for two-year terms, beginning January 1, 1848. Members of assembly elected in 1846 were to serve

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through 1847. The governor and lieutenant governor were also chosen under the old Constitution at the November election in 1846. No change was made in their terms, and the first governor and lieutenant governor under the new Constitution were elected in November, 1848. The court of chancery and the existing supreme court were abolished from and after the 1st Monday of July, 1847, but, for the purpose of hearing and deciding causes then ready, the chancellor and judges were continued in office until July 1, 1848, but their offices would terminate sooner on the completion of all pending business. Some other judicial offices were abolished and provision was made for transferring business from the old to the new courts. It will be observed that, for some purposes, the old Constitution continued in force until the 1st day of July, 1848. Legislation was necessary to put into operation some provisions of the new Constitution. The legislature of 1847 passed a judiciary act reorganizing the judicial system in accordance with the provisions of the Constitution, and also created a code commission and a commission on practice and pleadings.

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CHAPTER VII.

From 1847 to 1867.

The Constitution of 1846 did not please everybody,—this is manifest from the 92,000 votes against it,—but it is a high tribute to the framers of that Constitution that the people amended it only once in any essential respect in the twenty years immediately following its adoption. This amendment related to the canals, and affected a branch of canal administration which had been the subject of protracted controversy in the Convention, and which finally resulted in an unsatisfactory compromise. There was another amendment in this period of twenty years, but it was of a temporary and extraordinary character. This was the amendment permitting soldiers from this state in the Civil War to vote while absent.

Canals.

Governor Washington Hunt, in his annual message to the legislature in 1851, considered the canal situation and the need of an early change of policy,—especially concerning the enlargement of the Erie canal. He said the canals continued to yield rich returns, that the tolls the preceding year amounted to nearly $3,500,000, and that, after paying all expenses and the sums fixed by the Constitution, there was a surplus of $800,000 applicable to the enlargement of the Erie canal and the completion of the Black River and Genesee Valley canals. "Serious apprehensions," the Governor says, "are entertained that

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the trade of the Erie canal will be impaired by the competition of railroads and other rival avenues in and out of the state, unless early and effectual measures are adopted to cheapen the expense of canal transportation. The future policy of the state in reference to the Erie canal and its enlargement forms one of the most important and difficult subjects which will occupy the attention of the legislature. I must ask you to enter upon its consideration with an enlightened appreciation of the momentous interests involved in your deliberations, and with an earnest purpose to adopt a line of action worthy of the past triumphs of the state in the consummation of great designs, and in some degree commensurate with its present power and its future destiny. It is difficult to form an adequate estimate of the benefits so vast and varied as our people have derived from the original construction of a water communication connecting the Atlantic with the western lakes. The effects of this great work upon the wealth, prosperity, and advancement of the state surpassed the most ardent anticipations of its early advocates. It has doubled the trade and population of our great commercial emporium; and, if we but emulate the statesmanship of its authors by adequately increasing its facilities, it is destined to pour into our laps, during all future time, a stream of tribute rich and inexhaustible beyond any example in history, ancient or modern." Noting the fact that in the first ten years after the completion of the canal the receipts had exceeded the cost of construction, he said that an increased capacity of the canal was necessary to accommodate the growing commerce. Sixteen years had elapsed since the state entered on the project of enlargement, nearly $16,000,000 had been expended on the enlargement, and $11,000,000 more would be necessary to complete it, and $1,165,000 would be needed to complete the Genesee Valley and Black

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River canals. The Governor said that, under existing conditions, and with the then available revenues, the enlargement and completion of the canals could not be consummated before 1866,—a period of fifteen years. In view of the loss of interest on the sums already expended, and the increased expenses of transportation and canal administration, the Governor expressed grave doubt whether it would be profitable for the state to postpone so long the completion of these great public works. Remarking that the situation was somewhat embarrassed by the financial provisions of the new Constitution, which did not permit the former freedom of action by the legislature concerning public improvements, he suggested three possible methods of relief:

First. The issue of certificates, "transferring in advance, for a sufficient series of years, that portion of the canal revenues which is devoted by the Constitution to the enlargement of the Erie canal." He said that "some of our ablest jurists" had asserted that it was competent for the legislature to dispose of the canal revenues in this manner, but that it was obvious, "however, that an absolute sale of the revenues, at the risk of the purchaser, without recourse to the state, is the only mode by which they can be realized in anticipation, without a violation of the provision restraining the creation of a new debt. A mere pledge of revenues, as a security for moneys advanced on them, would constitute a debt against the state, in a new and unusual form." The legislature at this session, 1851, adopted the Governor's suggestion, and passed chapter 485 "to provide for the completion of the Erie canal enlargement and the Genesee Valley and Black River canals." This statute authorized the comptroller to issue canal-revenue certificates aggregating $9,000,000, payable not more than twenty-one years from date, for the purpose of raising money to complete such canal im-

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provements. The surplus revenues of the canals after paying the expenses of canal administration, the several sums provided by the Constitution for extinguishing the canal debt and the general fund debt, and for the necessary expenses of government, were devoted to the completion of the Genesee Valley and Black River canals, and of the Erie canal enlargement. After the completion of such improvements the whole surplus of canal revenues was to constitute a sinking fund for the redemption of the canal revenue certificates. The statute further provided that the state should not be bound to make up any deficiency in canal revenues, nor to pay the certificates except from such revenues; and it was expressly provided that the certificates should not be deemed to create a debt against the state under § 12 of article 7 of the Constitution. Thus the legislature attempted to compel the holders of the certificates to take their chances of collecting them from the canal revenues only. The validity of this statute was immediately challenged by the canal auditor, who refused to draw a warrant on the treasurer for the payment of a claim allowed by the canal commissioners, and the court of appeals, in *Newell* v. *People* (1852) 7 N. Y. 9, held the act repugnant to the provisions of the Constitution regulating the disposition of surplus canal revenues, and prohibiting the creation of a state debt without a vote of the people.

Second. Governor Hunt in the same message, 1851, suggested that funds for the completion of the canals might also be raised by authorizing a loan under the financial article of the Constitution. A law for that purpose must be ratified by the people, and must provide for a direct "annual tax to pay the interest on the debt as it falls due." Concerning taxation for the payment of interest, the Governor said: "No sufficient reason, founded in equity or expediency, can be assigned for the

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imposition of a direct tax upon the state at large to pay the interest on any portion of the cost of the enlargement, when the canal revenues are fully adequate to that object. Whilst all sections of the state are interested in the early consummation of the work, and will derive large benefits from the increased revenues which it will yield, a direct tax would operate unequally and unjustly, and would be unacceptable to the counties remote from the line of improvement."

Concluding his suggestions, the Governor said that the third and last resort was an amendment of the Constitution. "Whatever diversity of opinion may exist in regard to the wisdom of the policy which governed the Convention of 1846 in this respect, I cannot doubt that a large majority of our citizens of all parties, in view of the steadily increasing revenues of the canals, would now unite in conferring upon the legislature the necessary authority to create a loan of seven or eight millions on a pledge of the surplus revenues, for the early completion of the enlargement. The proposition to be submitted for this purpose should include a provision requiring an additional contribution from the canal revenues to the sinking fund, sufficient for the payment of interest on the new loan, and eventual reimbursement of the principal." The Governor admitted the reluctance of the people to create a new debt, and expressed the opinion that such a loan as he suggested, payable from canal revenues, would not increase public burdens, and could be paid without taxation. He said the money value of the canals, based on present revenues, was equal to a capital of nearly $42,000,000, at 6 per cent interest, and that their earning capacity would be largely increased by the proposed improvements. The legislature, however, sought to provide for the improvements by a direct loan under the act of 1851, but the decision of the court of

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appeals, declaring the act unconstitutional, prevented the consummation of this plan. So, when the legislature of 1853 convened it was confronted with the problem in a new form. The plan for borrowing money on a pledge of canal revenues had failed, and the plan for a loan under the Constitution, to be paid by taxation, was evidently not acceptable. The legislature was, therefore, compelled to resort to Governor Hunt's third suggestion, namely, a constitutional amendment authorizing the use of canal revenues for the immediate completion of the canals. An amendment had been proposed in 1852 authorizing the legislature to borrow $9,000,000 to complete the canal improvements, and in 1853 an amendment was passed proposing a substitute for § 3 of article 7. The amendment was passed again by the legislature of 1854, and submitted to the people and adopted at a special election, February 15, 1854. The text of this section will be found in the amendments to the Constitution of 1846. It authorized the legislature to use annually, for the next four years, $2,250,000 for canal improvements. The legislature was authorized to borrow money to meet any deficiencies in revenues. It seems that the state had received $1,500,000 on canal revenue certificates issued under the act of 1851, and the legislature was directed to borrow money to reimburse the holders of these certificates. Such loans might be made without ratification by the people. No payments were to be made on contracts under the act of 1851, except for work done or materials furnished prior to June 1, 1852. Canal tolls could not be reduced below the rates in force in 1852, without the concurrence of the canal board and the legislature. The section also contained the provision that "all contracts for work or materials on any canal shall be made with the person who shall offer to do or provide the same at the lowest price, with adequate security for their performance."

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Agitation concerning canals did not cease with the adoption of the amendment of 1854. Amendments to the canal article were proposed in 1855, amending §§ 1, 2, 3, and 12 of article 7. Section 12 was to be amended so as to except debts included in §§ 2, 3, 10, and 11 from ratification by the people. In 1856, Governor Myron H. Clark said that the eighteen-year limitation for the payment of debts in the Constitution was too short, and he suggested an amendment extending the time, which extension, he said, would enable the state debt to be paid from canal revenues, and avoid or reduce direct taxation. The state had evidently made the canal loan of 1854 on favorable terms. Governor Clark in the same message reported to the legislature that the premiums on this loan amounted to $365,880.05, which had been invested as required by law. In 1857 another amendment was proposed to §3 of article 7, authorizing the legislature to borrow $4,000,000 to complete the canal improvements.

Gubernatorial Succession.

Governor Hamilton Fish said, in his message of 1849, that "the Constitution of the state omits to provide for the contingency of a vacancy in the office of governor pending a vacancy in the office of lieutenant governor. As every precaution should be taken to guard against a failure of the depository for the executive power of the state, an amendment to the Constitution to meet this omission should be made." All the Constitutions from 1777 to 1894 have vested the president of the senate with power to act as governor in certain cases, one of which includes a vacancy in the offices of governor and lieutenant governor. If the office of governor becomes vacant the lieutenant governor assumes the office for the residue of the term, and if the office of lieutenant governor also

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becomes vacant the president of the senate becomes acting governor "until the vacancy shall be filled or the disability shall cease." The "vacancy" referred to here seems to be a vacancy in the office of governor, and not in the office of lieutenant governor, and, while the Constitution makes the president of the senate acting governor until the "vacancy" shall be filled, there is no provision for filling such a vacancy. The result is that, under the conditions stated, the president of the senate would continue to act as governor until a new governor should be regularly elected and assume the duties of his office. The first Constitution provided for an election to fill a vacancy in such a case, for, under § 21, "the president of the senate shall, in like manner as the lieutenant governor, administer the government, until others shall be elected by the suffrage of the people at the succeeding election." This plainly implied that the president of the senate was not to continue to act during the residue of the term of governor, but only until the vacancy could be filled at the next election. That provision was not continued in subsequent Constitutions. The first Constitution also provided that, in case of a vacancy in the office of governor, the lieutenant governor should act only until another governor should be chosen. The amendment suggested by Governor Fish was intended to provide for filling a vacancy where the offices of governor and lieutenant governor had both become vacant, and he evidently thought that the president of the senate, who is not chosen directly by the people for the executive office, should not be permitted to act as governor for the residue of the term, but only until a new governor or lieutenant governor could be chosen at a general or special election. The legislature, instead of making provision for an election to fill a vacancy in the office of governor or lieutenant governor, proposed to extend the section by including the

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speaker of the assembly. An amendment was accordingly adopted devolving the duties of the governor on the president of the senate in the cases already mentioned, with the further provision that, if there should be no president of the senate at the time, then such duties should devolve on the speaker of the assembly for the residue of the term of the said governor, or until the disability should cease. This amendment was agreed to by the legislature of 1850, and an act to submit it to the people was passed in the senate, but failed in the assembly. This is the first instance I have found where an amendment agreed to by two legislatures was not submitted to the people. The provision extending the succession to the speaker of the assembly was incorporated in the Constitution in 1894.

Judiciary.

Charles O'Conor, in the closing hours of the Convention of 1846, in giving his reasons for refusing to approve the new Constitution, said, among other things, that the judiciary article was a "signal failure." His disapproval was evidently shared by many others, and the dissatisfaction with the new judiciary system was expressed in numerous proposed amendments intended to remedy defects which became more apparent from year to year. The objections, so far as they were represented in proposed amendments, applied chiefly to the structure of the court of appeals, and specially to the annual change of four judges coming from the supreme court. While the appellate branch of the supreme court, divided into eight independent tribunals, with equal jurisdiction, must almost necessarily produce conflicting decisions, resulting in confusion rather than harmony in the law, only one amendment was proposed in the period between the two conventions intended to consolidate the general terms into one court,

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and this by a substantial return to the system established by the Constitution of 1821, namely, by creating a supreme court composed of seven judges and restoring the circuit system. We shall have occasion to observe that the Convention of 1867 did not propose to abolish the general terms, but to reduce their number, and that later amendments to our judicial system have continued the divided appellate jurisdiction of the supreme court. No amendments were approved by the people prior to the Convention of 1867, but it will be profitable to note the reforms proposed, and which were still pending when that convention was chosen. These suggestions may be classified according to the courts affected.

a. Court of appeals.—An amendment proposed in 1856 provided for a court of appeals of thirteen members to be appointed by the governor and senate, to hold during good behavior. In 1857 it was proposed to reduce the court to six judges, to be elected for terms of twelve years. The same year it was also proposed that this court should be composed of eight judges, all to be elected by the people; the court was prohibited from adjourning for more than four weeks in any term, except for lack of business, and the judges were to receive a salary of $5,000. By an amendment proposed in 1858 the judges of the court of appeals were to receive a compensation to be established by law, and which should not be diminished during their term of office, and the provisions of the act of 1857, fixing the salary of judges of this court, were to apply to judges then in office, and be deemed to have taken effect from its date. By an amendment proposed in 1859 the court was to be reorganized, and to consist of eight judges elected for eight years. The legislature at this session agreed to an amendment reorganizing the court by continuing in office the four elective judges, and providing for the election of two additional judges,

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making a court of six, with an ultimate term of twelve years. The salary act of 1857 was made applicable to the new court after January 1, 1858. Governor Edwin D. Morgan in his message of 1860 referred to the pending amendment reorganizing the court of appeals, remarking that "experience has shown that the frequent changes in the judges of that court tend to prevent the despatch of business with the rapidity and certainty imperatively demanded." The legislature did not pass the amendment again. At the same session petitions were presented for a constitutional amendment reorganizing the court with six judges, all to be elected by the people for terms of twelve years after the first classification. This amendment was introduced again in 1861. In 1862 an amendment was proposed creating a commission of appeals to consist of not more than five commissioners to be appointed by the governor and senate, to hear such cases as might be referred to it by the court of appeals. An amendment was adopted by the legislature in 1863, creating a commission of appeals to be composed of five members. Governor Seymour in his message of 1864 recommended the passage of the resolution providing for the commission, saying that the court was "overburdened with business from its organization, and, notwithstanding the industry of the judges, the arrearages have been steadily increasing until a remedy cannot be postponed." He thought the commission and the court could keep down accruing business until a new system could be organized, and could receive the attention of the convention that might be held in 1867. The legislature passed the resolution again, and also a bill to submit the amendment to the people, but for some reason the Governor did not sign it. Governor Reuben E. Fenton in 1865 called attention to the commission amendment, and recommended that a bill be passed to submit the question

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to the people. It was accordingly submitted on the 14th of March, 1865, but was not approved. It may be noted, in connection with this amendment, that the legislature which agreed to the amendment the second time did not submit it to the people.

b. Supreme court.—In 1855 it was proposed to elect an additional judge in each district, but such judges could not sit in the court of appeals. In 1856 it was proposed to create a supreme court of seven members with sixteen circuit judges, all to be appointed by the governor and senate, and to hold office during good behavior. By an amendment proposed in 1857 the supreme court judges were to be eliminated from the court of appeals, and to receive a salary of $4,000, with expenses when holding court outside their own district. The supreme court was also prohibited from adjourning for more than four weeks, except for lack of business; and "no court shall adjourn without day unless for want of causes to be tried or argued." The legislature was also authorized to reorganize the judicial districts once after each enumeration. In 1858 the provisions relating to compensation, already noted in reference to the court of appeals, were to be applied to the supreme court, and the subject of compensation was also included in an amendment proposed in 1860.

c. County court.—In 1855 it was proposed to permit county judges to hold courts in other counties. In 1856 an amendment proposed authorized the legislature to confer unlimited jurisdiction on the county court. This was substantially repeated in 1857, and again in 1859, 1860, and 1861.

d. Superior courts and common pleas.—In 1856 an amendment was proposed providing that all judges of the superior court and common pleas of New York, and all other judges having general jurisdiction, should be

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appointed by the governor and senate, and hold office during good behavior. In 1859 an amendment was proposed prohibiting any judge of the court of appeals, or justice of the supreme court, from sitting in review of a decision made by himself.

Legislature.

In 1851 an amendment was proposed by the legislature dividing senate districts into two classes, and providing for an annual election of sixteen senators. This amendment was not passed by the next legislature, but was included in the revised Constitution proposed by the Convention of 1867. At the same session an amendment was proposed abrogating the provision of the Constitution limiting the annual compensation of members of the legislature to $300. In 1855 an amendment was proposed making that part of Kings county outside the city of Brooklyn a county for purposes of apportionment, giving such outside portion at least one member of assembly, or more if its population was sufficient. By an amendment proposed in 1857 the legislature was prohibited from increasing its own compensation; the increase could take effect only from the beginning of the term of the senators next elected after the law was passed.

Prohibition.

In 1856 petitions were presented to the legislature for a constitutional amendment prohibiting the sale of intoxicating liquors as a beverage. Petitions were also presented in 1860, and an amendment for this purpose was introduced. A prohibition amendment was passed in 1861 by the legislature; the amendment was introduced again in 1862, but was not passed.

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Suffrage.

The suffrage amendment of 1826 had removed the property disqualifications imposed by previous Constitutions, and conferred on white citizens the unrestricted right of suffrage, limited only by certain requirements concerning residence; but the disqualifications of colored citizens were continued. The Convention of 1846 did not abolish these distinctions, but submitted a separate amendment for that purpose, which was rejected. The distinctions between white and colored citizens therefore remained in the Constitution, and the abolition of these distinctions was one of the subjects included in proposed amendments prior to the Convention of 1867. An amendment proposed in 1852 disqualified all persons who should receive any bribe, fee, or reward to influence their vote at any election. In 1855 a petition was presented by citizens of Rochester for an amendment extending the elective franchise to women. The legislature of 1853 passed a bribery amendment, under which persons guilty of bribery at elections might be excluded from the right of suffrage, and from the right to hold office. In 1854 a petition was presented by the grand jury of Columbia county against bribery at elections, and the bribery amendment was introduced, but not passed. In 1855 numerous petitions were presented from different parts of the state favoring equal suffrage for colored persons, and an amendment proposed abrogated the disqualifications of colored voters. At the same session an amendment was proposed authorizing the legislature to disfranchise forever, or for a limited time, any person who sells his vote; and another amendment limited the right of suffrage to native-born citizens, or to citizens who have been residents of the United States for twenty-one years. The bribery amendment was introduced again at this session. In 1856 more petitions were presented to abolish

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the disqualifications of colored voters, and an amendment was introduced for this purpose. Another amendment required voters to be of good moral character, and able to read the Constitution and statutes of this state. Several suffrage amendments were introduced in 1857. One abrogated disqualifications based on color; another required voters to be able to read the English language; another required voters to be able to read the Constitution of the United States or of the state, and, if a foreigner, to have been a citizen two years after naturalization; and still another amendment required the voter to be a citizen five years, a resident of the state one year, county six months, and of the election district ninety days; and another provided for punishing bribery at elections. It seems that two amendments were passed in 1857, one relating to bribery at elections, and the other removing the disqualifications of colored voters. Governor John A. King in his message of 1858 said that these resolutions were inadvertently sent to the executive chamber with bills, and were laid aside and overlooked, and, not being called for, were not published as required by the Constitution. He suggested that the legislature pass the amendments again. The amendment relating to colored voters was introduced again at this session, but was not passed. An amendment introduced in 1859 proposed to strike out the word "male" in the suffrage section, and change the word "man" to "person." This amendment was evidently intended to confer the right of suffrage on women, both white and colored. The bribery amendment was again introduced, but not passed. An amendment conferring equal suffrage on colored persons was passed again in 1860, and was submitted to the people at a general election held November 6, 1860. The proposed amendment was rejected by a majority of 140,429. It should not be forgotten that at the same election at which

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337,934 citizens of New York voted to deny equal suffrage to colored persons, Abraham Lincoln was elected President of the United States, and a train of events was set in motion which moved forward so rapidly and with such resistless energy that in a little more than two years slavery was swept away, and in less than ten years the Federal Constitution had been amended by conferring full citizenship on colored persons, and prohibiting any state from denying them the right to vote. The bribery amendment was again introduced in 1861, but was not passed.

Miscellaneous.

In 1849 an amendment was proposed abrogating the following clause in § 12 of article 1: "Saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved." In 1851 it was proposed to strike out the three-fifths clause in § 14, article 7. In 1853 it was proposed to amend the official oath by adding a provision requiring the candidate to swear that he had not used money, or promises, or improper influence to procure his election.

Conventions.

Notwithstanding the amendment adopted in 1854, the canals continued to be a troublesome element in state affairs. The adoption of that amendment did not prevent the introduction of others, and the agitation continued, and the dissatisfaction with the canal article found expression, not only in proposed amendments, but also in the project for a constitutional convention. In 1858 a petition was presented to the senate reciting that there had been a great falling off in canal revenue, and a large increase in the expenses of carrying on the government, thereby swelling up the taxes; therefore, with the view

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of relieving the people from the large amount now unnecessarily expended to sustain the executive and legislative departments, and to secure the honest and better administration thereof, the petitioners prayed that an act be passed calling a convention to revise the Constitution, abolishing the executive and legislative departments of the government, and vesting their powers in the president, vice president, and directors of the New York Central Railroad Company. This curious petition, signed by eighty-six persons, was presented on the 2d of March. It seems to have been taken seriously, and was referred to the committee on canals. On the 13th Mr. Stow, chairman of that committee, "to which was referred the petition of citizens for a convention to revise the Constitution of the state," reported a bill for that purpose. Mr. Stow had, however, given notice on the 27th of January that he would ask leave to introduce such a bill, but, according to the journal, the bill seems to have had its origin in the petition. The bill was passed by both houses and became chapter 320. Under this law the question of calling a convention was submitted to the people at the general election in November, 1858. The proposition for a convention was defeated by the narrow margin of 6,360 votes. A bill for a constitutional convention was also passed in 1861, but was not signed by the Governor, and another bill for the same purpose was introduced in 1865, but was not passed.

It is evident that the people intended to wait the time prescribed by the Constitution before permitting a convention to be held. The proposition for a convention submitted in 1866, in accordance with the Constitution, was adopted by nearly 100,000 majority.

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The Soldier Vote.

Early in the great Civil War, 1861–65, it became apparent that a large number of citizens would necessarily be absent from the state for an indefinite time in the military or naval service of the United States. Under the existing Constitution the right of suffrage must have been exercised at home, and the exigencies of war would not permit the Army, or any considerable portion of it, to leave the field for the purpose of attending an election. Hence, the volunteers who had left the state to participate in that tremendous struggle for the preservation of the Union might be deprived of the opportunity to exercise the chief function of citizenship, namely, the choice of officers to administer the government and represent and enforce the policies which might be deemed essential in carrying forward the great task in which the nation was then engaged. According to the adjutant general's report, it appears that in 1864 more than 400,000 New York men had joined the Union Army. The larger part of this great number were voters, and in the presidential campaign of that year, when the policy of the administration would be on trial, and the great national contest would occur on issues involved in the war, resulting in the election of a chief magistrate for another four years, and the approval or condemnation of the government in its conduct of the war, they would have no voice, and could not be heard in determining the great questions then pending. This was a situation which the framers of the early Constitutions could not have foreseen. They could hardly have been expected to make a constitution for such a crisis. The suffrage provisions of the Constitution had been framed for residents, and the electors were to exercise the right of suffrage at home among their neighbors, who knew their qualifications, and under conditions which rendered fraud difficult, if not impossible. The war had

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been in progress scarcely a year when the condition presented by the large enlistment became a subject of serious consideration and discussion, and the legislature, at the second session after the war began, took active measures to guarantee to the citizen soldiers an opportunity to exercise the right of suffrage while away from home.

On the 6th of January, 1863,—the first day of the session,—Henry R. Low "gave notice that he would, at an early day, ask leave to introduce a bill to take the vote of the soldiers of the state of New York in the service of the United States." Pursuant to this notice, Mr. Low introduced a bill on the 6th of February, amending the Revised Statutes by adding provisions giving soldiers an opportunity to vote, whether in or out of the state. Elections by soldiers were to be held wherever the military organization was stationed, and conducted by judges of elections chosen by the qualified voters present. Each soldier so voting was considered to have voted in the election district in which he resided for thirty days previous to his enlistment. Two poll lists were to be kept, one of which was to be sent to the governor, and the other to the secretary of state. The result and ballots were to be transmitted to the secretary of state, canvassed by the state board of canvassers, and credited to the election district in which the voter resided. This bill was referred to the committee on privileges and elections, by which it was reported favorably on the 20th of March. Thereupon a select committee of five, of which Mr. Low was chairman, was appointed to report the bill complete. On the 28th of March the select committee reported a new bill "to secure the elective franchise to the qualified voters of the Army and Navy of the state of New York." Under this bill the voter absent in the military or naval service might appoint, in writing, a resident of his election district his agent to receive his vote and deliver it to

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the inspectors of election on election day. The ballot was to be sealed, and in this form delivered to the inspectors, who were required to deposit it in the ballot box. The registration laws were made applicable to such absent voters, and the ballots cast by them were to be canvassed with other ballots at the same election and in the same manner. The bill was passed by the senate on the 1st of April, and sent to the assembly. It was evident that members of the legislature and others felt serious doubt concerning the validity of this measure, for, while the bill was pending in the assembly, a resolution was introduced on the 8th of April in that house by Gilbert Dean of New York, to amend the suffrage section of the Constitution by providing for taking the vote of persons absent in the military or naval service of the United States in time of war. Governor Seymour, sharing the doubt felt by some members of the legislature, thought a constitutional amendment would be necessary to insure the right of suffrage to absent voters. He sent a special message to the legislature on the 13th of April, recommending such an amendment, remarking, among other things, that "the question of a method by which those of our fellow citizens who are absent in the military and naval service of the nation may be enabled to enjoy their right of suffrage is one of great interest to the people of this state, and has justly excited their attention. I do not doubt that the members of the legislature participate in the general desire that those who so nobly endure fatigue and suffering, and imperil life, in the hope that by such sacrifices our national Union may be preserved and our Constitution upheld, shall, if possible, be secured an opportunity for the free and intelligent exercise of all their political rights and privileges. The Constitution of this state requires the elector to vote in the election district in which he resides; but it is claimed by some that a law can be passed

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whereby the vote of an absent citizen may be given by his authorized representative. It is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person. It would be an insult and injury to the soldier to place the exercise of this right upon a doubtful or unconstitutional law, when it can be readily secured to him by a constitutional amendment." He said that the next presidential election might be decided by the vote of a single state, that votes by proxy might determine this result, and that the complications growing out of the Civil War should not be increased "by the interposition of a well-founded doubt as to the person rightfully entitled to the presidential office." He therefore recommended the adoption of a constitutional amendment, rather than "the passage of an unconstitutional law, or one of questionable validity."

The next day John Ganson of Buffalo introduced in the senate an amendment intended to carry the Governor's recommendation into effect.

Notwithstanding the Governor's objections to the pending bill, which were clearly expressed in his special message, the assembly proceeded with its consideration, and passed it on the 22d of April, with an amendment applying it "in time of war, insurrection, or invasion." The senate on the same day concurred in these amendments, and on the 23d the bill was sent to the Governor, who vetoed it on the 24th. The Governor said that the bill was "so clearly in violation of the Constitution, in the judgment of men of all parties," that it was needless to dwell on that objection; it received in the assembly only the number of votes necessary to its passage; and that "some of those who voted for it openly stated their opposition to the measure." The Governor said the bill was not only unconstitutional, but it was "extremely defective and highly objectionable." He pointed out some

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of its defects and the difficulties that would attend the execution of the law, and expressed the opinion that it did not adequately protect from fraud either the soldiers or voters at home. The senate immediately passed the bill over the veto, but in the assembly it failed to receive the necessary two-thirds vote.

It is worthy of note that the assembly, immediately after passing the bill on the 22d, and without waiting for the Governor's action, passed the Dean amendment by a vote of 114 to 1. The senate on the 24th, after again passing the vetoed bill, adopted the Ganson amendment, which was also passed by the assembly on the same day. By this amendment the object sought was to be accomplished by the following addition to § 1, article 2:

"Provided, that in time of war no elector in the actual military service of the United States, in the Army or Navy thereof, shall be deprived of his vote by reason of his absence from the state; 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 canvass and return of their votes in the election districts in which they respectively reside, or otherwise."

Thus, all difficulties which might have arisen from a law based on existing constitutional provisions were avoided, and the machinery was set in motion in time to procure an amendment which would enable the absent soldiers and sailors to vote in the presidential election of 1864. The amendment was approved by the legislature of 1864, and submitted to the people at a special election held on the 8th day of March, 1864. The legislature was still in session, and on the 21st of April passed a law (chapter 253) to effectuate the object of the amendment. This law was quite similar to the bill passed in 1863, which was vetoed by Governor Seymour. It authorized

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the absent soldier to appoint a local agent to receive his ballots and deliver them to the inspectors of election. Under this law the absent soldiers and sailors of New York voted at the presidential election in 1864. The method of voting prescribed by this statute was not satisfactory, and the legislature of 1865 passed another act (chapter 570) under which the soldiers were to vote where the military organization was stationed. This was substantially the plan provided by the first bill introduced in 1863 by Senator Low, and by the assembly bill of 1864. But the war closed in the summer of 1865, and the soldiers returned to their homes. This extraordinary election machinery therefore became unnecessary, and the statute was repealed in 1866. This constitutional provision was again called into operation in the war with Spain, in 1898, and the legislature at an extraordinary session held in July of that year passed a law to enable electors absent in the military and naval service of the United States to vote at the place where the organization to which they belonged might be stationed.

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CHAPTER VIII.

The Convention of 1867.

We come now to the only convention which has been held under the twenty-year rule established by the Constitution of 1846. We shall have occasion hereafter to note some of the causes which led to the postponement until 1894 of the convention which should have been held in 1887. The people who had approved the Constitution of 1846 evidently determined to give it a fair trial, for they consented to only one amendment of substance in more than twenty years, and that (the canal amendment of 1854) resulted from conditions which demanded an imperative choice between such an amendment and a statute authorizing a large public debt. The people, in 1858, had refused to authorize a convention. In 1860 they had rejected the proposition to abrogate the disqualification of colored voters, and in 1865 had decided not to create a commission of appeals, preferring to leave the subject of judicial reorganization to the regular convention, which would probably be ordered in 1866, and held in 1867. Notwithstanding these adverse votes, the people were willing to subject the Constitution to examination and possible revision when the twenty-year interval between conventions had expired; and the convention act of 1866 was therefore approved by a very large vote. Governor Fenton, in his message of 1867, said that the large majority by which the convention had been ordered was an "emphatic expression of the public judgment that some modification of the organic law is essential to the general welfare;" that there should be a "prompt re-

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sponse" to the call for a convention; that, since the Convention of 1846, "memorable events" had occurred "which have furnished new problems for solution by the framers of constitutional law;" that reform was needed in the judicial system, especially in the structure of the court of appeals, which, by reason of inherent defects, had proved unable to perform the labor imposed on it by the Constitution, and which had been "rendered even more unstable than the framers of the Constitution designed, by the resignation of some of the permanent judges," who found it impossible to clear the calendars, and declined longer to carry the burden for the small compensation then received. The Governor approved the suggestion for a larger convention, by providing for delegates from assembly districts, and also for thirty-two delegates at large, each elector voting for only sixteen. This, he thought, would secure equal representation between the political parties; and he expressed the opinion that the nominations would be made by each in such a spirit of common regard for the welfare and honor of the state as to contribute to the strength of a deliberative body charged with duties of such interest and magnitude.

The Convention of 1867 was chosen on a new plan of representation. The delegates to the first convention (1776) were chosen by counties, and the number was not and could not be limited by any law. The delegates to each of the Conventions of 1801, 1821, and 1846 were equal in number to the members of assembly, and were chosen in the same manner. In 1867 the plan of assembly district representation was abandoned, and a double representation substituted; namely, a representation partly from senate districts, and partly from the state at large. This convention was composed of one hundred and sixty delegates. Each of the thirty-two senate districts chose four, making one hundred and twenty-eight,

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and thirty-two were chosen from the state at large, practically divided between the political parties, in accordance with the suggestion contained in Governor Fenton's message. By the convention act an election for the purpose of choosing delegates was to be held on the fourth Tuesday (23d) of April, and all persons entitled to vote for member of assembly might vote for such delegates. The influence of the Civil War was manifest in the provision which required a voter, if challenged, to establish his loyalty by taking an oath that he had not voluntarily borne arms against the United States, nor aided in the late rebellion, nor held any office under any authority, real or pretended, in hostility to the United States; nor voluntarily supported such authority; and that he was not a deserter, and did not leave the state to avoid the draft during the late rebellion. In *Green* v. *Shumway,* 39 N. Y. 418, June, 1868, the court of appeals, affirming a judgment of the general term of the supreme court, declared this provision of the convention act unconstitutional; that the legislature could not add to the qualifications fixed by the Constitution.

District delegates might be chosen from any part of the state. In the article on the legislature, in the chapter on the Constitution of 1846, I have cited a few instances of the election of nonresidents as delegates to the Conventions of 1801 and 1821, but in those cases the election was not specially authorized by statute. I am not aware that in 1867 the electors of any district availed themselves of the right to elect a nonresident delegate. The following is the list of delegates:—

At Large.

Waldo Hutchins, William M. Evarts, George Opdyke, Augustine J. H. Duganne, George William Curtis, Horace Greeley, Joshua M. Van Cott, Ira Harris, Erastus

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Cooke, Martin I. Townsend, William A. Wheeler, Charles Andrews, Tracy Beadle, Charles J. Folger, Erastus S. Prosser, Augustus Frank, Augustus Schell, George Law, Henry C. Murphy, Homer A. Nelson, David L. Seymour, Jacob Hardenburgh, Smith M. Weed, Alonzo C. Paige, Francis Kernan, George F. Comstock, John Magee, Henry D. Barto, Sanford E. Church, Henry O. Chesebro, Joseph G. Masten, Marshall B. Champlain.

By Districts.

First district.—Selah B. Strong, Solomon Townsend, William Wickham, Erastus Brooks.

Second district.—John P. Rolfe, Daniel P. Barnard, Charles Lowrey, Walter L. Livingston.

Third district.—Teunis G. Bergen, William D. Veeder, John G. Schumaker, Stephen I. Collahan.

Fourth district.—Charles P. Daly, Samuel B. Garvin, Abraham R. Lawrence, Jr., John E. Burrill.

Fifth district.—Nathaniel Jarvis, Jr., Elbridge T. Gerry, Henry Rogers, Norman Stratton.

Sixth district.—Frederick W. Loew, Gideon J. Tucker, Abraham D. Russell, Magnus Gross.

Seventh district.—Samuel J. Tilden, Anthony L. Robertson, Edwards Pierrepont, James Brooks.

Eighth district.—Richard L. Larremore, Claudius L. Monell, John E. Devlin, William Hitchman.

Ninth district.—Abraham B. Conger, Abraham B. Tappan, Robert Cochran, William H. Morris.

Tenth district.—Stephen W. Fullerton, William H. Houston, Clinton V. R. Ludington, Gideon Wales.

Eleventh district.—B. Platt Carpenter, John Stanton Gould, Wilson B. Sheldon, Francis Silvester.

Twelfth district.—John M. Francis, Jonathan P. Armstrong, Cornelius L. Allen, Adolphus F. Hitchcock.

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Thirteenth district.—Erastus Corning, William Cassidy, Amasa J. Parker, James Roy.

Fourteenth district.—Marius Schoonmaker, Solomon G. Young, Manly B. Mattice, Ezekiel P. Moore.

Fifteenth district.—Alembert Pond, Hezekiah Baker, Judson S. Landon, Horace E. Smith.

Sixteenth district.—George M. Beckwith, Matthew Hale, Nathan G. Axtell, Andrew J. Cheritree.

Seventeenth district.—William C. Brown, Edwin A. Merritt, Leslie W. Russell, Joel J. Seaver.

Eighteenth district.—Edward A. Brown, Marcus Bickford, James A. Bell, Milton H. Merwin.

Nineteenth district.—Richard U. Sherman, Theodore W. Dwight, Benjamin N. Huntington, George Williams.

Twentieth district.—Elijah E. Ferry, John Eddy, Ezra Graves, Oliver B. Beals.

Twenty-first district.—Elias Root, Lester M. Case, M. Lindley Lee, Loring Fowler.

Twenty-second district.—Thomas G. Alvord, L. Harris Hiscock, Patrick Corbett, Horatio Ballard.

Twenty-third district.—Elizur H. Prindle, John Grant, Samuel F. Miller, Hobart Krum.

Twenty-fourth district.—Stephen D. Hand, Charles E. Parker, Oliver H. P. Kinney, Milo Goodrich.

Twenty-fifth district.—George Rathbun, Charles C. Dwight, Leander S. Ketcham, Ornon Archer.

Twenty-sixth district.—Elbridge G. Lapham, Angus McDonald, Sterling G. Hadley, Melitiah H. Lawrence.

Twenty-seventh district.—Elijah P. Brooks, David Rumsey, Abraham Lawrence, George T. Spencer.

Twenty-eighth district.—Jerome Fuller, Lorenzo D. Ely, William A. Reynolds, Freeman Clark.

Twenty-ninth district.—Seth Wakeman, Levi F. Bowen, Thomas T. Flagler, Ben Field.

Thirtieth district.—Edward J. Farnum, Isaac L. Endress, John M. Hammond, William H. Merrill.

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Thirty-first district.—Israel T. Hatch, Isaac A. Verplanck, Allen Potter, George W. Clinton.

Thirty-second district.—George Barker, Augustus F. Allen, Norman M. Allen, George Van Campen.

A mere perusal of this list will convince any citizen of New York that here was a gathering of great men. It would be invidious to select names; a large number of them were and have been many years familiar in every household. Here were men who achieved fame, and helped to make New York and the nation illustrious. Judges, lawyers, statesmen, journalists, historians, business men,—representatives of the first rank from all the principal vocations,—assembled to consider the subject of constitutional reform in a great state. It might not be too much to say that the task was not equal to the talents of the Convention. The work of making a Constitution for New York had already been performed by others. These men could not, like the men of 1776, enjoy the rare honor of erecting a new government for a new state; nor were they, like the men of 1821 and 1846, free to pull down and rebuild the fabric of constitutional government. They found a constitution the essential parts of which had been in operation ninety years, and under which the state had flourished and all its interests and enterprises had grown far beyond the dreams of the men who laid the foundations of its greatness. The Constitution clearly expressed the general outlines of government, and needed only some modifications of detail, which were made necessary by twenty years of growth and experience since it was revised. It was a time for conservatism rather than for radical reforms, and this should be the attitude of all conventions chosen to revise and improve, but not to overturn and rebuild, the existing order of society. Original and revolutionary conventions may use a free hand in constructing a system of government, but later conven-

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tions are bound to respect existing institutions and continue them unless they have become obsolete, or their further use is clearly detrimental to the state.

The Convention met at the capitol on the 4th of June, 1867. William A. Wheeler, afterwards Vice President of the United States, was chosen president, and Luther Caldwell, secretary. Committees were appointed to consider various parts of the Constitution, and the task of examining and revising the fundamental law was promptly begun.

The Judiciary Article.

Many delegates said, in the course of the debate, that the chief reason for calling the Convention was a desire for reform, or, at least, a change, in the judicial system established by the Constitution of 1846. It did not need an experience of twenty years to discover the defects in that system. Many of the wisest men in the Convention of 1846 predicted its failure, and it soon became apparent that the wide departure from the principles underlying the early judicial system, and the compromises which almost inevitably result when one system is abandoned and a new one constructed, had produced conditions which made it difficult, if not impossible, for the courts satisfactorily to perform the high function committed to them; namely, to administer justice promptly and with the due appreciation of harmony in judicial decisions. The result was not the fault of the judges, but of the system. With eight co-ordinate appellate tribunals in the supreme court, judicial harmony was scarcely to be expected; and the annual change of half the members of the court of appeals made it practically impossible for that court to perform its work with the promptness and certainty that would have been possible in a continuing court, with members chosen for long terms. The judi-

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ciary article proposed by this Convention was ratified by the people, and in many important respects it has continued unchanged to the present time. This article is another step in the process of constitutional evolution, and we may profitably study its development and progress through the Convention, and the reasons on which a new judicial system was founded. In the last chapter I have noted numerous judiciary amendments proposed from time to time in the legislature, after the Convention of 1846, and it is apparent from those amendments that the most serious attention of the Convention was required by the court of appeals.

The judiciary committee was appointed on the 19th of June. It was composed of fifteen of the most eminent men in the Convention. Indeed, it might not be easy in any convention chosen by the people to find fifteen men more competent for such a great task. Their patriotism, their high character, their great talents, their distinguished public service, their successes at the bar, in literature, and statesmanship have made them famous in the annals of New York. Even if the Convention of 1867 could be forgotten, these men cannot be forgotten, for they are an inseparable part of our history. Nearly all of them have closed their earthly career, but "their works do follow them," and the fame of those who have gone and of those who remain is our common heritage. The judiciary committee was composed of the following delegates: Charles J. Folger, William M. Evarts, George F. Comstock, Joshua M. Van Cott, Charles P. Daly, George Barker, Francis Kernan, Waldo Hutchins, Joseph G. Masten, Theodore W. Dwight, Amasa J. Parker, Charles Andrews, Matthew Hale, Milo Goodrich, Edwards Pierrepont.

The committee immediately began the consideration of the judiciary article, and, on the 30th of August, thirteen

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members joined in a report. Judge Comstock was not present, and, in response to a telegram, declined to permit his name to be attached. The majority submitted a complete judiciary article, embodying many of the provisions already in the Constitution, with such changes as were deemed desirable to perfect the system. Mr. Goodrich presented a minority report which followed in many respects the plan proposed by the majority, but with very marked differences relating to the organization of the court of appeals and supreme court. In examining the subject as presented by the reports and its development in the Convention, it will doubtless be most convenient to consider each court separately.

THE COURT FOR THE TRIAL OF IMPEACHMENTS.

No change was made or proposed in the organization of this court.

COURT OF APPEALS.

This court demanded and received the most serious consideration of the Convention, and some of the ablest delegates devoted their best thought to the formation of a court which, by its structure and composition, should command the respect due to the highest tribunal in a great state. The majority of the judiciary committee proposed a court of appeals composed of seven judges elected by the people, who should hold office during good behavior or until the age of seventy years. One judge, to be designated by his associates, was to act as chief justice during his continuance in office. Milo Goodrich, of Tompkins, presented a minority report, proposing a court of seven judges, elected by the people for terms of fourteen years after the first classification. The judges first elected were to be so classified that one term should expire at the end

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of every two years. The chief justice was to be designated by his associates. Vacancies were to be filled for the residue of the unexpired term. Under both plans the governor might appoint to fill a vacancy until an election could be held.

On the 21st of November the Convention began a long debate on the judiciary article. When the section on the court of appeals was reached, many amendments were offered, proposing different forms of organization for the new court. Mr. Smith proposed the plan contained in the Goodrich minority report. Mr. Smith said he doubted whether the people were ready to return to a system of life tenure for judges. "If an incompetent man be elected for life, he is fixed upon us," unless he is guilty of misconduct, "while, if an incompetent man is elected for a term of years, he can be displaced at the end of his term, without charges." Mr. Baker proposed a court of appeals with nine members, to hold office for twelve years. Mr. Wakeman proposed a court of seven members, to hold office twelve years; six to be elected by the people, and the chief justice to be appointed by the governor and senate. Mr. Beckwith proposed a court with a chief justice, to be appointed by the governor and senate for fourteen years, and six associate judges, to be elected by the people for twelve years. Mr. Rumsey proposed to continue the judges in the existing court of appeals as members of the new court. After the Convention had discussed the subject several days, Judge Comstock proposed a court of seven members, all of whom, including the chief judge, were to be elected by the people for a term of fourteen years. The judges were not to hold office after the 1st day of January next after they had reached the age of seventy years, and should not be eligible to re-election. Mr. Pond proposed a court of appeals of ten judges, continuing the four elective members of the

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present court, and providing for the election of six more, giving each elector the right to vote for four. Mr. W. C. Brown proposed a court of nine members, to include the present judges, with a chief judge, to be designated by the other members of the court. Mr. Graves proposed a court of eight members, four to be elected by the people and four to be taken from the justices of the supreme court having the shortest time to serve. Mr. Landon proposed to abolish the court of appeals, and make the supreme court the final judicial tribunal of the state. He was willing to adopt the supreme court plan submitted by the majority of the committee; namely, a plan of four departments, with a general term in each, except that he proposed to limit the chief justices of the departments to general term work, and also require them to hold at least two extraordinary general terms each year. There should be no right of appeal to these extraordinary general terms, and they could hear only cases certified to them by a regular general term "as may seem necessary in order to promote harmony in the decisions throughout the state." Mr. Barto proposed a court of five members.

All the plans, except one, proposed to eliminate the supreme court judges from the court of appeals; and while the suggestions included a court of five, seven, eight, nine, and ten members, there was substantial unanimity in favor of a court of seven, as proposed by both the majority and minority reports. There was also a general agreement concerning the method of selecting the judges.

The question which divided the Convention, and which provoked a long and very able discussion, was the question of tenure of office. The majority of the judiciary committee had agreed on a life tenure, or, rather, on a tenure during good behavior, and ending, in any event, when the judge should become seventy years of age. All

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the other plans proposed a fixed term, ranging from eight to fourteen years, coupled with a prohibition of re-eligibility after the longer terms. It was stated in the course of the debate that the term of fourteen years was suggested because it appeared that fourteen years was the average term of service in the courts of this state, of other states, and of the United States, where the tenure during good behavior had prevailed.

Several delegates advocated briefly the plan proposed by the majority of the judiciary committee, but the principal argument was made by William M. Evarts. That great lawyer had been absent during the first part of the debate, but, on his return to the Convention, entered the contest with the enthusiasm which marks the earnest advocate of a great cause, and expressed his views in a speech which exhibited in a conspicuous degree the breadth of learning, logical skill, and felicity of language which characterized his great forensic addresses, and made him so long a distinguished leader of his profession. He believed in the life tenure, because it established a permanent court, in which the state was sure to receive the best service of which the judge was capable, free from embarrassing considerations concerning another election, or the return to the ranks of the legal profession after a separation of many years; and which would give the state the benefit of his ripening talents, as he grew and developed in judicial learning and experience. He said, among other things, that the judicial office should be established on the principle of good behavior, "during what may be expected to be the period of judicial usefulness in respect to age and faculties. By fixing the age at seventy years as the period of judicial life, we avoid at once some difficulties which have been felt, and others which have been imagined, as resulting from the prolongation of the term of office beyond the continuance of the powers of

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mind and body necessary for the performance of its duties. Establishing that as the term of judicial life, we then give to the incumbent the security, and to the public the advantage, of the continuance in office of a judge during that period. The judiciary is the representative of the justice of the state, and not of its power. The judge is not to declare the will of the sovereignty, whether that sovereignty reside in a crowned king, in an aristocracy, or in the unnumbered and unnamed mass of the people. Justice is of universal import, of universal necessity, under whatever form of government." The judges are to declare the law, and not impose it. They are not to take the place of the legislature. They are to declare the law of the land, and not the will of any power. The judges are not personally accountable to members of the community who are affected by their action. No action lies against a judge for anything that he does in the judicial office, but he may be removed for misconduct. He said the plan of electing judges for short terms did, in effect, introduce the element of accountability for judicial acts, and it also involved the element of holding office at the pleasure of the people. "Short terms and renewable judicial authority represent, under the form of an election, the intolerable vices both of accountability, and retaliation for judicial action, and of holding during pleasure because the office is renewable at pleasure." Noting the similarity between the plan submitted by the committee, and the minority plan, as modified by Judge Comstock's amendment, he said the substantial difference was in the length of term. The majority proposed to permit the judge to serve continuously from his election until seventy years of age, while the minority proposed to permit him to serve only fourteen years, in any event; also practically terminating his service at seventy years. "If there is anything that is fundamental, anything that is

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worth preserving in our political system, it is the principle that a public office is for the public service, and not for the private advantage and possession of the incumbent." He thought that we had departed very widely from this practice in our politics; men held office simply because it was convenient to do so. He said that the experience of England and of this state and country "was that courts built upon the plan of a judicial tenure during good behavior, up to a period of age designated, give the best judges;" that, as a rule, he did not think it for the public interest to select for judges men who were more than forty or forty-five years of age. After describing the qualities which should be possessed by a lawyer selected by the state for service in its highest judicial tribunal, the losses he sustains by abandoning his chosen profession, with its emoluments and opportunities, and the sacrifices he often makes in accepting a judicial position, especially when the service is for a limited term, at the end of which he must return to the profession, or find a new vocation in which to exercise the energies of his declining years, Mr. Evarts said that "by a less durable tenure than for good behavior, without any just compensation for what is sacrificed, you lose the great part of the essential ideas of commanding the best men and at the best age for the public service. You thus lose all that makes up the difference between a judge standing above all embarrassments, and a judge who is left undefended by your institutions against the operations of the ordinary influences that betray the frailty of our human nature." He expressed the opinion that the people would not be satisfied with the work of the Convention unless it presented a judicial system in which they could "see the judiciary as it stood before them in the past,—clothed with all the majesty of justice, and endued with all the strength that it is in the power of men to place about those whom they desire to

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honor, and whom they are willing to intrust with final authority. Let us have the reflex influence of an independent judiciary upon an independent bar. Let the power—governor or the people—which fills the place, understand that it is for a durable tenure, and that a whole generation is to sit under the shade of that authority which is raised over them."

It is impossible to present in a few fragments the full scope and power of this address. It should be read by every student of our political system who wishes to understand the true foundation of our early judicial system, under which the jurisprudence of New York had been established. Here Mr. Evarts was at his best, and every one familiar with his great career knows what that means; he was contending against an order of things which, during the radical days of the Convention of 1846, had been created in a spirit of revulsion from the old order, so destitute in many essential respects of the real elements of popular government; but the new plan of an elective judiciary, holding for short terms, had been given a twenty-year trial, and it had been demonstrated that the people were capable of selecting judges fully competent to maintain the high judicial standard which New York had reached under the former system. Mr Evarts did not oppose this part of the new system, but he believed, and in this he and his associates were in accord, that the judicial term should be extended. The final difference on this question was one of degree; namely, between a fourteen-year tenure or a tenure during good behavior, both with an age limit. Mr. Evarts presented what he believed was the ideal system, and he brought to the support of his views the experience of history and the philosophical principles which should underlie every well constructed judicial system. The reader of to-day cannot fail to appreciate the masterly array of facts, logic, and illustra-

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tion which Mr. Evarts presented with persuasive eloquence as he traversed the subject of the best judicial system for New York. Even now, reading the speech after thirty-five years, we fall under the spell of the orator, and can readily understand how, as he rose to the height of that great argument, the Convention hesitated, and almost decided to abandon a fixed judicial term, and restore the ancient tenure during good behavior, with an age limit, which had prevailed in the colonial days, and through the first seventy years of our state history.

Joshua M. Van Cott also made a very able speech on the same side. After referring to the length of the executive and legislative terms already established by the Convention, and the long judicial term proposed, he pointed out the differences between the executive and legislative functions on the one hand, and the judicial on the other. The distinction between the two is that the function of the judge has no relation to policy. "The legislative authority determines the policy of the state." "The function of the executive is merely to see that the laws are faithfully administered." The function of the judge is fixed and absolute. It does not depend on his ideas of policy, nor on his will or discretion. He is there as a magistrate, to read, interpret, and apply the law. The will of the people is expressed in the policies adopted; but this will has nothing to do with the solemn functions of justice. "The executive cannot approach the court, although it has the whole military power of the state at its back." The legislature cannot approach the court except in the form of statutes. He advocated a life tenure, saying, among other things, that a judge chosen under this tenure would enter at once upon his duties, "knowing that his life is entirely changed, and his character entirely fixed." He has no interest except the interest of administering justice wisely and well.

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By whatever method a judge is placed on the bench, he said, "leave him there, to ripen by experience, to enlarge his learning, to be utterly independent of everything which can approach and improperly influence the mind of a judge; leave him there in a state of perfect independence, having no fear but the fear of God, which casts out all other fear, to influence him in the performance of his great magisterial functions."

Amasa J. Parker was a member of the judiciary committee, and had joined in the majority report, but, in the course of the debate, he expressed himself as indifferent between the tenure during good behavior and the fourteen-year term, provided a judge could be made ineligible for a second term. He said that the independence of the judiciary was the chief thing to be sought, and that could be attained by one long term.

The Convention had three tests on this question. On the first test, on December 4, the life tenure was rejected by a vote of 43 to 48; on the second, on Mr. Evarts' motion, December 18, by a vote of 56 to 58; and the third, February 19, nine days before the Convention adjourned, on a motion by Erastus Brooks, by a vote of 45 to 51. Judge Daly observed that, if the Brooks amendment could be adopted, it would enable the people during the next twenty years to try both plans; namely, a court of appeals elected during good behavior, and a supreme court elected for a term of fourteen years. We cannot conjecture what the result might have been in a full convention. On the first test sixty-nine delegates, on the second forty-six, and on the third sixty-four, were either absent or did not vote; and on each test, except the second, where there was a slight excess, the fourteen-year term was established by less than one third of the Convention. In no convention, except the Convention of 1776-77, when extraordinary conditions prevailed,

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had important constitutional changes been made by such a small proportion of the delegates composing the convention. It may be proper to note here that in the Convention of 1894 no amendment was deemed adopted unless it had received eighty-eight affirmative votes.

The advocates of the fourteen-year term generally admitted that the judge ought to be independent, and they sought to accomplish this result by making him ineligible to a re-election, and the term was at first fixed with this qualification. It was thought that, with any fixed term to which a judge might be elected in middle life, he might, toward the end of the term, neglect his judicial duties in promoting his candidacy for re-election; and that any temptation of this sort would be removed by making him ineligible. It was pointed out that even with this long term the judge might go out of office many years before actually disqualified, but he would necessarily be embarrassed in again entering the profession because of his long absence in judicial service. After considerable discussion and some fluctuation of opinion it was finally determined to leave the judge eligible for another term. It was believed that, under ordinary conditions, he would, if his judicial service was reasonably satisfactory, be re-elected without any special effort on his part, and without any candidacy in any sense which could embarrass him in his work, or impair the efficiency of his service.

There was also some difference of opinion concerning the classification of the judges. Many delegates thought there should be rotation in office; at least, to the extent that a judge should be elected every two years; but the majority thought that the ordinary accidents of life would produce enough change in the court, without distinctly providing for it by regular elections. Under the rotation plan the vacancies would necessarily have

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been filled for the residue of the unexpired term; otherwise the rotation would soon have been destroyed. The Convention finally agreed that each judge should be elected for a full term, letting the expirations fall as they might.

The Convention was also considerably unsettled at first concerning the method of choosing the chief judge. It was urged by some of the ablest delegates that the chief judge should be appointed by the governor and senate, who would have the widest range of selection, and would choose an officer for this exalted position who would everywhere be known as the chief judicial officer of a great state. Others proposed that the judge having the shortest time to serve should be chief judge, while others thought the chief judge should be selected by his associates; but the discussion resulted in providing for his election by the people in the same manner as other members of the court.

The proposition to continue the elective judges of the old court as members of the new found little favor. If there was to be a reorganization of the court, and a new tribunal established, the people ought to have the right at the outset to choose all the judges, so that all of them would go into office on equal terms, and, primarily, for the same length of service; besides, the former judges were to be employed as members of a commission in disposing of the unfinished business of the old court.

To prevent the election of the new court wholly from one political party, Amasa J. Parker proposed a plan of minority representation which, with some modifications, was adopted by the Convention. This permitted each elector, at the first election of judges, to vote for the chief judge and not more than four associate judges. This enabled the minority party in the state to elect at least two judges.

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When the subject of filling vacancies was under consideration Judge Comstock proposed that a vacancy be filled at the next general election occurring not less than three months after the happening of the vacancy, urging, as a reason for this limitation, that the people ought to have time to be informed of the vacancy, and to consider the merits and qualifications of candidates. Some delegates thought that two months would be sufficient, but the Convention adopted Judge Comstock's proposition. On motion of Amasa J. Parker the quorum of the court was fixed at five, and four must concur in a decision; and on motion of Mr. Livingston the court was authorized to appoint a clerk, reporter, and attendants.

Several incidental suggestions were made, affecting either the organization or jurisdiction of the court, and the method of transacting its business. Thus, it was proposed that judges should reside during their terms where the court was held; that the court should always be open, and continue in session each term until its business was completed. Mr. Landon submitted a proposition which, in effect, denied any right of appeal to the court of appeals, but authorized that court to hear such cases as might be sent to it by the general terms; another suggestion authorized the legislature, after five years, to reorganize the court, and increase or diminish the number of judges. None of these suggestions were adopted.

"But wisdom is justified of her children." The advocates of a tenure during good behavior have been amply vindicated. In the light of the history of the court of appeals since its reorganization in 1870, under the judiciary article proposed by the Convention of 1867, probably no citizen of New York would now feel any regret if the Convention had not only almost, but altogether, yielded to the persuasions of Mr. Evarts and his associates, who sought to establish for that court a tenure

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during good behavior, with an age limit at seventy years. The practical operation of the fourteen-year tenure has produced substantially the results that would have come from a tenure during good behavior. Fifteen judges have been elected to the court of appeals, not including those in office on the 1st of January, 1905. Of these fifteen, five—namely, Church, Peckham, Sr., Grover, Allen, and Ruger—died during their first term. Judge Rapallo was re-elected, and died early in his second term. Judge Folger, before the expiration of his first term, was chosen chief judge, and, in 1881, resigned to become Secretary of the Treasury in President Garfield's cabinet. Judge Rufus W. Peckham, Jr., elected in 1886, resigned in 1895 on his appointment as associate justice of the Supreme Court of the United States. Four judges—Earl, Miller, Danforth, and Andrews—served until the expiration of the age limit. Judge Finch retired from office December 31, 1895, at the expiration of a full term, and might have served until June 9, 1897, under the tenure proposed by the judiciary committee. Chief Judge Parker, who was elected in 1897, resigned August 5, 1904, on his nomination by the Democratic party as its candidate for the office of President of the United States. Judge Martin, who was elected in 1895, retired December 31, 1904, by operation of the age limit. Concerning the judges now in office it may be observed that Judge Gray was re-elected at the expiration of his first term, in 1902, and may serve until December 31, 1913, making a total of twenty-five years of judicial service by election, besides nearly a year by previous appointment. Judge O'Brien was re-elected in 1903, and may serve until December 31, 1907,—a total of eighteen years. It thus appears that eleven judges—Church, Peckham, Sr., Grover, Allen, Ruger, Rapallo, Earl, Miller, Danforth, Andrews, and Martin—held office under the fourteen-

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year rule for terms which would have been the same under the life rule proposed by the judiciary committee; and that the term of service of three other judges—Folger, Peckham, Jr., and Parker—who resigned, would have been the same under either rule. The court, on the 1st of January, 1905, was composed of Cullen, chief judge, and Gray, O'Brien, Bartlett, Haight, Vann, and Werner, associate judges. Of these, the terms of three—Cullen, Gray, and O'Brien—will be shortened by the age limit. I have already quoted Mr. Evarts' opinion that, as a general rule, judges, at the time of their selection, should not be more than forty or forty-five years of age; a similar suggestion had been made several years earlier by Daniel Webster, but this rule has not usually been applied in the court of appeals. Twenty-six judges have been elected or appointed to that court since its reorganization under the judiciary article of 1869, not including judges assigned from the supreme court under the amendment of 1899. Of the number appointed to fill vacancies, four—Johnson, Hand, Tracy, and Maynard—were not subsequently elected. The age of the judges on becoming members of the court varied from forty-three to sixty-one years; six were under fifty, and the average age was a little more than fifty-three years. The average length of service of the elected judges, not including those in office on the 1st of January, 1905, was about twelve years.

COMMISSION OF APPEALS.

The large accumulation of undecided causes in the court of appeals when the Convention met presented a situation demanding immediate relief. Attempts had already been made, as noted in the preceding chapter, to create a commission to aid the court in disposing of its business. A proposition for that purpose was presented

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in the legislature of 1862, and finally resulted in a proposed amendment submitted to the people in 1865, but which was rejected. It seemed clear to the Convention that, in reorganizing the court of appeals, the new court should not be loaded down at the outset with the business which had accumulated in the court now to be superseded, and which that court had found itself unable to dispose of. Several plans were proposed which, directly or indirectly, included a commission; some of them continued the elective members of the former court for that purpose, with an additional commissioner, to be appointed by the governor, and others provided for an entire new commission. The judiciary committee proposed a commission including the elective members of the former court and a fifth commissioner, to be appointed by the governor, vesting in the commission jurisdiction to hear and determine all causes pending in the court of appeals on the 1st day of January, 1868. The judiciary committee also proposed to authorize the legislature, at the end of ten years from the adoption of the new Constitution, to create a new commission to hear and determine such causes as might be transferred to it by the court of appeals. Mr. Spencer proposed a different plan; instead of providing for a commission at once, he proposed a flexible scheme under which, at any time when there was an undue accumulation of business in the court of appeals, the court might certify that fact to the governor, who might appoint a commission of five members to hear and determine cases which might be transferred to it by the court. The commissioners were to hold office not less than one year nor more than two years. On motion of A. J. Parker, the section was stricken out which provided for a commission after ten years.

Mr. Ballard proposed that four members of the com-

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mission should concur in a decision, but the Convention adopted Mr. Barker's plan, providing that four members should constitute a quorum.

SUPREME COURT.

Institutions persist. From the days of Samuel, "the last and best of the Hebrew judges," who, thirty centuries ago, "went from year to year in circuit" to certain cities, "and judged Israel in all those places," also holding a court at the seat of government, the world has been familiar with the dual system of administering justice, embracing trial in appellate courts; and Samuel's circuit system was the model on which have been constructed the courts of nisi prius, the oyer and terminer, the trial and special terms and appellate courts, which are an inseparable part of our Anglo-Saxon jurisprudence. The evolution of the judicial circuit has been gradual and natural. The supreme court was at first confined to a limited territory; but, as population extended, settling other parts of the state, and new counties were erected with local government, it became necessary to carry the courts to the new settlements; so that, while it was not literally true that justice was carried to every man's door, yet, for the purpose, as stated in the judiciary act of 1785, of providing a more "equal distribution of justice," the courts must go to the new centers of population, and there furnish a tribunal for the determination at home of legal controversies in which the people might become engaged. So the circuit system was gradually extended throughout the state, and it was only natural that the Convention of 1821 should take the circuit system as then in practical operation and modify it to meet new conditions. The regular judicial force of the supreme court had long been inadequate for the work required of it. Five judges could scarcely be expected to

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do the work required of a court of original jurisdiction throughout the state. The legislature had resorted to several expedients, such as increasing the jurisdiction of courts of common pleas, the appointment of supreme court commissioners, with a large share of the powers of a judge at chambers, and vesting recorders and mayors of cities also with supreme court functions. But all these expedients were insufficient, and did not afford relief from the growing burden and delay of an increasing mass of litigation. The Convention of 1821 took the circuit system then in operation and localized it or distributed it into geographical sections, so that, instead of the state being one great circuit, as theretofore, and each county in which a court was held constituting only a small part of it, a group of counties was erected into a distinct division of the state, called a circuit, for each of which a judge was provided, possessing the general powers of a justice of the supreme court. From this the evolution was easy, in 1846, to judicial districts, with an additional number of judges.

The Convention of 1867 manifested little disposition to disturb the judicial districts. The districts or circuits had been established a long time; they were convenient, and there was no good reason suggested why they should not be continued. The principal controversy in this Convention, so far as the supreme court was concerned, related to the general terms. The Convention addressed itself to the solution of the problem of reducing the eight appellate tribunals in the supreme court to a smaller number, or combining them into one, so that there could not be the conflict of decision which had been the subject of complaint under the former system. Many plans were suggested and remedies offered to effect the reform in the supreme court which would reduce the number of conflicting decisions, or render a conflict impossible.

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The majority of the judiciary committee proposed to divide the state into four departments, with two districts in each, the city and county of New York being one, with a supreme court composed of thirty-four judges, ten in the department including New York, and eight in each of the other departments; and the legislature might provide for an additional justice in each department. The legislature was directed to provide for designating four justices to hold general terms in each department. The chief justice of a department was to act as such during his continuance in office. Any judge might hold a special term or circuit court, or preside at oyer and terminer, but he could not sit in review of his own decision. Justices of the supreme court were to be elected by departments, and were to hold during good behavior or until they should become seventy years of age. The Goodrich minority plan differed from the majority plan in many important respects. He proposed to divide the state into three departments, to consist of existing judicial districts, with twelve justices in each department, to hold office for twelve years after the first classification. The judges were to be elected by departments, and an equal number, as nearly as practicable, were to reside in each district. The legislature might provide for an additional justice in each department, or reduce the number, but could not legislate a judge out of office. Each general term was to select from its own number a presiding justice, who could not hold trial or special terms or grant orders reviewable in the general term. The presiding justices might appoint and remove the supreme court reporter. The general terms were to be composed of five judges; the presiding justice was to be designated from one department, and two justices from each of the other departments. Except the presiding justice, two of the general term justices should

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retire at the end of every second year, and other justices should be designated to take their places. Here may be the germ of the appellate division provided by the Constitution of 1894. General terms were to be held in each judicial district, for the hearing of causes arising therein.

Mr. Landon proposed a plan already outlined in the section in this chapter on the court of appeals. His plan involved the abolition of the court of appeals, leaving the supreme court the only appellate tribunal in the state. Matthew Hale proposed a supreme court composed of twelve judges, to be chosen from the state at large. His plan also provided for four judges in New York and two in each of the other districts, making eighteen in all, who were to do the circuit work. General terms were to be held in each district and be composed either of three of the judges, chosen at large, or of two of these judges and one justice; but no circuit judge could sit in a general term in review of his own decision. In addition to the general terms the plan contemplated a "state term," to be held once each year by seven of the supreme court judges. He did not provide for an appeal from the circuit or general term to the state term, but proposed to give the state term jurisdiction to hear cases sent to it by the general terms or by the legislature. Under his plan the general term could not declare a statute unconstitutional, but if, in a given case, the general term should deem the statute unconstitutional, the case should be sent to the state term, and its decision should be final unless reversed by the court of appeals. Mr. Hale's "state term" was quite similar to the "appeal session" proposed by Mr. Bascom in the Convention of 1846, and which has been noted in the section on the court of appeals in the chapter on that convention. Mr. Landon's plan of extraordinary general terms, to be held by the presiding justices of the regular general term,

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also illustrates the same idea; namely, that there ought to be one central tribunal of the supreme court, for the purpose of insuring harmony of decisions made by the regular appellate tribunals.

Mr. Spencer proposed a plan which substantially continued the existing organization of the supreme court. Mr. Prindle's plan provided for three departments, composed of existing districts, with a general term in each, composed of four justices, who should have no other jurisdiction. This, in part, was Mr. Goodrich's plan. Mr. Prindle's plan also provided for eight justices or circuit judges in each department. Mr. Ferry's plan provided for dividing the state into three districts, with five judges in each, elected by the people, to hold office ten years, and so classified that one should go out of office every second year. These judges were to hold a court in their district, which should have appellate jurisdiction only. The court was always to be open, and the judges were required to reside where the court was held. His plan also provided for a justice of the supreme court in each county, to be elected for a term of eight years, and who should have all the powers, and exercise all the jurisdiction, of a judge at special or trial term, oyer and terminer, or in the county court or court of sessions. He was required to reside at the county seat, and his court must always be open. He might act in any county. Erastus Cooke proposed a supreme court of nine judges, three of whom might hold a general term. This would have permitted not more than three general terms, or all the general terms might have been combined in one tribunal. The supreme court, under this plan, was given general, original, and appellate jurisdiction. Mr. McDonald also proposed a supreme court of thirty-six judges, distributed in three departments, twelve in each, four to reside in each district. Mr. E. A. Brown pro-

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posed to continue substantially the existing district system. Mr. Baker proposed a supreme court with a chief justice elected by the state at large for a term of twelve years. His plan also provided for eight judicial districts with four judges in each, except New York, in which the legislature might provide for the election of a larger number. Their terms of office should be twelve years, and the justices in each of the eight districts having the shortest time to serve constituted a court to hold general terms. The age limit was fixed at seventy-five years.

When the general term section was under consideration, Mr. Smith proposed that no justice sit in the general term in the department in which he was elected. A motion made by Mr. Hale was carried, providing for a general term, to be composed of four judges, three of whom constituted a quorum. The three months' rule of election to fill vacancies, suggested by Judge Comstock, was agreed to. The judiciary committee proposed to elect the judges by departments. The Convention changed this, and provided for an election by districts. Mr. Church proposed a plan of minority representation in the first election of judges of the supreme court and of the superior city courts, but the adoption of Mr. Spencer's proposition to continue in office for the residue of their terms the present judges of the supreme court and judges of the superior court made it impracticable to apply the principle of minority representation. Suggestions were made, fixing the term of office at eight, ten, and twelve years; but, on Judge Comstock's motion, the term was fixed at fourteen years. On Mr. Prindle's motion the age limit was fixed at the 1st day of January next after the judge shall have arrived at the age of seventy years. This was afterwards changed to December 31st. A motion to make judges of the supreme

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court ineligible to re-election was defeated by a vote of 35 to 57.

While the supreme court sections were under consideration, Mr. Livingston offered an amendment authorizing the legislature to provide by law for meetings of the presiding justices, to review conflicting decisions arising under the Code of Procedure, made by any of the departments of the supreme court or by certain local courts. The amendment was adopted with a modification suggested by Judge Comstock, limiting the review in such cases to mere questions of practice, not reviewable in the court of appeals. Later, the judiciary committee was instructed to report the article complete; and in so reporting it, omitted this provision. Mr. Livingston tried to have it reinstated, but failed. If the provision had been allowed to stand it would probably have had the effect of materially reducing the number of conflicting decisions in the several departments, relating to practice.

The result of the deliberations of the Convention relating to the supreme court was the continuance of the court as it then existed, with the same number of judges in each district. It will be remembered that, under the Constitution of 1846, each district was given four judges, and the legislature had authority to provide additional justices in New York. Such an additional justice was provided by chapter 374 of the Laws of 1852, and this number had not been increased at the time of the Convention of 1867. The judicial term of office was extended from eight to fourteen years, and each judge was to be elected for a full term, without any attempt at rotation. The general term plan was modified by reducing the number as fixed under the Constitution of 1846,—one for each of the eight judicial districts,—and the legislature was vested with power to establish not

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more than four general terms. Under this power the legislature might have established only one, and would thus have accomplished the results sought by several members who thought that one appellate tribunal would be sufficient and would avoid conflicting decisions. The general terms might consist of four judges, and could not be organized oftener than once in five years. A general term was required to be held in each judicial district. Each judge might hold any court or perform any judicial service, but could not sit in review of his own decision.

The general term provisions of the new judiciary article were put into operation by chapter 408 of the Laws of 1870, which abrogated the existing general terms, and provided for four general terms, and divided the state into four departments. The first department was to consist of the first district, the second of the second, the third of the third, fourth, and sixth districts, and the fourth of the fifth, seventh, and eighth districts. In obedience to the constitutional mandate that general terms must be held in each district, this statute required terms to be held in the city of New York for the first department; in Brooklyn and Poughkeepsie for the second; Albany, Binghamton, Elmira, Plattsburgh, and Ogdensburg for the third department; Syracuse, Oswego, Rochester, and Buffalo for the fourth department. This provided a general term in each judicial district. The general terms were to be composed of a presiding justice, who should act as such during his official term, and two associate justices, who should act as such for five years from the 31st day of December next following their designation, or until the earlier close of their official terms.

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COUNTY COURT.

The county court nearly met its death in the Convention of 1846; it was saved "as by fire," with a margin of one vote; but its jurisdiction and powers were seriously reduced, and it lost its importance as a court of general jurisdiction between the justice's court and the supreme court, which had continued from early colonial days. In the section on the judiciary article, in the chapter on the Convention of 1846, I have noted the reaction from the policy adopted by that convention concerning the county court, and the efforts of the legislature to rehabilitate it with its former jurisdiction, and the failure of these attempts in consequence of the decisions of the court of appeals to the effect that such statutes were unconstitutional. During the interval between such decisions and the Convention of 1867 several amendments were proposed in the legislature, intending to enlarge the jurisdiction of the county court; but these, with all other judiciary amendments of a similar character, failed to reach the people. Hence, the Convention of 1867 found the county court as it had been left by the Convention of 1846. The principal question demanding the attention of the later convention related to the jurisdiction of the court. There seems to have been general agreement in favor of enlarging the jurisdiction; but there were differences of opinion concerning the extent and quality of such jurisdiction.

Under the plan proposed by the majority of the judiciary committee the county court was to possess such original and appellate jurisdiction as might, from time to time, be conferred upon it by the legislature. Mr. Goodrich's minority plan proposed substantially the same jurisdiction, but differed from the majority plan in some other respects. Mr. C. L. Allen proposed to confer on the court "original jurisdiction in all actions of slander, libel,

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malicious prosecution, assault and battery, false imprisonment, seduction, criminal conversation, and breach of promise of marriage," and also the jurisdiction proposed by the judiciary committee. Mr. Spencer suggested that the legislature ought to be left at liberty to confer jurisdiction on county courts in its discretion; and that this jurisdiction need not necessarily be uniform in all the counties. This would have enabled the legislature to provide for a wider jurisdiction in the large counties and a more limited jurisdiction in the smaller counties, where there was likely to be less litigation. This suggestion did not meet with much favor, for the reason that a general court like the county court should have a uniform jurisdiction throughout the state. Suitors ought to be able to ascertain from the Constitution itself the extent of the jurisdiction of any court not local, and such jurisdiction should not be left to the fluctuations of legislative opinion. After some discussion the Convention concluded not to confer jurisdiction in general terms, as suggested by the judiciary committee, but to make the jurisdiction definite in actions for money, depending on amount involved. Mr. Chesebro proposed to give the court jurisdiction in cases where the damages claimed did not exceed $1,000 and the parties resided in the county, but later modified his plan by making it apply to cases where the defendants resided in the county, so that nonresidents might bring actions in the county court of the county in which the defendants resided. The Convention adopted this plan, and thus fixed the general jurisdiction on a money basis; but the powers and jurisdiction which the county court then possessed were continued until altered by the legislature, and the legislature was authorized to confer on the court other criminal jurisdiction. On Judge Comstock's motion the

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jurisdiction was made subject to the power of removal of causes into the supreme court.

The judiciary committee proposed to fix the term of the county judge at eleven years. Mr. Goodrich's plan continued the term at four years. In view of the extension of the terms of judges of the court of appeals, the supreme court, and city courts, and the enlarged jurisdiction which the county court was to possess, it seemed only reasonable and consistent that the term of office of the county judge be extended; accordingly, after some discussion, the Convention adopted Mr. Chesebro's suggestion, fixing the term at six years. The Convention declined to approve Mr. Ketcham's suggestion to abolish the office of justice of sessions. Mr. Ketcham's motion that the salary of the county judge be fixed by "law" instead of by the board of supervisors was also lost in committee of the whole, but was renewed in convention by Judge Comstock and carried.

SUPERIOR COURTS AND COURT OF COMMON PLEAS.

The judiciary committee proposed to establish in the Constitution the superior courts of New York and Buffalo, and the court of common pleas of New York, giving the superior court of Buffalo three judges and the superior court of New York and court of common pleas five judges each. This was a reduction of one judge in the New York superior court, and an addition of two judges in the court of common pleas. In its progress through the Convention the section was amended on motion of Henry C. Murphy by including the city court of Brooklyn, and authorizing an increase of its judges to three. The section was also amended on Judge Comstock's motion in relation to the number of judges in the superior court and court of common pleas. By this amendment the superior court was to have six judges,

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the number it then had, and the court of common pleas was also to have six. Judge Daly, discussing this motion, said that the court of common pleas, from the limited number of its judges, was the most heavily worked court in New York; that its present force was quite inadequate to its labors; its ordinary business was as great as that of the superior court, and it was, in addition, the appellate court of all the inferior tribunals in the city. He said the business of both courts was very heavy, and that whatever number of judges was required for the superior court was also required for the court of common pleas. The jurisdiction these courts then possessed was to be continued, and the legislature was authorized to confer on them other original, appellate, civil, and criminal jurisdiction. Some of these courts had been in existence a long time; they had all become firmly established, and their usefulness had been abundantly demonstrated. A brief sketch of their origin and development may aid in explaining the action of the Convention in making them a part of the judicial system established by the new judiciary article.

Court of common pleas.—The first reference I have found to the New York court of common pleas is in the Dongan charter, dated April 27, 1686, by which the "mayor, aldermen, and commonalty of the city of New York" were authorized to hold a court of common pleas. This court was vested with certain civil jurisdiction, which had already been vested in the court of sessions and the court of oyer and terminer under the act to settle courts of justice, passed by the first legislature, in 1683. The court of common pleas established by this charter seems to have been a continuation of the mayor's court, established by the Governor in June, 1665, and which court was composed of the mayor, aldermen, and sheriff. This court in turn had its origin in the court of burgo-

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masters and schepens, established in February, 1653, under the Dutch *régime*. The jurisdiction vested in this court had been exercised in part by the Board of Nine Men, established in 1647, and the jurisdiction of this board was originally exercised by the director general and council of the Dutch West India Company. The court of common pleas thus established by the Dongan charter was also called the mayor's court; and in several statutes both titles are used. In 1797 a statute was passed under which the court of common pleas, "called the mayor's court," might be held by the mayor and recorder, or either of them, without the presence of any of the aldermen, although they were continued as members of the court, and might, if they chose, sit as judges therein. By chapter 72 of the Laws of 1821, the court was to be known as the court of common pleas of the city and county of New York, and it ceased to be called the mayor's court. The act created the office of first judge of the court, to be appointed by the governor and Council of Appointment, and to hold office during good behavior, or until he should attain the age of sixty years. The first judge, the mayor, recorder, and aldermen were to be the judges of the court, "and the said first judge, or the said mayor, or the said recorder alone, or together with one or more of the said judges, shall have full power to hold the said court." An associate judge was provided in 1834, and another in 1839, and vested with the same powers as the first judge. In 1847, three judges of the court were made elective by the people. The Code of Procedure of 1848 prescribed the number of judges who were to hold general and special terms. Early in the history of the court the mayor and aldermen ceased to be active members of it, although not actually excluded by statute. As already observed, the Convention of 1867 increased the number of judges from

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three to six; and by the judiciary act of 1870 provision was made for the election of the three additional judges. The Code of Civil Procedure of 1876 contained provisions relative to the terms of the court and the judges by whom they were to be held. The act of 1821 was repealed in 1881.

Superior court of New York.—This court was established by chapter 137 of the Laws of 1828, with a chief justice and two associate justices, to be appointed by the governor and senate for terms of five years. The court was given jurisdiction of "all local actions arising within the city and county of New York, and all transitory actions, although the same may not have arisen therein." Judgments of the superior court might be reviewed by the supreme court, on writ of error. The jurisdiction of the court was extended and established by the Code of Procedure of 1848. By chapter 255 of the Laws of 1847 the judges of the superior court were to be elected by the people, for terms of six years. By chapter 124 of the Laws of 1849 the number of judges was increased from three to six. Under this chapter two judges might hold a general term of the court.

Superior court of Buffalo.—This court had its origin in the recorder's court, which was established in 1839. By chapter 96 of the Laws of 1854 the name of the recorder's court was changed to that of the superior court of Buffalo. The court was to be composed of three judges, to be elected by the people for terms of eight years. The statute prescribed the jurisdiction of the court, regulated the procedure therein, and provided for general and special terms.

The city court of Brooklyn.—This court was established by chapter 125 of the Laws of 1849, with one judge, elected by the people for a term of six years. It was a court of record, and possessed general jurisdiction

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in local actions. In 1850 appeals were authorized from this court to the general term of the supreme court. By chapter 470 of the Laws of 1870 two judges were added to the court pursuant to the authority conferred by § 12 of the new judiciary article of the Constitution.

Mr. S. Townsend, discussing the judiciary committee's plan, objected to the exception in favor of these courts by including them in the Constitution, and excluding the courts of other cities, because he thought the Constitution should provide one uniform judicial system. Mr. Cooke proposed to amend the section by giving the legislature the power to establish courts of limited jurisdiction in cities, without specifying any courts. Judge Comstock said it was a grave question whether the courts named in the section should be included in the Constitution. "They are courts of the very highest importance, scarcely second in importance to the supreme court, and it is a very serious question whether they should be subjected to the will of the legislature." He thought that whatever reasons applied for fixing the supreme court permanently on the foundations of the Constitution applied with equal force to the courts in the city of New York. Their jurisdiction, within the territorial limits, was equal to that of the courts of the state. He thought the courts should receive a recognition in the Constitution. On motion of Mr. Evarts the legislature was authorized to provide by law for detailing judges from the superior court or court of common pleas to hold circuits or special terms of the supreme court in New York. Discussing the subject, Mr. Evarts said that it had been considered in the judiciary committee in connection with the "habit which prevailed in England, and which has been found very useful, when an accumulation of business should arise in any circuit, by authorizing, by special commission from the Crown, a barrister to discharge

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particular functions for a limited period for the relief of that particular circuit." After the city court of Brooklyn was included in the section the same provision was extended to the judges of that court. By this provision twelve additional judges were made available for service in the supreme court in the first district, and three in the county of Kings. This provision was made operative in New York by the judiciary act of 1870, chapter 408, and in Kings county by chapter 10 of the Laws of 1881. These statutes authorized the governor to designate local judges to hold specified circuits or special terms of the supreme court in their respective counties.

SURROGATES' COURTS.

The judiciary committee submitted some radical and far-reaching recommendations concerning surrogates' courts. While continuing the provision in the former Constitution, under which the county judge was to act as surrogate in the smaller counties, the power was vested in the legislature to create a separate office in more populous counties, and the committee practically vested in the legislature power to determine whether and how long these courts should continue as constitutional tribunals, and whether their functions should be transferred to, and distributed among, other courts. The committee proposed the following section:

"The legislature may create probate courts, abolish the office of surrogate, confer upon existing courts the powers and duties of surrogate and the jurisdiction of surrogates, create registers of wills and of the probate thereof, and of letters of administration, and provide for the trial by jury of issues in surrogates' courts, and in courts having the like powers and duties."

It is not surprising that it attracted the attention of the Convention. Erastus Brooks moved to strike it out;

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and on this motion Mr. Folger, chairman of the judiciary committee, said the section had arisen from the demand which has been made upon the legislature, from time to time, for the creation of additional surrogates' courts in the city of New York. "The plan proposed was for two additional surrogates in the city of New York, dividing the city into three divisions by geographical lines. The query was raised and affirmatively answered, that there was no power in the legislature to create additional surrogates' courts in that city; that the language of the Constitution inhibited it. There must, by its provisions, be one surrogate's court for each county, and no more." He said the section was proposed for the purpose of meeting the necessity existing in New York, and enabling the legislature to afford relief in any manner that seemed adequate and desirable, especially by providing "for the trial of issues which are raised in surrogates' courts, and tried by juries instead of surrogates." Mr. Evarts also made some observations on the proposed section, suggesting that, with the probable increase of wealth and population in New York and Brooklyn, there would be a corresponding increase in the number of probate cases, and that it might be "desirable that the legislature should have the power to separate the mere official duty of the surrogate, as the register of wills, and in taking formal proof of uncontested wills, and issuing testamentary papers and letters of guardianship, from the true judicial functions now discharged by the surrogate, and which pass upon the gravest questions of law and fact that can be submitted to any tribunal of the state." Mr. Evarts expressed doubt whether, with the office of surrogate established in the Constitution, the legislature would have the power to "make a court of probate that would have a judge under the usual conditions of judicial responsibility which belong to a judge

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of a court of record, and a jury as a part of its framework." Commenting on the expensive method of procuring a jury trial in probate cases by an appeal to the general term, he thought that, in the interest of economy, the legislature should have power, on the application of any community, to "open a probate court for the trial of contested cases with a jury," leaving undisturbed the official duties of the surrogates "in the registration of wills and formal probates." Mr. Brooks' motion to strike out the section was lost. Mr. Brooks then moved to strike out the clause authorizing the legislature to abolish surrogates' courts. This was agreed to, but a motion by Mr. Livingston to strike out the provision authorizing the legislature to confer on other courts the powers and jurisdiction of surrogates was lost.

When the judiciary article was under consideration again on the report of the committee on revision, containing this section as amended in committee of the whole, the Convention, on motion of E. A. Brown, struck out the section, and substituted for it a provision that "the legislature may provide for the trial by jury of issues in surrogates' courts." Mr. Brown thought that the Constitution ought not to contain any provision permitting "such a radical change in the surrogates' courts as that proposed by the judiciary committee." Such courts had long been organized in all the counties, and were useful and convenient. "The people have become accustomed to them as now organized, and are satisfied with them." Mr. Folger said the proposed section was intended especially for the city of New York, where the surrogate's court was overtaxed in the amount of its business; that repeated efforts had been made in the legislature for the passage of bills for the relief of the court. Commenting on the provision in the Constitution by which a surrogate's court is provided for each county,

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he said: "It has been held by good lawyers that, under the present Constitution, no relief can be afforded to the city and county of New York, but that they must continue with one surrogate's court, and one only." Mr Church also objected to the judiciary committee's plan, observing that it was not limited to New York, but that under it additional courts and officers might be created in any county, thereby largely increasing local expense. He thought that if such a provision were needed in New York it ought to be limited to that county alone; and suggested that the committee frame a new section for that purpose. Mr. Brown's substitute was adopted by a vote of 46 to 26. Mr. Rumsey then moved to strike out the Brown substitute. He said the effect of it might be to send all issues of fact in a surrogate's court to a jury for trial; that much the largest proportion of questions of fact in that court should be disposed of without a jury, and that the power vested in the general term to send such questions to a jury afforded all the relief needed. Mr. Rumsey's motion was carried, and this apparently disposed of the whole subject; but the next day Mr. Folger, on behalf of the judiciary committee, submitted a section vesting in the legislature authority to confer on courts of record in counties with a population exceeding 400,000, "the powers and jurisdiction of surrogates, with authority to try issues of fact by juries in probate cases." The section was adopted and became a part of the judiciary article. It seemed from statements made in the Convention by prominent delegates that there was a most urgent necessity for the relief afforded by this provision, especially in New York; but it was not applied until 1886,—sixteen years after it was put into the Constitution,—and then it was limited to the court of common pleas, instead of being extended also to the superior and supreme courts.

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Chapter 119 of the Laws of 1886 amended § 2547 of the Code of Civil Procedure by conferring on the surrogate of New York the power to transfer probate cases to the court of common pleas. The superior court and court of common pleas were abolished by the Constitution of 1894; this provision was amended and made applicable only to the supreme court; and by chapter 946 of the Laws of 1895 the section of the Code was amended accordingly, limiting the transfer of probate cases to the supreme court. I do not find any statute extending the provision to Kings county. The statute does not prescribe the enumeration that is to govern in such cases. Under the Federal census of 1900, Erie county has a population exceeding 400,000; and, if that census controls, is entitled to the benefits of the constitutional provision.

I have already quoted from the remarks of Mr. Folger and Mr. Evarts in the Convention of 1867, expressing their own doubts and the doubts of others concerning the power of the legislature to provide additional surrogates' courts, for the reason that there could be only one surrogate's court in any county. In 1892 the legislature sought to afford relief in New York without creating another surrogate's court, and chapter 642 was accordingly passed, which declared that "the surrogate's court of the city and county of New York shall hereafter consist of two surrogates," and authorized the election of another surrogate, but did not define his powers. Apparently this form of relief did not occur to the Convention of 1867. Governor Roswell P. Flower, in a memorandum accompanying the act, said that, practically, the constitutionality of the bill was the only question he considered in connection with it, He thought the affirmative arguments established its constitutionality, but that it could be tested, if desired, before the new

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surrogate could enter on the duties of his office. If there was any doubt about the status of the surrogate's court in New York under this act it was settled by § 15 of article 6 of the Constitution of 1894, which continued existing surrogates' courts and the surrogates then in office.

INFERIOR LOCAL COURTS.

The judiciary committee proposed to continue the provision of the Constitution of 1846, authorizing the creation of inferior local courts, with civil or criminal jurisdiction in cities, adding Brooklyn to the cities excepted from the requirement of uniform organization and jurisdiction. This provision was included in the county court section, and when that section was under consideration the Convention adopted Mr. E. A. Brown's proposition to strike out the provision requiring uniform organization and jurisdiction of such courts; and on a later motion by Mr. Cooke the limitation on the power of the legislature to create such courts in cities only was abrogated, thus giving the legislature power to establish such courts in any community. The provision appears in this form in § 19 of the judiciary article.

COURTS OF SPECIAL SESSIONS.

The Convention adopted an amendment proposed by Mr. Folger, which he said he offered for an "absent delegate," providing that "courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law;" but rejected Mr. Hadley's motion to give these courts the right to try such offenses with or without a jury.

GENERAL PROVISIONS.

Under the Constitution of 1846 the clerk of the court of appeals was elected by the people. By the new ju-

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diciary article the court appointed its clerk, and he was required to keep his office at the seat of government. The court of appeals and the general terms of the supreme court were also authorized to appoint reporters for the respective courts. The provisions of the former Constitution relating to justice's courts were continued. The county clerks were continued as clerks of the supreme court. Judges of the court of appeals, justices of the supreme court, and judges of the courts of record in New York, Brooklyn, and Buffalo were prohibited from practising as attorneys or counselors in any court of record, or acting as referees. Justices of the supreme court, county judges, surrogates, local city judges, and justices of the peace were continued in office until the expiration of their terms. Judges of the new court of appeals and the other judges provided for by the new article were to be elected in the spring following its adoption.

The new judiciary article was approved by the people at the general election in November, 1869, and, pursuant to statutes passed early in the session of 1870, the election was held on the 17th of May, and the new judges entered on the duties of their offices on the first Monday of July, 1870. The court of appeals established by the Constitution of 1846 was organized on the first Monday of July, 1847, and after an existence of twenty-three years was succeeded by the new court of appeals on the first Monday of July, 1870.

METHOD OF CHOOSING JUDGES.

The Convention sometimes seemed inclined to look backward,—to search among the rejected amendments and outgrown experiences of earlier years for reforms in the Constitution. This conservative tendency has been manifest in all our conventions, and in each of them attempts, sometimes successful, have been made to in-

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corporate provisions in the Constitution which had been rejected by former conventions; or else to "turn back the hands of time" and return to former conditions which the people had deliberately abandoned. A striking illustration of this tendency was the proposition of this Convention to ask the people to vote directly on the question whether the judges of the higher courts should be elected or appointed. To this generation such action seems surprising, in view of the development of opinion and experience concerning the proper method of selecting public officers. The earlier method had been almost exclusively by appointment. It was an inheritance from the royal policy which, in theory as well as in practice, made the Crown the source of all authority, and therefore the only power which could logically appoint to office. The framers of the first Constitution were familiar with this policy, and had no experience with any other. I have described in former chapters to some extent the development of the opinion concerning the popular selection of public officers, and the Convention of 1846 expressed this development in the new and almost universal policy of choosing officers by popular election.

The governor and legislature had been elective from the beginning; but the state waited seventy years before it saw the judges of the higher courts chosen directly by the people. So, when the Convention of 1867 deliberately asked the people to vote on the method of choosing the judges, twenty years had passed since the policy of election had been established, and under which the judges had been chosen.

The judiciary committee did not itself propose to change the policy, and make the judges appointive instead of elective. Its original plan provided for the election of judges, but the report also contained a provision asking the people to determine whether the judges

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should continue to be elective, or whether the state should return to the appointive plan. These two propositions, taken together, meant that, while the people were to vote on the ratification of the Constitution, which, in terms, provided for the election of judges, the Constitution, so ratified, would provide that, at a specified later date, the people should have the opportunity to change the method of choosing judges, and to return to the policy which had prevailed under the first and second Constitutions. There was strong opposition in the Convention to the provision for such submission. While there were many advocates of an appointive system, the Convention consistently adhered to the policy of election, and to many delegates it seemed incongruous to send to the people a Constitution providing for an elective judiciary, and at the same time ask them to vote, three years later, whether they would continue this method of choosing their judges. A motion by E. A. Brown to strike out the section was lost by the close vote of 42 to 43; on later tests the margin was slightly increased, but the vote showed that the Convention was almost equally divided on the propriety of submitting the question to the people. On motion of Mr. Krum, county judges were also included in the plan. Other delegates moved to include district attorneys and justices of the peace, but the Convention declined to accept these suggestions. The city court of Brooklyn was added, and then, after some discussion, the section, on Judge Comstock's motion, was limited to judges of the court of appeals and the supreme court; but later the Convention adopted a motion by Mr. Folger to submit two questions: one including the judges of the court of appeals and justices of the supreme court, and the other county judges, judges of the superior court of Buffalo, the superior court and court of common pleas of New York, and the city court of Brooklyn.

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The section, in its final form, provided for submitting these questions at the general election in 1873. The questions were submitted accordingly. The people had then had twenty-five years' experience in choosing judges by election; the new court of appeals, additional judges in the city courts, and several justices of the supreme court and county court had been elected under the new Constitution, and the new judicial system was in full operation. Nevertheless, with this experience, and under these conditions, advocates of an appointive judiciary were not wanting, for 115,337 electors voted for the appointment of judges of the court of appeals and justices of the supreme court, and 110,725 voted for the appointment of county judges and judges of the city courts above named. But the people were evidently not willing to relinquish the right to choose their own judges, and both propositions were defeated by majorities exceeding 200,000.

The Constitution That Might Have Been.

THE BILL OF RIGHTS.

Every convention seems to think it important to state with considerable detail the principles on which constitutional government is properly constructed. Sometimes these principles are stated with great detail, and again in mere outline. The Convention of 1867 thought it important to modify some of the statements in the Bill of Rights. Some of these proposed modifications were due to judicial decisions, some to the development of internal improvements, and others to the influence of the great Civil War through which the country had just passed. This influence found expression in several proposed amendments, showing that the war had compelled men to modify their opinions concerning the proper rela-

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tions of state and Federal governments. Thus, Mr. Bell proposed to amend the preamble so that it would express, not only gratitude for the blessings of freedom, but also for the blessings "of preserved nationality." Augustus Frank, speaking for the committee, said it had considered the proposition, and had unanimously determined not to recommend it, for the reason that, as the Convention was making a constitution for the state, "a question relating to national affairs was not proper to be inserted in the preamble to our Constitution." The amendment was withdrawn. Again, when the habeas corpus section was under consideration, Mr. Verplanck offered an amendment that "no person shall be arrested without due process of law, except as authorized by the common law." Explaining the amendment, he said he wished to prevent arrests, "except where the complaint has been made on oath before a magistrate and a warrant issued, or in cases authorized by the common law, and to prohibit the legislature from authorizing the arrest of the citizen in any other case." He referred to some instances of arrests which he thought unlawful, but, in reply to a question by Mr. Van Cott, said the arrests had been made by Federal officers during the late war. Smith M. Weed favored the amendment because it would prevent arrests in the metropolitan police district under an existing statute which would be unconstitutional if the amendment were adopted. Several delegates opposed the amendment on the ground that the liberty of the citizen was already amply protected by various provisions in the Constitution, and the amendment was rejected by a vote of 12 to 48.

Once more, when the Convention reached the section which declares that the people, 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," Judge Comstock proposed to add a provision that

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"they have also every other power, jurisdiction, and right of a free sovereign and independent state, except such as they have expressly delegated by the Federal Constitution to the United States," which he said was intended to "affirm the right of the state as a sovereign state, subordinate only to that degree of sovereignty, or to those enumerated powers, which have been delegated by the Constitution to the United States." He accepted this amendment suggested by Mr. Alvord: "But the Constitution and laws of the United States shall be deemed paramount in all cases where any conflict of jurisdiction or laws shall arise." The Comstock amendment was opposed as unnecessary, because, under the Tenth Amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It was rejected by a vote of 37 to 66.

When the jury section was under consideration Mr. Merwin moved to amend by inserting the words, "except that in suits in justices' courts provision may be made by law for trial by a jury of less than twelve men." It seems from Mr. Merwin's remarks on presenting the amendment that it was intended to remove any doubt concerning the power of the legislature to increase the civil jurisdiction of justices' courts, although by such increase a cause might be tried before a jury of six men, instead of a jury of twelve, if the action had been brought in a court of record. The court of appeals had decided in the *Wynehamer Case* (1856) 13 N. Y. 378, that a provision in the Excise Law of 1855, chapter 231, giving courts of special sessions jurisdiction to try persons charged with violating the law, was unconstitutional, for the reason that before such statute they had a right to a common-law jury of twelve men. The Convention agreed to Mr. Merwin's amendment, and it was included

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in the section as finally reported. In June, 1868, the general term in the 7th district (*Dawson* v. *Horan,* 51 Barb. 459) decided that a statute increasing the civil jurisdiction of justices' courts was not unconstitutional because it required a trial before a jury of six men, instead of twelve. This decision was approved in *Knight* v. *Campbell* (1872) 62 Barb. 16, where Mr. Justice Johnson, in an elaborate opinion, reviewed the history of legislation on this subject, and showed that, as early as 1737, the colonial legislature, in a statute relating to the jurisdiction of justices' courts, prescribed a jury of six men, and that this number had been continued from that time, while the jurisdiction had often been changed, both during the colonial period, and after the organization of the state. If the *Dawson Case* had been decided a few months earlier, probably Mr. Merwin's amendment would not have been presented.

When the section on religious freedom was under consideration George William Curtis moved to strike out the words "without discrimination or preference." The Convention agreed to do this, but afterwards, when reminded of its possible effect, Mr. Curtis acknowledged that without these words the legislature might establish a state church, and he promptly consented to their restoration.

On Mr. Verplanck's motion, the grand-jury section was amended by providing that "in any trial in any court the party accused shall be confronted with the witnesses against him." He said the object of it was to prevent evidence in criminal cases being taken by a commission, and that it was in nearly every state Constitution. This provision, which has not yet been included in the Constitution, will be found in the article on the Bill of Rights, in the chapter on the second Constitution. It has been a part of our statutes for more than a century.

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The Convention also once adopted an amendment giving the defendant in a criminal trial the last appeal to the jury, but afterwards this was stricken out.

The committee on industrial interests recommended the adoption of the following section, drawn by Mr. Wales: "The legislature may pass laws authorizing and permitting parties owning or occupying lands to construct agricultural drains across the lands of other parties when such drains shall be necessary; and under proper restrictions, and under proper remuneration." When the Bill of Rights was under consideration Mr. Duganne moved to amend § 7 by providing for the construction of agricultural drains and ditches. On the first test the amendment was rejected, but it was afterwards renewed by Mr. Lapham, and adopted with modifications, and was included in the Constitution proposed by the Convention. Mr. Lapham, Judge Comstock, and others supported the amendment, and it was opposed by several delegates, among them Mr. Livingston, who objected to it because under it private property might be taken for private use, and he thought the Constitution should not attempt to sanction such a doctrine. Mr. Livingston's suggestion is important in view of the opinions expressed by judges of the court of appeals in a case construing a similar provision in the Constitution of 1894.

The Convention adopted an important amendment on motion of David Rumsey, which declared that "the fee of land taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners, subject to the sole possession of the railroad company while used for such purposes." Mr. Rumsey said the amendment was intended to apply to railroads the rule governing highways, namely, that, on the discontinuance of the highway, the land reverted to the owner; it was not in-

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tended to apply to land taken for buildings, but only to land taken for tracks.

Mr. S. Townsend offered a section providing that "faithful conduct in the civil and military service of this state shall be recognized by a suitable compensation when, from inability, the individual may be no longer qualified to discharge such service;" but the Convention declined to adopt it. The principle of this amendment has been adopted and applied in several municipal statutes, and was included in the Constitution and applied to the compensation of judges of the higher courts.

The Convention also declined to accept an amendment offered by Mr. Wales, conferring on resident aliens the same rights relating to property as were enjoyed by native-born citizens. The Convention, without debate, increased the limit of agricultural leases from twelve to twenty years. An amendment proposed by Mr. Bell was adopted, providing that "the right to take fish in any of the international waters bordering on this state shall not be denied or restrained." A section in a somewhat different form had been reported by the committee on industrial interests, and, in support of it, the committee said it was recommended for the reason that "certain lakes and rivers of the state are so located as to be accessible, for fishing purposes, to the inhabitants of an alien country, as well as to our own citizens, and, in consequence of this fact, no restrictions upon our citizens can restrain aliens from taking fish in the same waters, but they will only operate to give the said aliens an undue advantage over citizens of this state." The Convention declined to adopt an amendment offered by Mr. S. Townsend, that "remedies existing when a contract is made shall not be disturbed or impaired by subsequent legislation." Judge Comstock proposed to add to the first section of the Constitution a provision that "the

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elective franchise and the right of the citizen to hold office are determined by this Constitution, and no test or official oath not herein provided for shall ever be required." This proposition seems to have been suggested, at least in part, by the provision in the Convention act requiring a challenged voter to swear to his loyalty, and Judge Comstock thought that, where the Constitution prescribes the qualifications of voters, the legislature should not have the power to require any other qualification or test. The proposition was rejected by a vote of 40 to 65. Mr. Landon proposed to prohibit the imprisonment of witnesses to insure their attendance, if they give security therefor; "and, if unable to give security, their testimony shall be taken in a manner to be provided by law, in the presence of the accused, and thereupon they shall be discharged." The Convention once agreed to this amendment, but later, on motion of Mr. Veeder, it was stricken out, and the original provision concerning detention of witnesses was restored. The Convention declined to adopt a suggestion by Mr. Livingston, that "the title of a citizen to real estate shall not be impaired by reason of the alienism of any person through whom such title is derived." The Convention also rejected Mr. S. Townsend's proposed amendment making counties liable for the damages caused by mobs. The legislature in 1855, by chapter 428, had provided for this class of cases, and that statutory provision is still in force.

SUFFRAGE.

Horace Greeley, chairman of the committee "on the right of suffrage and the qualifications to hold office," presented a majority report on the 28th of June, containing an article on suffrage, which modified in many important respects the existing constitutional provisions

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on this subject. The general qualifications of voters were stated as follows:

"Every man of the age of twenty-one years, who shall have been an inhabitant of this state for one year next preceding an election, and for the last thirty days a citizen of the United States, and a resident of the election district where he may offer his vote, shall be entitled to vote at such election, in said district, and not elsewhere, for all officers elected by the people."

It will be observed that this provision omits the requirement of residence for a stated period in a county; the voter must have resided in the state one year, in the election district thirty days, and must have been a citizen thirty days. Residence in the state was the general standard, and the voter must have been a citizen during all the required residence in an election district. The section then excludes from the right of suffrage idiots, lunatics, persons under guardianship, felons, persons convicted of bribery, persons who have been paupers thirty days next preceding an election, and persons who "shall receive, expect to receive, pay, or offer to pay, any money or other valuable thing to influence or reward a vote to be given at an election;" and the legislature was authorized to exclude from the right of suffrage persons who should make or be interested in a bet or wager depending on the result of the election. The majority plan also continued the provision that, "for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state, of the United States, or of the high seas, nor while kept in any almhouse or other asylum at public expense, nor while confined in any public prison;" and also the pro-

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vision adopted in 1864 concerning the soldier vote in time of war. The plan required a registration of voters to be completed at least six days before election, and to be uniform throughout the state. The provision requiring elections to be by ballot was continued from the Constitution of 1846 without change. The plan required an office holder to be an elector, and continued the official oath prescribed by the existing Constitution.

Mr. Cassidy and Mr. Schumaker presented a minority report expressing their dissent from certain propositions contained in the majority report, but without submitting any sections in detail. They expressed their preference for the existing provisions of the Constitution concerning the qualifications of voters, for the reason that they were familiar, and had already received judicial interpretation.

The suffrage article was considered at great length, and involved a protracted debate on its different features; and, during the progress of this debate, numerous amendments were offered, sometimes of a substantial, and sometimes of a verbal, character, sometimes relating to the article as a whole, and again to separate parts of it. The article naturally divides itself into several subjects, somewhat distinct, though related to the general plan, and it will doubtless be most convenient to examine these subjects separately.

Qualifications.

a. In general.—Mr. C. C. Dwight proposed to substitute the sections in the existing Constitution, relating to the qualifications of voters and bribery, for the first section reported by the committee. While the section on qualifications of voters was under consideration, Judge Comstock moved to strike out the clause, "for all officers that now are, or hereafter may be, elected by the people." The effect of this would have been to

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fix by the Constitution the qualifications of voters at each election, without specifying for whom or for what they might vote. Discussing the section containing this clause, Judge Comstock said he thought there was a "certain looseness and redundancy of expression which may be very inconvenient in carrying on the government, and may be even mischievous and fatal." He then referred to the debate in the legislature of 1867, when the convention act was under consideration, in which doubt was expressed whether delegates to a constitutional convention were officers under the Constitution, and, therefore, whether the provision of the Constitution prescribing the qualifications of voters should govern in the election of such delegates, and whether the legislature had not the power to say who should and who should not be entitled to vote. It seems that the assembly thought that the qualifications of voters for delegates were fixed by the Constitution, and that the senate was of a different opinion, proposing to give every adult male citizen of ten days' standing, who had been a resident of the state a year, and of the senate district four months, a right to vote for delegates. This enlarged the qualifications prescribed by the Constitution. The result of the difference between the two houses was a compromise, making the right to vote for member of assembly the general test of the right to vote for delegates, with the additional requirement that the voter must, if challenged, prove his loyalty. The legislature did not add new voters, but by the test oath subtracted from those qualified under the Constitution. Judge Comstock then inquired what the rule would be with the clause in the Constitution relating to officers if a question were submitted relating to the Constitution itself. Who would be entitled to vote? And who would be entitled to vote on an election of delegates to a new Constitutional convention? "Will it be con-

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trolled by the Constitution, or will it be in the power of the legislature to say that such men may vote and other men may not vote? Will it be in the power of the legislature to submit the important, fundamental questions which may lie at the very foundation of civil liberty with reference to the suffrage of a class?" Judge Comstock said there ought to be a uniform rule of suffrage "for all occasions and all times," and that persons possessing the constitutional qualifications should have the right to vote, not for officers only, but on all questions when the will of the people is to be consulted. Mr. Folger, who was in the senate of 1867, discussing Judge Comstock's motion, said it was suggested in the legislature that delegates to the Convention were not officers, and therefore the legislature was not bound by the Constitution, but might give the "privilege of voting to others than those empowered by the Constitution to vote for officers;" but that the true and prevailing ground on which the right of the legislature to enlarge the body of electors for delegates to this Convention was placed in the senate, "was that the formation of a new Constitution was a semi-revolutionary matter; that it was the whole people who once more undertook the work of reorganizing their fundamental law," and "they were to be consulted as to this new form of the organic law, and it was for them to determine who were to be called together to frame it." It was held that "there is not of right a class who alone can rule; that to rule is a privilege conferred; and, if a privilege, then it can be recalled by the power that gave it. That power is the whole people, and, when a new Constitution is to be formed, in which is to be laid down, again, to whom shall be given the privilege of ruling, the whole people should be consulted. It was upon this ground, and not upon the narrow ground stated by Judge Comstock, that a delegate was not an officer.

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A Constitution is the work of the whole people, and the whole people are to be consulted, men and women, white and black." Judge Comstock's amendment does not reach this position. "For if it is true that in going back to the people, as the people they have the right to say, when they tear up the foundation work of the organization of society, who shall be the workmen; they have the right to be consulted, and to take hold and assist in laying the new groundwork. Then nothing in this Constitution, however stringent may be its provisions, will protect and guard against that." Mr. Folger then referred to the convention act of 1821, by which the legislature prescribed liberal qualifications of voters for delegates, and which admitted nearly all adult male citizens; but it should be observed that, under the first Constitution the governor, lieutenant governor, and members of the legislature were the only elective state officers, and the qualifications for voters for each were specifically prescribed. The Constitution did not prescribe the qualifications of voters at local elections, and did not furnish a rule for the election of a constitutional convention. Mr. Folger might also have cited the convention act of 1801, which prescribed a more liberal rule, for under it "all free male citizens of this state of the age of twenty-one years and upwards" were entitled to vote for delegates. This was a recognition of the principle stated by Mr. Folger, that in the election of delegates to a constitutional convention the people act in their original sovereign capacity, and are not restricted by a written constitution, which does not in terms prescribe the qualifications of voters at such an election. By the act which called the Convention of 1846 voters for delegates must have been qualified to vote for members of assembly, and the same rule was applied in the election of delegates to the Convention of 1894. The Constitution proposed by that convention

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settled the question by requiring delegates to future conventions to be chosen by electors. This deprives the legislature of any power to enlarge or restrict the qualifications prescribed by the Constitution. There was some further discussion of Judge Comstock's amendment, but the Convention did not deem it wise to eliminate the clause which conferred on an elector the right to vote for all officers. The amendment had elicited debate on an important question, and its consideration was continued, although the Comstock amendment was not adopted. Two days later Mr. Church offered an amendment that, in addition to the right to vote for all officers, an elector should also have the right to vote "upon all questions which may be submitted to the vote of the people." Judge Comstock suggested that the words "of the state at large" be added, "so as to avoid the question of municipal charters," and they were accordingly included in the proposed amendment. On this amendment Mr. Church said: "This section prescribes the qualifications of voters for all officers that now are, or hereafter may be, elected by the people. It seems to me proper that the same qualifications should exist upon all questions which may be submitted to the vote of the people. There are a great many questions that the legislature may submit,—questions provided in the Constitution, such as questions of debt and others. Unless we insert this provision, it will be in the power of the legislature to prescribe qualifications for electors for that particular election, and they may enlarge the elective franchise or restrict it at their pleasure. It seems to me we should have the same rule applied to the election of all officers, and to all other questions on which the people will vote." Mr. Folger moved to amend by restricting the application of the provision to questions required by the Constitution to be submitted to the people, remarking that the legisla-

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ture, on the submission of a question, might prescribe qualifications of voters not specified in the Constitution. Discussing the subject further, Mr. Folger reiterated the opinion that the legislature, "in passing an act for the calling of a convention to revise the Constitution, had a right to include in the electoral body persons who were not authorized by the Constitution to be amended to vote for delegates;" and by his proposed amendment he intended to except this power from the operation of the Church amendment. Mr. Folger's amendment was lost. The Convention evidently felt serious doubt concerning the wisdom of the Church amendment, for it was adopted by the narrow margin of 70 to 67. Mr. Folger voted against it, saying that without his amendment it was "mischievous and dangerous." Experience has not justified Mr. Folger's fears. The clause was sent to the people in this form, but the phrase "of the state," at the end of the clause, was omitted by the Commission of 1872, and the provision was adopted in 1874 without those words. Some observations will be made in the chapter on that commission concerning the effect of this omission.

Mr. Bickford moved to reduce the minimum age of voters to eighteen years in the case of native citizens who had always resided in the state, and thirty-three delegates voted for this amendment.

b. Residence.—The requirement of a year's residence in the state, prescribed by former Constitutions, was continued without objection. The majority of the committee proposed to abrogate the former provision requiring residence for four months in the county. The majority report urged, in favor of this change, that thousands of mechanics left the cities to work in neighboring localities during the summer, that they could not afford to maintain two residences, and it was often doubtful where they could vote; and also that hundreds of Methodist and

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other clergymen, who changed their location in the summer, were often deprived of the right to vote by reason of the four months' limitation. The committee thought it "wise to abolish a requirement which debarred thousands of capable and worthy citizens." It will be remembered that, under the Constitution of 1846, the only limitation concerning residence in a district was that the voter must have been thirty days next preceding the election a resident of the district from which the officer was to be chosen for whom he offered his vote. This did not relate to an ordinary election district, except as to officers chosen from such a district, but related to districts created for purposes of representation, such as assembly, senate, and congressional districts, and also counties or other municipalities. The requirement was that the elector must have been for thirty days a resident of the district from which the officer was to be chosen. The majority report points out that, under the former Constitution, a voter might be a stranger in the election district where he offered his vote, because his right to vote depended on his state and county residence, and not on his residence in a particular election district. The committee thought that an absolute residence of thirty days in the election district should be required, and that it was more important than a four months' residence in the county. Mr. McDonald offered an amendment requiring a residence for thirty days in the district in which the elector should offer his vote. This modified the provision which required the elector to have resided thirty days in the district in which the officer resided for whom he offered his vote.

The suffrage committee had omitted the provision which declared that a person should not be deemed to have gained or lost a residence for the purpose of voting while absent "as a student of any seminary of learning."

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Mr. Greeley thought the clause was unnecessary because the Convention could not determine a man's residence, which is the real test of his right to vote, and is not necessarily affected by his attendance at school. He thought that if a young man went to a college town to obtain an education, and had no other home, he ought not to be disfranchised for that reason. Mr. Landon proposed to amend the provision relative to the soldier vote by making it include students in seminaries of learning out of the state, thus requiring the legislature to provide for taking their votes while absent. His amendment was not adopted. Mr. Van Campen proposed to reduce county residence from four months to two. On Mr. Lapham's motion, amended at the suggestion of W. C. Brown, the voter must have been a resident thirty days in the town or ward, and ten days in the election district.

c. Naturalized citizens.—Under the existing Constitution, a voter must have been a citizen ten days before the election. This applied to naturalized citizens, and required them to complete their naturalization at least ten days before election. The report states that the committee had been asked to extend this limitation to sixty days, but had concluded to fix it at thirty days. The minority preferred to retain the ten-day rule, principally for the reason that the rule suggested by the majority might deprive a large number of citizens of the right to vote in 1868 and 1869.

d. Persons disqualified.—This part of the committee's plan was intended to include the disqualifications already stated in the Constitution, and others which were fixed by statute. It was thought that the Constitution itself should state the qualifications and disqualifications specifically. Mr. Lapham proposed to add to this list "persons judicially declared to be of unsound mind, or incapable of managing their own affairs." Mr. Duganne

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proposed to authorize the legislature to exclude from the right of suffrage "persons registered by the police as notorious and professional violators of the law, or as engaged in and sharing the proceeds of illegal and criminal practices and pursuits."

e. Registration.—The committee proposed to make registration compulsory, under uniform laws. The plan did not require personal registration; that subject was left to the legislature, but the registration must have been completed at least six days before the election.

f. Educational qualifications.—This subject was not new in this convention. Amendments had frequently been presented to the legislature prior to the convention, requiring voters to possess certain educational qualifications. Many delegates urged the adoption of such a provision, and it was one of the subjects considered by the committee on suffrage. That committee declined to recommend an educational qualification. In speaking of this subject, the committee say that "men's relative capacity is not absolutely measured by their literary acquirements; and the state requires the illiterate, equally with others, to be taxed for her support, and to shed their blood in her defense. We prefer that she shall persist in her noble efforts to instruct and enlighten all her sons by means less invidious and more genial than disfranchisement." While the suffrage article was under consideration, several amendments were offered prescribing an educational qualification, but they were all rejected. Mr. Carpenter proposed to submit this question separately. Mr. Greeley opposed this, saying that the committee had determined not to recommend any separate submissions, for the reason that they tended to confuse and alienate the people. He objected to submitting the Constitution "in patches." Judge Comstock proposed a preamble to the suffrage section in the following words:

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"The people of this state, in virtue of their constitutional sovereignty, have the undoubted right to establish and regulate for themselves the elective franchise without interference or control by any other authority whatsoever. It is therefore declared as follows." Fifty delegates voted for this preamble, but it was not adopted. After considerable discussion, Mr. Dwight's motion to substitute the original first section with some amendments for the plan proposed by the suffrage committee was adopted by a vote of 70 to 45. This showed a clear purpose to preserve the qualifications already well established and well known, and was another illustration of the conservatism of the Convention.

Woman suffrage.—The woman suffrage movement had its organized beginning in a convention held at Seneca Falls, New York, in July, 1848. That convention was called by four women, and was largely attended by both men and women. The women who called the convention prepared beforehand a "Declaration of Sentiments," in the general form and style of the Declaration of Independence, substituting "all men" for "King George," and "women" instead of the "American colonists," as the sufferers from the tyranny denounced by the declaration. The original Declaration had eighteen grievances against King George, and the promoters of the new movement wished to state the same number of grievances in their declaration. It required a protracted search among law books, church usages, and social customs to find the required number, but, with the aid of "several well-disposed men," the eighteen grievances were found and duly set in order. Under the call for the convention, the meeting on the first day was for women exclusively, but, notwithstanding this notice, many men were present at the opening of the meeting. The promoters concluded that the men might make them-

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selves useful, and they were permitted to stay "and take the laboring oar through the convention." Elizabeth Cady Stanton, Lucretia Mott, Frederick Douglass, and other advocates of the new movement were there, actively engaged in formulating an aggressive policy for the enlargement of woman's opportunities. The convention was in session two days, and at its close the declaration with its eighteen grievances was, like its great original, sent forth on the wings of the morning to a "candid world."

The eighteen grievances may be summarized as follows:

Woman was denied the elective franchise;

She was obliged to submit to laws made without her assistance;

Such laws withheld from her rights conferred on ignorant men, natives and foreigners;

She was oppressed on all sides as a result of not possessing the elective franchise;

A married woman was civilly dead;

She was deprived of rights of property, even of wages earned;

She was not responsible for crimes committed in the presence of her husband;

She was compelled to take a subordinate position in marriage;

Her husband might chastise and imprison her;

She had no voice in framing the laws concerning divorce;

Single women must pay taxes, but had no other recognition in public affairs;

Woman was excluded from nearly all profitable employments;

She was not permitted to teach theology, medicine, or law;

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She was denied facilities for thorough education, and colleges were closed against her;

She was excluded from the ministry, and from nearly all participation in church affairs;

Women and men were not judged by the same code of morals;

Man asserted the divine right of prescribing woman's sphere of action;

And, finally, she was reduced to an abject condition by man's oppression.

The time was evidently not yet ripe for the radical reforms proposed by this convention. The historians of the convention say that its proceedings "were unsparingly ridiculed by the press, and denounced by the pulpit;" but it was the beginning of an agitation which has had large results, and the end is not yet. It may be worth while to note here some of the changes in conditions outlined in the declaration, which appear in various statutes passed since this memorable convention. These statutes reflect social and political conditions, and are in most respects the clear result of the movement inaugurated by the Seneca Falls convention. Looking beyond the Constitutional Convention of 1867, which is the immediate subject of our study, we observe that there is now little left of the grievances stated in the declaration, but that nearly all have disappeared in the social development of the last half century; and it would seem that the limit has almost been reached beyond which reform cannot be carried without constitutional amendment which shall confer on women a complete elective franchise with all the rights which the Constitution guarantees to men.

Many of the changes since the Convention of 1848 are not found in the statutes, but have become firmly established in society. The statutes show, among others, the following steps in the development of these reforms: In

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1849 married women were given full right to take, hold, and dispose of property, and antenuptial contracts were to continue in full force after marriage; in 1850 a married woman was permitted to make and collect deposits in savings banks the same as if single; in 1851 married women who were stockholders in corporations might vote for directors, by proxy or otherwise; in 1853 the widow's estate only was liable for her debts contracted before marriage, but the husband continued liable for antenuptial debts of his wife to the extent of property received from her; in 1857 the State Woman's Hospital was incorporated; there were thirty-five women as directresses with authority to manage its domestic concerns; in 1858 a wife might insure her husband's life for the benefit of herself and her children; in 1859 the Woman's Library of New York was incorporated; in 1860 a married woman was given full control of her property and earnings. She was authorized to carry on trade or business in her own name, and she might sue and be sued in all matters relating to her property, and maintain actions for injuries to her person or character. She was also made joint guardian of her children with her husband. and, in case of his death intestate leaving a minor child or children, she had the use of all his real estate during the minority of the youngest child and one third thereof during her life. In 1862 a wife might sell and dispose of her property and make contracts with the same effect as if single, and a child could not be apprenticed without his mother's consent; in 1867 an adult woman was entitled to vote for church trustees, and married women might be appointed executors, administrators, and guardians, and give bonds with the same effect as if single; in 1873 a child could not be adopted without its mother's consent; in 1878 a married woman could execute a power of attorney with the same effect as if single. In 1879 a

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married woman might make an acknowledgment of a written instrument the same as if single,—this dispensed with the old practice of a separate examination of the wife on making an acknowledgment. In 1880 an adult woman was made eligible to any school office, and in 1881 she was given the right to vote at school meetings. In 1881 employers of women were required to afford them reasonable use of seats. In 1884 a married woman was vested with full power to make contracts as if single, except with her husband. In 1886 women under twenty-one were not permitted to work in a manufacturing establishment more than sixty hours in one week. By a statute passed the same year women might be admitted to practice as attorneys. In 1887 husband and wife might convey land directly to each other; in 1888 women were entitled to vote for members of the board of education in the city of Auburn. A statute passed in 1888 required police matrons to be appointed in certain cities, and another statute made women eligible as managers of the State Industrial School. In 1889 taxable women were entitled to vote on tax questions in the village of Cooperstown. By statutes passed in 1890 women were made eligible as deputy factory inspectors, were to sue and be sued as if single, might maintain actions for injuries to property, character, person, or growing out of marital relations, as if single, and were to be appointed physicians in each state asylum, except the State Asylum for Insane Criminals. In 1891 the incorporation of young women's Christian associations was authorized. By statutes passed in 1892 the wife or daughter of a town clerk might be his deputy; a woman or girl was not permitted to sell or serve intoxicating liquors, unless she was a member of the licensee's family; a married woman might make contracts with her husband the same as with any other person; a board of women managers

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was to be appointed for the World's Fair, and an adult woman was also given the right to vote for school commissioner; but this statute was held unconstitutional by the court of appeals. In 1893 a woman might be clerk of a village under the general law, and was also made eligible as school commissioner in Syracuse. By a statute passed in 1899 women were not to be employed in any factory in using any emery, corundum, stone or emery polishing or buffing wheel; a statute passed in 1901 conferred on taxable women the right to vote on tax questions in towns and villages; in 1902 a married woman was authorized to maintain actions in her own name, recover for wages, salary, profits, or compensation or other remuneration for any work or service, or derived from any business carried on by her; and the statute declares her presumptively entitled to recover in such cases unless the contrary expressly appears.

In addition to these positive statutory provisions, women are appointed to the offices of notary public and commissioner of deeds. They officially represented the state at the World's Columbian Exposition, in 1893, at the Atlanta Exposition, in 1895, and at the Pan American Exposition, in 1901. Women also took a prominent part in the management of the Louisiana Purchase Exposition, at St. Louis, in 1904. They are managers of hospitals, charitable and reformatory institutions, directors of corporations, and occupy numerous administrative positions. They have become physicians, lawyers, ministers, teachers, professors, and presidents of educational institutions, and are found in almost every branch of business. The declaration of 1848 has borne abundant fruit.

This summary may appropriately be concluded by quoting from recent opinions expressed by high executive and legislative authority. Governor Frank W. Hig-

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gins, in his first annual message, 1905, recommended that, in third-class cities, the right to vote at special tax elections be restricted to resident taxpayers, but "without limitation as to sex;" observing that it would be only "an act of justice to extend that right to women property holders as well as to men." S. Frederick Nixon, in his address to the assembly, at the opening of the legislature of 1905, on his seventh consecutive election as speaker,—which he said was "an unprecedented honor,"—urged the extension of the right of suffrage to all taxpaying women in all third-class cities, saying that they already enjoyed the right in seventeen cities of this class. He thought it only just that "all women taxpayers should vote on all tax propositions," and that every community would be benefited by their votes.

In the chapter on the period between the Conventions of 1846 and 1867 I have referred to the petition for woman suffrage presented to the legislature in 1853 by citizens of Rochester, and the proposed constitutional amendments on this subject prior to this Convention. When this Convention was about to be chosen, the advocates of woman suffrage determined to use the occasion to advance their cause. They began to agitate the subject in the legislature of 1867 when the convention act was under consideration, and urged the legislature to give women the right to vote for delegates. The convention acts of 1801 and 1821 were cited as precedents for an elective franchise broader than that fixed by the Constitution. It was also asserted, in substance, that when a new constitution was to be framed society resolved itself into its constituent elements, and all members of society had a right to be heard. I have already quoted from Mr. Folger's speech, showing that the senate substantially accepted this view of the situation presented when a constitutional convention was to be chosen, and,

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while the senate proposed to enlarge the elective franchise, it did not propose to give women the right to vote for delegates. Advocates of the new movement were heard by the Convention, and the committee on suffrage was urged to propose equal suffrage for men and women. The committee declined to recommend the extension of the elective franchise to women, observing that, "however defensible in theory, we are satisfied that public sentiment does not demand, and would not sustain, an innovation so revolutionary and sweeping, so openly at war with a distribution of duties and functions between the sexes as venerable and pervading as government itself, and involving transformations so radical in social and domestic life."

When the suffrage article was under consideration in the Convention, George William Curtis proposed to extend the elective franchise to women, supporting his proposition by an elaborate address with a force, lucidity, and eloquence which left little to be said by other speakers. Mr. Curtis delivered the principal speech on that side. There were speeches against it, but they seemed hardly necessary in view of the manifest attitude of the Convention toward this question. Mr. Wales proposed to confer the right of suffrage on taxpaying women. Mr. Graves proposed to submit the question of woman suffrage to the women themselves at a special election, and, if a majority of the votes cast were in the affirmative, all women should thereafter have the right to vote on the same conditions as men. Mr. Greeley, chairman of the committee, opposed this proposition because it "compelled women to vote in order to avoid voting." He was in favor of submitting the question to women, but thought that all that did not vote should be counted in the negative. "Let the women who do not choose to vote abstain from voting, and by abstaining affirm their desire not

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to have the right of suffrage extended to them. I believe in the principle that 'governments derive their just powers from the consent of the governed,' and whenever the women of this state shall say that they desire the right to vote I am in favor of conceding it." He did not believe that one tenth of the women desired the right of suffrage. "I wish the women of the state to be heard as women, and not to be mixed up and commingled with men in caucuses, on nominating committees, and at the polls, but allowed to have their views heard as the women of the state. I would be willing to commit to them all questions connected with the domestic relations,—with marriage, separation, and divorce, and all questions touching the care of families, of inheritance, and of dower. If they are ever to exercise the elective franchise, let them meet as women, and elect delegates as women, and have legislatures or conventions to which only women shall be admitted, either as spectators or officers; and let them there state their wishes in regard to the legislation of the state. I am sure they will be heard. I am very sure they will be heard as women; but this demand for a common right with men is the voice of a very few women; and the claim that they act for women I repudiate." Referring to Queen Elizabeth, Mr. Greeley inquired whether she selected a Cabinet or called a Parliament of men and women indiscriminately. "I appeal to all the female rulers, from Semiramis to Victoria, to the Empress Catherine of Russia, to Maria Theresa of Austria. Not one of these great women has ever proposed the commingling of men and women in legislation or government." The proposition for a separate submission of the question was defeated by a vote of 9 to 133. The question on extending the elective franchise to women was presented in various forms, but the highest number of votes received was twenty-four.

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The color line.—The fires of Civil War had consumed the hateful institution which so nearly wrecked the Union, but the prejudices engendered by more than two centuries of contact with it remained to vex the nation. It is not surprising, therefore, that in a convention held only two years after the close of the war prominent delegates who had always been opposed to giving equal suffrage to colored men should have tried to continue the color line established in previous Constitutions. The great and irrepressible conflict had come, and had been fought to a stern conclusion. It was yet fresh in the minds of all men. The convulsion had been terrific, its effects could not be measured, the passions of war had not wholly cooled, and it could hardly be expected that the opinions and prejudices of a lifetime should be immediately abandoned as a consequence of the violent destruction of the institution which had been their cause and support. The results of the Civil War present themselves in two striking features connected with this Convention. First, on one side was the determination that men who had participated in the Rebellion should not participate in making a new state Constitution, and should not even be permitted to vote for delegates to the Convention. This was no amnesty, but a rigorous assertion that men who had been faithless to the Union should so far be deprived of the rights of citizenship as to be excluded from any part in reconstructing the government under which they were expected to live. On the other side, delegates to the Convention sought to continue the proscription against colored men, even carrying it beyond its existing limits by excluding them altogether from the right of suffrage or from the right to hold office, and thus enjoy an active participation in the affairs of government. Much history has been made since that Convention, and, whatever may be thought now of the diverse views expressed in the

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convention act and in the Convention itself, we cannot fairly estimate the opinions of 1867 by the experiences of 1905. The Thirteenth Amendment, which crystallized in the Constitution the proclamation of emancipation, had been adopted in 1865, and the Fourteenth Amendment, which guaranteed the rights of citizenship to all persons, was ratified in New York by the same legislature that passed the act under which this Convention was held. It took one more amendment, the Fifteenth, to secure equal suffrage to all men, and that came two years after the Convention.

The suffrage committee proposed to strike out all discriminations based on color, and on this subject said: "Slavery, the vital source and only plausible ground of such invidious discriminations, being dead, not only in this state, but throughout the Union, as it is soon to be, we trust, throughout this hemisphere, we can imagine no tolerable excuse for perpetuating the existing proscription. Whites and blacks are required to render like obedience to our laws, and are punished in like measure for their violation. Whites and blacks were indiscriminately drafted and held to service to fill our state's quotas in the war whereby the Republic was saved from disruption. We trust that we are henceforth to deal with men according to their conduct, without regard to their color. If so, the fact should be embodied in the Constitution."

When the subject of qualifications of voters was under consideration Mr. Murphy proposed to continue the provisions of the existing Constitution relative to the qualifications of colored voters. Discussing the question, he said the state had repeatedly decided not to extend the elective franchise indiscriminately to all colored persons, because it was deemed inexpedient for political reasons, and also because it was deemed by many to be

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morally and socially wrong. He thought the extension of the franchise to colored persons would not add to the strength of the government, but, on the "contrary, that it will confound the races, and tend to destroy the fair fabric of democratic institutions, which has been erected by the capacity of the white race." Mr. Corbett said that striking out the word "white" marked distinctly the dividing line between the two political organizations in the state of New York to-day, and perhaps in the United States, between those who still get their nourishment from the dying traditions of slavery, and those who have associated their sympathies with the growing aspirations of liberty. Mr. Conger evidently held extreme opinions on this subject, for he proposed an amendment that "no person of color shall ever be admitted to participate in or enjoy the functions of sovereignty in this state, so as to hold any executive, judicial, or representative office designated in this Constitution. . . . Nor shall any person of color, excepting such as have heretofore been admitted to the elective franchise, be entitled to vote upon any Constitution of this state, or any amendment to the same now or hereafter to be adopted." Mr. Burrill proposed to restrict the right of suffrage to colored persons already qualified, and to those born in the state. Mr. Cassidy proposed to extend the right of suffrage to men of color who had been residents of the state five years on the adoption of the new Constitution. It was also proposed to submit to the people a separate amendment on this subject, and Mr. Landon favored this plan, but the Convention was fully determined to erase the color line and establish equal-manhood suffrage. Mr. Murphy's amendment, which expressed all the opposition so long manifested against equal suffrage to colored men, was defeated by a vote of 29 to 78, and all other attempts to continue the discrimination against colored voters met

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a like fate. The Constitution proposed by this Convention was not accepted by the people, and the color discrimination in the Constitution of 1846 continued, at least nominally, until the adoption of the amendments of 1874, which took effect January 1, 1875; but the provision had become obsolete by the operation of the Fifteenth Amendment, which took effect early in the year 1870, and which prohibited any state from denying to any person the right to vote "on account of race, color, or previous condition of servitude."

THE LEGISLATURE.

The legislative structure proposed in and by this Convention is another illustration of its tendency to look backward. The committee on legislative organization unanimously reported a plan embracing eight senate districts, thus restoring the senate system established in 1821, and which had been abandoned in 1846. The geographical arrangement of the new districts was quite different from the old; under the new plan the districts were nearly conterminous with the judicial districts, and provision was also made for an additional senator in the county of New York, which comprised one district. Under this plan one senator was to be chosen from each district each year for four years, except in New York, which had five senators, where provision was made for the election of the additional senator. This plan was supported by Mr. Evarts, who called the large districts "compound districts," by Mr. Folger, Mr. Merritt, Mr. Van Cott, Mr. Merwin, Mr. Barker, and many others.

Mr. Merritt, chairman of the committee, said it was thought that the large-district plan would "invite into the legislature the ablest minds of the state." It was also thought that this would reduce the amount of legislation. Mr. Merwin preferred the eight-district plan, because it

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provided for a moderate rotation, bringing in a few new men each year, and because of the liability under the single-district plan of a complete change every two years. By the new plan three fourths of the senators would always be experienced men. Mr. Harris said that in the Convention of 1846 he voted for the single-district system, but now regarded it a failure. Mr. Folger thought the large-district system would assure the independence of senators by electing them for a long term and scattering their constituency over a larger district. Opposing the large-district plan, Mr. Ballard said that it was taking a step backward, instead of keeping pace with the progress of the age. Mr. Martin I. Townsend said it would restore the reign of the politician. Mr. Bergen said he had lived under both systems, and he thought there was a decided advantage in electing senators by single districts. Mr. Young gave the discussion a partisan turn by pointing out that, according to the election returns of 1866, the Democrats would elect only nine senators,—five from the first district and four from the second,—representing an aggregate Democratic majority in the two districts of a little more than 56,000. While the Republicans would elect senators from each of the other six districts,—twenty-four in all,—representing an aggregate Republican majority of about 72,000.

While the organization of the senate was under consideration, Mr. Greeley, who was an advocate of minority representation, proposed a senate of forty-five members to be chosen from fifteen districts, each district electing three, on the plan of cumulative voting. Mr. Schoonmaker proposed sixteen districts with two senators from each. Mr. Bickford proposed a senate of thirty-nine members, one third to be chosen each year and from single districts. Mr. Rumsey proposed a senate of thirty-three members, to be chosen from eleven districts,—three from

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each. After considerable discussion the Convention, by a vote of 79 to 35, substituted the existing single-district system for the eight-district plan proposed by the committee, but fixed the term of office at four years, and divided the senators into two classes, those from the odd-numbered districts forming one class, and those from the even-numbered districts the other; and one class was to be chosen every two years.

The committee's plan also included an assembly of one hundred and thirty-nine members,—an increase of eleven; and the members of assembly were to be chosen for one year by counties, thus abandoning the single-district system established in 1846, and returning to the method prescribed by the earlier Constitutions.

On the subject of electing members of assembly by counties instead of districts, Mr. Merritt said there was no local interest involved in the selection by districts, and that a representative of a district was in fact a representative of the county; therefore, all the electors should be entitled to vote for all the representatives. It was also believed that this plan of representation would bring into the assembly a better class of men. There was a general agreement in favor of an increase in the assembly, but opinions differed widely as to the size of this body. Mr. Merwin, a member of the committee, presented a minority report proposing an assembly with a possible membership of two hundred and fifty, and until that limit was reached the number was to be determined by dividing the population of the state, excluding aliens, by a ratio of 20,000, adding one member in case the fraction over exceeded 5,000. Mr. Greeley proposed forty-five assembly districts with three members from each, chosen on the plan of minority representation. Suggestions were made for an increase of the assembly to 141, 142, 143, 145, and a proposition to fix the number at 160 was defeated by a

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vote of 52 to 62. Mr. Field proposed an assembly of one hundred and twenty-eight members to be chosen by senate districts,—four from each.

Concerning the increase in the assembly, Mr. Merritt said the addition of eleven members was a compromise. It was made for the purpose of reducing to some extent the unrepresented fractions which resulted from distributing one hundred and twenty-eight members among the counties on the county unit basis. There was no substantial opposition to the committee's assembly plan, except to the change from single districts to elections by counties. The plan of electing members of assembly by counties, instead of by districts, was sustained by a vote of 64 to 43. There was also some discussion over the length of term. Mr. Rumsey, with a view to biennial sessions of the legislature, proposed to elect members of assembly for two years, but the Convention declined to adopt this proposition, and it was rejected by a vote of 38 to 62.

The Convention also proposed that any elector should be eligible to the office of senator or member of assembly. Mr. Merritt, explaining this provision, said it was intended to give the people in a senate district or county the right to select a representative from any part of the state. The salary of members of the legislature was fixed at $1,000 with mileage, and the speaker of the assembly was given an additional compensation equal to one half the amount received as a member. Mr. Greeley proposed that senators should receive "no compensation other than the consciousness of honorable usefulness, and the resulting gratitude of their fellow citizens." He said the best legislative bodies received no pay, referring particularly to the British Parliament, whose members received no compensation. "I propose there shall be one branch of the legislature, a small body, composed of men who are willing to serve the public without compensation. They

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need not be rich men. There are poor farmers who will serve honorably and usefully because they believe it well and wise to do so." It is hardly necessary to say that the Convention did not adopt Mr. Greeley's view.

The committee on powers and duties of the legislature considered numerous subjects affecting the legislature, and also other subjects of legislative cognizance, but which might more logically have been considered by other committees. The committee in its report noted this fact, and reported several subjects which had thus been considered because in part referred to it by the Convention, and also because it was thought best to cover the whole subject in one report. While the report of the committee was under consideration several subjects so considered and reported were referred to other committees which had the same or cognate subjects under consideration. I have considered here only the remaining subjects; the others will be considered in connection with the reports of other committees.

The committee recommended the following provisions not already included in the Constitution: Biennial sessions of the legislature; special sessions, but with power to consider only the subjects specified in the governor's proclamation; "the legislature shall not adjourn for more than two weeks at any one time;" no member to be expelled from either house without a vote of a majority of its members, nor to be expelled twice for the same offense; no money or property to be appropriated except by bill; no law shall embrace more than one subject, and the matters connected therewith, and each subject shall be expressed in its title. (The former Constitution limited this restriction to private and local bills.) No bill shall be introduced during the last five days of the session; "after a bill has been finally rejected by either branch of the legislature no bill or joint resolution containing

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the same in substance shall be passed into a law during the same session; . . . no law shall be revised, altered, or amended by reference to its title only, but the act revised, or the section or sections thereof altered or amended, shall be re-enacted and published at length, and the act so revised, or the part or parts thereof so altered or amended, shall be repealed; . . . the presiding officer of each house shall sign, publicly, in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and joint resolutions passed by the legislature, and the same shall not be so signed until they are fully enrolled." The final adjournment of the legislature shall be at 12 o'clock noon. "The legislature shall not appropriate, lend, or give any of the money or property of the state to or for any charitable institution, purpose, or object, except such as have been or shall be established by, and be owned and controlled solely by, the state, except the following: The New York Institution for the Blind, the New York State Institution for the Blind, the Society for the Reformation of Juvenile Delinquents in New York, and the New York Institution for the Deaf and Dumb." This section and the next two were omitted from the Constitution as finally approved. The legislature was prohibited from lending or appropriating any of the money of the state to any persons, association, or corporation, with certain exceptions. The legislature shall not authorize any municipal corporation to give or appropriate its money or property, or lend its credit, to any person, association, or corporation. The legislature shall not audit or allow any private claim or account against the state, or pass any special law in relation thereto, except to appropriate money to pay such claims as shall have been audited and allowed according to law. The legislature shall be required to create a court of claims. "The legislature shall not grant any

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extra compensation to any public officer, servant, agent, or contractor after the services shall have been rendered, or the contract entered into, nor increase or diminish the compensation of any public officer, agent, contractor, or servant during his time of service. . . . No railroad shall hereafter be constructed or operated within any of the cities or incorporated villages of this state, until the consent of the local authorities of such city or village shall be first obtained for that purpose, and also the consent of the owners of at least one half in value of the property on the line of street through or over which the same shall be constructed, shall be previously had and obtained for that purpose; or, in case the consent of such property owners be not obtained, then with the consent of the general term of the supreme court of the district in which such road shall be located, to be first obtained, and such consent to be obtained and authenticated in such manner as the legislature shall by general law for that purpose provide. The franchise allowing such railroad to be operated shall be sold at public auction to the highest bidder, after three months' public notice describing the route of such railroad in the state paper, and in such newspapers in the city or village where the said railroad shall be located as the legislature shall direct. The whole avails of such sale shall belong to the city or village in which said railroad shall be located."

"No bill for any local or private purpose shall be introduced into the legislature unless notice thereof shall have been published in the state paper for twenty days before the commencement of the session of the legislature at which such application shall be made. No such bill shall be introduced into the legislature except during the first sixty days of the session."

"The legislature shall not pass local or special laws in either of the following cases:

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"Granting divorces;

"Authorizing the sale, mortgaging, or leasing of the real property of minors or other persons under disability;

"Changing the names of persons;

"For laying out, working, or discontinuing public or private roads or highways;

"For locating or changing county seats;

"For legalizing, except as against the state, the unauthorized or invalid acts of any officer;

"For granting to any individual, association, or corporation the right to lay down railroad tracks in the streets of any city or village;

"Giving effect to informal or invalid deeds or wills; in any case for which provision has been made by any existing general law;

"And the legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases where a general law can be made applicable."

Mr. Robertson and Mr. Burrill presented a minority report objecting to the majority's restriction on appropriations for charitable purposes, and also objecting to the provisions for biennial sessions, and a court of claims. The minority also proposed to prohibit the legislature from creating civil divisions other than counties, cities, towns, and villages. This prohibition was proposed in view of the creation of the metropolitan police district, and other similar districts different from those created for ordinary municipal purposes. School districts are not specified in the report, probably because not then classed among municipal corporations, although the legislature has created several school districts.

When the report of the committee was under consideration numerous changes were made, and several important propositions were rejected. The Convention declined to adopt biennial sessions. There was considerable discus-

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sion of this subject, in which a desire was frequently expressed to impose some restraint upon the legislature, both as to quantity of legislation and legislative procedure,—especially with the view of preventing hasty legislation. When the provision prohibiting the introduction of a bill during the last five days of the session was under consideration, Mr. Verplanck proposed that no bill be passed until the lapse of five days after its introduction. Mr. Baker proposed to require every bill to be introduced ten days before its final passage. Mr. Schoonmaker proposed that no bill be passed without consideration by a committee of the whole, and then not on the same day on which it was reported by such committee. The principle involved in this suggestion was incorporated in the Constitution in 1894, by the provision which requires a bill to be printed and on the desks of the members "at least three calendar legislative days prior to its final passage." The section was stricken out which required the presiding officer to sign the bills in the presence of the house over which he presided. The provision relating to notice of intention to introduce a private or local bill was modified by striking out the sixty-day limitation, and conferring on the legislature power to determine the time and method of publication of the notice. Mr. Lapham thought the notice ought to be published in the locality affected, but his suggestion was not adopted.

The Convention declined to adopt Mr. Morris's proposition authorizing divorces for "adultery, habitual drunkenness, cruel and inhuman treatment, and desertion for seven years." The subject of divorces was stricken out because included in the 1st article of the Constitution. The provisions relating to changing county seats, validating actions of public officers, giving effect to informal or invalid deeds or wills, were also omitted from the section as finally approved.

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One of the important recommendations of the committee, adopted by the Convention, provided for the creation of a court of claims, to be composed of three judges, to be appointed by the governor and senate, for terms of five years, with power to adjudicate such claims against the state as the legislature might by law direct. The provision for this court was included in article 5 relating to state officers, instead of the judiciary article. The event shows that, if it had been included in the judiciary article, the court would have been established in 1870. It may be worth while to observe here that the board of claims was created in 1883, and in 1897, thirty years after the Convention, it was transformed into a court of claims, principally on the lines suggested by that Convention.

One of the most important recommendations of the committee related to the sale of railroad franchises in cities and villages. In the preliminary article on banking and currency in the chapter on the Convention of 1846, I have quoted Governor Marcy's remarks in his message of 1834 proposing the sale of the stock on the incorporation of a bank, "reserving to the state the advance above par value." This was one method of selling a franchise. Under the committee's report railroad franchises were to be sold to the highest bidder, the avails to belong to the city or village. The committee of the whole agreed to Mr. Weed's amendment that the franchise be sold to the bidder "who will build and operate the road at the lowest fare." He thought this was more just to the public than a sale for a sum of money to be put into the public treasury. After some further discussion the whole section relating to street railroads, including the franchise provision, was stricken out, but afterwards in convention the street-railroad provision was restored omitting the provision for a sale of the franchise.

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The committee of the whole adopted an amendment offered by Mr. Alvord prohibiting a private or local bill "releasing the right of the state to lands acquired by escheat or forfeiture, or by the death of resident aliens;" but afterwards in convention the amendment was stricken out. A prohibition against escheat bills would save many special laws. Under the Public Lands Law, the commissioners of the land office have jurisdiction to release escheated lands in certain cases, and claims for such lands may also be presented to the court of claims under the act of 1895; but, notwithstanding these general provisions, numerous special laws are passed releasing escheated lands.

EXTRA COMPENSATION.

The committee on legislative powers reported the following section relative to extra compensation:

"The legislature shall not grant any extra compensation to any public officer, servant, agent, or contractor after the service shall have been rendered, or the contract entered into, nor increase or diminish the compensation of any public officer, agent, contractor, or servant during his time of service."

There was little debate on the section, but its intended scope and purpose were stated by Mr. Alvord, who said that the legislature should not "undertake to interfere with a contract after it is once entered into and agreed to;" also that various public officers were brought into official relations to the legislature, and they should not be placed in a position "by means of which they can use their power and influence in certain directions, with the hope of getting a reward by the increase of their salaries." Attempts were made to change the section by striking out the prohibition against the increase of compensation, and

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also eliminating public officers. These attempts failed, and the section as presented was referred to the committee on revision. That committee modified it by omitting the words "after the service shall have been rendered, or the contract entered into." No reason was assigned for this change, and the Convention accepted the section in this form. But Mr. McDonald was not satisfied with it, and, when the Bill of Rights was under consideration, presented a section in the following form:

"The pay or salary of any public officer or agent, except judicial officers, shall not be increased during the term of office. And no public officer, board, or other agent of the people of this state, or any political, civil, municipal, or other division thereof, shall allow, receive, or pay any extra compensation for any services rendered or property furnished after such services shall have been rendered, or property shall have been furnished, or after a contract therefor shall have been made, or price therefor agreed upon."

It will be observed that this section stated the purpose of the amendment with much more detail, but the Convention adhered to the section as adopted in the legislative article, and rejected Mr. McDonald's amendment.

EXECUTIVE DEPARTMENT.

The article on the executive department received the attention of three committees, namely, the regular committee on the governor and lieutenant governor, the committee on powers and duties of the legislature, and the committee on the pardoning power. The latter committee considered only one section. The committee on legislative powers and duties reported a section on the power of the legislature at extraordinary sessions, and also the regular section relating to the governor's action on bills. Other provisions in the article were reported by the com-

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mittee on the governor and lieutenant governor. The principal changes recommended related to the governor's action on bills passed by the legislature. These changes related to the veto power and the consideration of bills after adjournment. The terms of office of the governor and lieutenant governor were left unchanged, but the compensation of these officers was to be fixed by the legislature at the first session after the adoption of the new Constitution, and which compensation could not be changed during their term of office.

Governor Fenton, in his message of 1867 in connection with his discussion of prison management, recommended a radical limitation of executive power in relation to pardons, namely, that the "pardoning power should be delegated to a co-operative bureau, or so distributed as to relieve the governor of the sole responsibility of investigation,"—giving as a reason that the rapid increase in population, and the large number of crimes, had necessarily increased the appeals for clemency, many of which required careful and patient investigation of questions both of law and of fact, thus demanding an undue share of the governor's time. The committee on pardoning power considered the Governor's suggestion, and reported that in its opinion the provision in all our Constitutions, that the governor "shall take care that the laws are faithfully executed," implies an undivided executive responsibility; that, while the labor required of the governor in connection with pardon cases was "truly formidable," no plan to lighten the executive burden had been suggested which was deemed safe and practicable. The committee said that in states where the governor is assisted in pardon cases by a council, the duty of the council is merely advisory, and the final responsibility rests with the governor. The governor, besides conferring with the council, must make a personal investigation, and

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his labor is, therefore, increased, rather than diminished, by this additional executive machinery. The committee consulted former Governors Fish, Morgan, and Seymour and also Governor Fenton, all of whom, except Governor Fish, though an executive council would be impracticable. Governor Seymour said that from the nature of our government the pardoning power "could not be safely lodged in other hands, nor its responsibility be safely divided." It seems that Governor Fenton did not suggest any plan by which his proposition for a "co-operative bureau" could be put into practical operation.

The committee therefore recommended the continuance without change of the existing section relating to pardons and reprieves. The committee on legislative powers and duties reported a section relating to extraordinary sessions of the legislature, and which provided, in substance, that the governor should specify in his proclamation the subjects to be considered at such session, and the legislature was prohibited from considering any others. The original report of the committee on the governor and lieutenant governor did not contain this recommendation, but, in the progress of the consideration of the subject, the provision was included in a section in the executive article reported by the committee on revision. Mr. Church sought to amend the section so as to permit the legislature to transact business not included in the governor's proclamation. He thought the governor should not have the power to limit the business to be transacted by the legislature at an extraordinary session. The Convention declined to accept Mr. Church's amendment, but did adopt a suggestion by Judge Comstock, that laws enacted at a special session must relate to the subjects included in the proclamation. Judge Comstock said this was intended to confine legislation to subjects specified in the proclamation, but to permit the legislature to exercise the

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power of appointment at a special session, either by electing officers, or acting on nominations by the governor.

Thirty-day period.—The amendment of 1874, which established the thirty-day period for executive consideration of bills after adjournment of the legislature, may be anticipated here for the purpose of considering the evolution of this constitutional provision. It will be remembered that under the first Constitution the power to approve or disapprove bills passed by the legislature was not vested in the governor alone, but in a Council of Revision composed of the governor, chancellor, and judges of the supreme court. By the 3d section of that Constitution the council had ten days in which to consider bills, but, if a bill was not returned within ten days, it became a law, unless the legislature, by its adjournment, rendered its return "impracticable, in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days." Under this rule, the council alone had power to determine whether it was "impracticable" to return a bill within ten days. If the legislature adjourned while bills were still under consideration by the council it was not required to dispose of such bills until the opening of the next session. Bills were, however, usually disposed of by the council before the close of the legislative session; but in a few instances they were held for further consideration during the recess, and reported to the legislature at the opening of the next session, sometimes approved, and sometimes with objections. If the council concluded to take more time to consider a bill, it was the usual custom to refer it to the chancellor or one of the judges for examination, and he was expected to report his conclusions at the meeting of the council held at the opening of the next session of the legislature. The bills thus held by the council remained in abeyance during the recess, and I have found no instance

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in which such a bill was acted on until the opening of the next session of the legislature. By operation of this procedure, a bill thus approved by the council became a law of the session succeeding that at which it was actually passed. At the opening of the session of the legislature in January, 1794, the council failed to report a bill that had been presented to it by the legislature on the 12th of March, 1793, and held for further consideration. This failure to report the bill was deemed to have the same effect as if the council had failed to report on a ten-day bill during the session of the legislature. The minutes of the council for January, 1794, state that, by reason of the failure of the council to report the bill, "the same, according to the Constitution, is become a law." It appears as chapter 1 of the Laws of 1794. This construction extended the ten-day period through the entire recess. I have found no other instance in which the council failed to report a bill held after adjournment. Obviously the council would try to dispose of bills during the session, otherwise they could not become laws until the next session of the legislature, for the council had no power to approve and attest a bill during the recess, and make it a law. The council appreciated the importance of an early consideration of bills, and I think that during the whole legislative period covered by the first Constitution, from 1777 to 1822,—forty-five years,—the council held bills only sixteen times after the legislature adjourned, including three fall sessions, and only thirty bills were thus held, of which number six were approved and twenty-four disapproved.

The Convention of 1821, after concluding to abolish the Council of Revision, found it necessary to reconstruct the section defining the powers of the council in relation to bills, with a view of vesting the new power in the governor alone. The clause relating to the effect of adjourn-

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ment on bills which had not then been considered by the governor, as reported by the committee, declared that a bill should become a law if not acted on by the governor within ten days, "unless the legislature, by their adjournment, prevent its return, in which case it shall be a law, unless returned on the first day of the next meeting after the expiration of the said ten days." Under this provision a bill left with the governor on adjournment would have become a law, unless he returned it to the legislature at the opening of the next session, but until that time the status of the bill was uncertain, and subject to the governor's action. While this subject was under consideration, Henry Wheaton, one of the most distinguished lawyers in the Convention, proposed to substitute for the last clause the language of the Federal Constitution, providing, in substance, that if the bill were not acted on within ten days it should become a law "unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law." The Convention adopted Mr. Wheaton's proposition, and the last part of the section was made to conform to the Federal Constitution on the same subject, as follows: "If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law."

In view of the power assumed some years afterwards by the governor to sign bills after adjournment of the legislature, and in view, also, of the decision of the court of appeals sustaining this power, Mr. Wheaton's remarks in proposing to substitute the provision of the Federal Constitution are especially pertinent.

Mr. Wheaton stated his object to be to make the provision respecting bills, the return of which within ten days

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was prevented by the adjournment of the legislature, correspond with that in the Constitution of the United States, which seemed to him founded in wisdom. "If Congress, by their adjournment, prevent the return of a bill by the President, it does not become a law. Nor is it fit that it should. The regulation proposed by the committee of the whole would enable the governor to keep in his own breast the secret whether a particular bill would or would not ultimately become the law of the land, and might enable those by whom he was surrounded to profit by that knowledge, which they alone would possess, to the disadvantage of the public in general. Such a practice would draw after it many of the evils of the secret legislation of despotic governments, and would certainly be abused to corrupt purposes in many cases where private rights were involved, or private interests affected by measures of a general and public character."

It seems clear that Mr. Wheaton did not suppose that the governor would have power to sign a bill after the close of the legislative session, and such a power was not exercised during the life of that Constitution. The governor followed the President's practice, and did not sign bills after adjournment. The Convention of 1846 made no change in this provision, and it was assumed that the governor could not constitutionally sign a bill after the close of the session. It should be noted, however, that in 1847 Governor Young signed two bills the next day after the legislature adjourned. I do not find that these statutes were ever questioned for this reason, and these are the only instances of the kind until 1852, when six bills were signed the next day after adjournment, none were signed in 1853, but beginning with 1854 the practice of signing bills after adjournment was followed without interruption until 1875, when a constitutional amendment took effect fixing the thirty-day period. During this

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time 3,162 bills were signed after the legislature adjourned.

In June, 1860 (*People* v. *Bowen*, 21 N. Y. 517), the court of appeals rendered a decision involving the validity of chapter 545 of the Laws of 1855, which was signed by the Governor after the legislature adjourned. The statute was attacked as unconstitutional for this reason, but the court held that the Governor had power to sign bills after adjournment,—especially as in this case it was within ten days after the bill was presented to him by the legislature. Judge Denio in his opinion said he thought the Governor "would not be justified in acting upon a bill after his ten days had elapsed, whether the session continued or not." But the decision was given a wider scope, and was construed to authorize the Governor to approve a bill at any time during the recess. In 1867 the legislature adjourned April 20, and the Governor approved a bill on the 6th of August. In other years bills were signed several weeks after adjournment. The effect of this practice was to leave bills in the hands of the governor subject to his action at any time. Judge Comstock, who was chief judge of the court of appeals when the *Bowen Case* was decided, and dissented, said, in the Convention of 1867, that the validity of the statute was sustained because of the inconveniences that might result from a contrary decision in view of the large number of bills that had been signed by the Governor after adjournment. The record shows that prior to this decision one hundred and six bills had been so approved after adjournment, all of which would have been affected by an adverse decision in the *Bowen Case*. The court therefore concluded to give the bills the benefit of the doubt, although it seems to have been contrary to the opinion of Mr. Wheaton and other members of the Convention of 1821, by which the clause was incorporated in the Constitution,

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and was also contrary to the practice at Washington under the same provision in the Federal Constitution.

It seems clear that the executive practice, thus doubtfully begun and reluctantly sanctioned by the court of appeals, was the occasion of the change in the Constitution giving the governor a fixed time after adjournment for the consideration of bills. The increase in legislation, and the custom which still prevails of postponing final action on many bills until near the close of the session, made it practically impossible for the governor to consider all the bills passed just before adjournment. Thus, in 1867, the year the Convention met, one hundred thirty-five bills were presented to the Governor on the day of adjournment, and four hundred ninety-four were afterwards signed. Under the same clause in the Federal Constitution, it seems to have been the uniform custom of the President, with one exception, to approve bills before the final adjournment. This exception occurred in 1863, when President Lincoln signed a bill on the 12th of March, eight days after Congress adjourned. The validity of this statute was questioned at the next session, and the House of Representatives directed its judiciary committee to inquire and report by what authority the act was approved, and whether it was in force. The committee made a report on the 11th of June, 1864, from which it appears that Congress adjourned on the 4th of March, 1863, that the bill in question was referred by the President to the Secretary of the Treasury for examination, that it did not reach the President again until after the adjournment, and that it was approved by him under the belief that the Constitution authorized the President to sign a bill within ten days after it was presented to him, although Congress had in the meantime adjourned. The committee thought this was not a correct interpretation of the Constitution. "The ten days' limitation, contained

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in the section, refers to the time during which Congress remains in session, and has no application after adjournment. Hence, if the executive can hold a bill ten days after adjournment, and then approve it, he can as well hold it ten months before approval. This would render the laws of the country too uncertain, and could not have been intended by the framers of the Constitution. The spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfected before the adjournment of Congress." The committee were unanimous in the opinion that the act was not in force. Congress evidently did not share this opinion, for the act was recognized and proceedings under it regulated by another act passed July 2, 1864, in relation to captured and abandoned property, which was in part the subject of the original act.

The Convention of 1867, when it reached the consideration of the article on the executive department, found a practice established by the governor, and sanctioned by the court of appeals, under which the governor had an indefinite time in which to act on a bill after the legislature adjourned. It was evident from the discussion that this practice was not approved, and that a constitutional rule should be established which would fix with certainty the period during which the governor had jurisdiction to consider a bill. This subject received the attention of two committees. The committee on the executive reported the bill section with a provision prohibiting the governor from signing any bill after adjournment. The committee on powers and duties of the legislature also assumed jurisdiction of this subject, and reported the section with a provision which required bills to be disposed of during the session. Mr. C. L. Allen, chairman of the committee on the executive, said that the amendment to prohibit the governor from signing a bill after

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adjournment was proposed with the expectation that the committee on the powers and duties of the legislature would recommend that no bill be sent to the governor within the last ten or twenty days of the legislative session. That committee did not propose any limitation on the power of the legislature to present a bill to the governor at any time during the session, but it did recommend that no bill be introduced during the last five days of the session. While this section was under consideration Mr. Van Cott offered an amendment that "no bill shall become a law unless it shall have been presented to the governor at least ten days (Sundays excepted) before the adjournment of the legislature, or signed by him before the adjournment, or unless it shall have been passed over his objection, as herein provided." This amendment was objected to because it would leave the legislature without anything to do during the last ten days of the session while waiting for the governor to dispose of the bills. The Convention did not accept this proposition. Mr. C. L. Allen said that Governor Fenton had called attention to the large number of bills left with him by the legislature of 1867, and the impossibility of disposing of them before adjournment, and had suggested that the time for signing bills be limited to thirty days after the session. This is the earliest suggestion I have found proposing a thirty-day limit. Mr. Alvord proposed that the time be limited to ten days. After considerable discussion this proposition was rejected in committee of the whole, but later, in the Convention, it was renewed by Mr. Cassidy, and adopted. The same rule had been proposed in the Convention of 1846.

The Commission of 1872 adopted the period suggested by Governor Fenton, and an amendment was accordingly submitted to the people, and ratified in 1874, fixing the period at thirty days.

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The veto power.—The Convention proposed an important change concerning the passage of a bill over the governor's veto. Under the first three Constitutions, a bill could be passed over the veto by a vote of two thirds of the members present, except that the first Constitution seemed to require a two-thirds vote of all the members on the passage of a bill over a veto by the house to which it was returned, but permitted it to be passed in the other house by two thirds of the members present. It was pointed out in the Convention of 1867 that this permitted the passage of a bill over the governor's veto by a smaller vote than was required on its first passage. The committee on executive department, and the committee on powers and duties of the legislature, both proposed to change this rule, by providing that on the repassage of a bill over the veto it must receive the affirmative vote of two thirds of all the members elected to each house, thus increasing the vote required on its first passage. Thus, in an assembly composed of one hundred and fifty members, a bill on its first passage must receive seventy-six votes, but on its passage over a veto it must receive one hundred votes. In the senate twenty-six votes are necessary on the first passage of a bill, and thirty-four on its passage over a veto. This change in the Constitution, proposed by the Convention, was included in the amendments recommended by the Commission of 1872, and was adopted in 1874.

The committee on the executive proposed a significant and radical change in the veto power, under which the governor might veto separate and distinct parts of any bill. He was required to communicate his objections to the legislature, by which the whole bill was to be again considered. If passed again by the required two-thirds vote, it was to become a law the same as if the entire bill had been vetoed. If the bill was not again passed over

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the veto, the part not objected to was to be engrossed as a separate bill, and returned to the governor for his signature. This proposed veto power elicited a very animated debate. The plan was opposed by Mr. Folger, Mr. Evarts, Mr. Church, Judge Comstock, and other leaders of the Convention. Mr. C. L. Allen, chairman of the committee, said the subject had received very careful consideration. The objections to the plan had been duly weighed, but the committee thought the arguments in favor of the new power largely outweighed those against it. This power was deemed important because it authorized the governor to eliminate distinct portions from a bill not germane to the general subject, and which, standing alone, might not have received the assent of the legislature. The power was especially desirable when applied to appropriation bills, which were usually made up of distinct and unrelated items. Quoting from the committee's report, he said: "Bills proposing to enact wholesome and salutary laws have also contained provisions of so objectionable a character as to prevent their approval by the governor; and thus many measures highly conducive, and almost indispensable, to the public welfare have been defeated, or have been preserved only by carrying with them enactments highly odious and offensive. Indeed, it is well known that obnoxious propositions have been artfully inserted in bills for the purpose of enforcing their enactment under the calculation, not often ill-founded, that honest members of the legislature would be induced to suffer them to pass into laws, rather than lose the benefit of the unobjectionable features." Mr. Alvord thought the power should be limited to items in the appropriation and supply bills, and he proposed an amendment accordingly. He said the appropriation and supply bills as a whole ought to be approved, but that they often contained objectionable items

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which were allowed to stand, because the governor, for obvious reasons, could not veto the whole bill. Mr. Folger opposed the proposition because it would give to the governor too much affirmative power over legislation. The governor should have the negative, but he should not become an affirmative part of the lawmaking power. Mr. Folger did not object to the power if limited to appropriation and supply bills, but said that "upon a bill which is at all complex in its nature, and which requires one part to depend upon the other and to accompany the other, the power of a partial veto would be dangerous and contrary to our theory of the legislative power, and it cannot be safely exercised. Even the right of a qualified veto, a negative in the governor has been by many seriously doubted. But the right of such veto as this now proposed would make him an affirmative lawmaker, and it would place in the hands of one man the lawmaking power of the state, subject only to the restriction which might be found in the dissenting two-thirds vote of each house of the legislature." Mr. Prindle proposed to give the legislature the power to reject that part of the bill which the governor approved.

Mr. Church, opposing the plan, asked who should decide what were separate and distinct portions of a bill. He thought the operation of the plan would lead to "all sorts of litigations and difficulty." Amasa J. Parker supported the plan, remarking that it was simply an enlargement of the veto power, and did not enable the governor to participate in legislation. Mr. Evarts opposed the plan, because it permitted the governor to take an active part in legislation, and interfere in the details of laws. He said the governor might object to a distinct clause in a bill, "and the legislature is compelled to say whether it will itself lose the bill without the clause, or whether it will adhere to that clause." Mr. Evarts said

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that the legislative will expressed in a bill was a unit, and was not intended to be expressed in sections or parts. "The legislative law is the final conclusion of the whole measure, as it is in the entire law." Judge Comstock thought the plan should not be adopted, especially if applied to bills left with the governor on adjournment of the legislature, because, if the governor differed from the legislature concerning specific parts of the bill, there was no opportunity to make corrections which might be needed to perfect the bill after excluding the objectionable provisions.

Several amendments of detail were offered, intended to perfect the plan, but, on Mr. Rumsey's motion, the Convention, by a vote of 52 to 30, substituted the existing veto power for the partial veto proposed by the committee on executive department. Mr. Alvord's proposition to confer on the governor power to veto distinct provisions in tax and appropriation bills was also rejected by a vote of 30 to 56.

Concerning the power to veto specific portions of a bill, it may be proper to add that such a power would often be beneficial if judiciously used. Under modern practice, a large part of the legislation of a session goes to the governor for action during the thirty-day period. The legislature has adjourned, and has no power to correct mistakes. Bills not making appropriations, but of a general or local character, ofter contain objectionable, and even unconstitutional, provisions, which could sometimes be eliminated without affecting the bill as a whole. Under the operation of the thirty-day rule, the governor becomes an affirmative factor in legislation. While the legislature is in session his power is negative, and his affirmative action is not necessary to enact a law. The legislature passes a bill and sends it to the governor, and, if he does nothing, it becomes a law under the operation

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of the ten-day rule, but after adjournment his relation to legislation is reversed, and no bill can become a law without his affirmative action. The legislature, by passing bills and leaving them for the governor's action, in effect simply recommends that the bills become laws; but they cannot become laws without the governor's approval. If the legislature had continued in session, the governor might have called its attention to defects in a bill, and, either by suggesting its recall, or by veto, might have procured its amendment. This opportunity to perfect a bill is not continued after adjournment, and the governor must either assent to, or reject, the bill as a whole. In numerous instances the governor might perfect a bill by eliminating objectionable provisions without affecting its general character; and this would save the time of the legislature at subsequent sessions in making needed amendments, or of the courts in construing separate provisions whose constitutionality is questioned.

I think the Convention of 1867 was right in refusing to permit the governor to veto separate parts of a bill while the legislature is in session, because the legislature, being the lawmaking power of the state, should, while in session, perfect its own bills; but the same reason does not apply where the legislature, without waiting for the governor's action on a bill, adjourns and deprives itself of any further power over the bill, and declines any further responsibility concerning it. If the governor is to be held responsible for legislation approved by him during the thirty-day period, he ought to have power to correct a bill, not by adding new matter, but by excluding objectionable provisions.

STATE OFFICERS.

The committee on state officers recommended few changes in existing provisions. It was proposed that

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the attorney general be a counselor at law of at least ten years' standing, and that the state officers be elected at the same time and for the same term as the governor. These officers then being elected at a different time, it was proposed to abbreviate to one year the term of those elected in 1867, so that thereafter these officers would be chosen at the regular gubernatorial election. The legislature was to be vested with power to remove the state treasurer, but this provision was stricken out by the Convention. When the report was under consideration in committee of the whole, Mr. Duganne offered an amendment providing for the appointment of the attorney general by the governor and senate. Mr. Kernan, supporting the amendment, said the governor should have something like a cabinet to advise with, and to act in unity with him, in executing the great functions which are devolved upon the executive department of the government. The person who is to advise with him as to the law should be nominated by him. Judge Daly approved the cabinet idea, and said he considered it "most injudicious to leave the chief adviser of the executive in all matters relating to the administration of the law throughout the state entirely independent of the governor," instead of making him the confidential and consulting officer, which he would be if appointed by the governor. Mr. Andrews said the attorney general advised the governor in the execution of the laws; if the attorney general is to be elected you confer on the governor, on the one hand, the functions of the executive, while, on the other, you divorce from his control the agencies by which he is to execute the laws. Mr. Barker thought the attorney general should be appointed by the governor, for the reason that the most friendly, cordial, and intimate relations, both social and political, should

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exist between the governor and the attorney general of the state.

In opposition to the amendment, it was pointed out that the attorney general had duties to perform not connected with the executive, and that, while he might and should be the governor's adviser on public affairs, he was also the adviser of other departments of the government. Martin I. Townsend opposed the amendment. It was not the governor alone, but the people, who wanted an attorney general. He was to look after the interests of the people of the state, and take care of their money, so far as his action in the courts was concerned, and in the criminal courts he was to preserve the peace of the people of the state. If he does his duty it matters little to the people whether he is in accord with the governor or not. Indeed, observed Mr. Townsend, it may be to the interest of the people that the attorney general should not always be in accord with the governor. "The attorney general holds a dignified position; he has important functions, and acts on his own judgment and responsibility." Edwards Pierrepont said the attorney general should be a man who could not be ordered by anybody. His opinions should be above any fear of the loss of his office. His duties are of the highest order,—as high as those of any judicial officer; and he should be as independent as any judge. The governor should have no more power to remove the attorney general than he has to remove the chief judge of the court of appeals. "His opinions are upon great questions, affecting the great interests of the state. He ought not to be a mere creature of the governor to supervise his vetoes and obey his dictation." Mr. Folger also opposed the amendment. No one has suggested any practical difficulties under the present Constitution. It was not claimed that the governor could not get a constitutional opinion from

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the attorney general, even if he belonged to a different political party. The attorney general is the officer of the people and of every state officer and department, and he had answered all their inquiries. The attorney general should not be the officer of the governor alone, and subject to his controlling influence. Mr. Folger cited an instance where the governor vetoed a bill which the attorney general, in answer to an inquiry by the legislature, had pronounced constitutional. The legislature has as much right as the governor to call on the attorney general for a constitutional opinion, and the attorney general should not be dependent on either.

Mr. Cassidy, Mr. Van Cott, Mr. Church, Mr. Greeley, and Mr. Curtis also supported the amendment. It was rejected in committee of the whole by the close vote of 54 to 56. The amendment was renewed in Convention, and rejected again by a vote of 50 to 66. The Convention struck out the provisions requiring an attorney general to be a counselor at law, and the state engineer and surveyor to be a practical engineer.

STATE POLICE.

The recent agitation in and out of the legislature concerning the establishment of a state police lends interest to the provisions on this subject reported by the committee on prisons. That committee reported several sections providing for a state police; and there appears, in connection with the report, what apparently was intended to be a complete scheme of police reorganization of the state. The provisions in the main report embraced the appointment of a superintendent of police for a term of seven years by the governor and senate; the division of the state into five police districts, with one inspector in each, to be appointed by the superintendent, who was also required to divide each district into five subdivisions,

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and appoint a subinspector for each. The legislature was required to provide for the establishment of a general system of state police with an adequate force in each subdivision; "and no other police force shall be organized except under its provisions." The other plan required the legislature to organize a state police force in lieu of all municipal police. This force was to be under the command of a "chief executive officer," to be appointed by the governor and senate. The legislature was required to divide the state into five divisions, each under the charge of a chief of division, and each division was to be divided into five sections, each of which was to be under the charge of a section inspector. Section inspectors were to form the staff of the chief of division, who, with the section inspectors, was to be appointed by the governor and senate on the nomination of the chief executive officer. The chief executive officer and chiefs of divisions were to hold office during good behavior, subject, only, to impeachment by the senate. The governor, attorney general, chief executive officer, and chiefs of divisions were to constitute a board of state police, with power to make rules for the government of the police. All subordinate police officers were to be appointed by the board of police on the nomination of the mayor of a city and the presidents of boards of supervisors, and privates were to be appointed in cities by the mayor and board of aldermen, and elsewhere by the board of supervisors. Provision was also made for the use of the police force in cases of riot or insurrection, and also for assistance by the national guard. Local police departments were to become a part of the state system, and members of the local police force were continued in office.

This subject seems to have received little attention, except by the prison committee. When the prison article

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was under consideration the sections relating to the state police were stricken out without debate.

LOCAL OFFICERS.

The committee on county and town officers, while preserving the general features of the existing system, recommended a few important changes, principally intended to transfer the powers of local government from the legislature to boards of supervisors. Existing county officers were continued with the addition of a county supervisor, all of whom were to be elected except the district attorney, who was to be appointed by the governor. Any of these officers might be removed by the governor for "incapacity, neglect of duty, malfeasance, intemperance, turpitude, or crime." The existing town officers were continued, except that the supervisor's term was fixed at two years.

Board of supervisors.—The committee proposed to remodel the board of supervisors, making it a county legislature, with exclusive jurisdiction over several important local subjects. The existing representation in the board was continued, but the legislature was authorized to increase and equalize the representation from towns, cities, and villages by the election of additional representatives, who should be members of the board, but possess no other power. The board was given somewhat of the dignity of the state legislature. A county supervisor was to be elected by the people for a term of three years, who was to be president of the board with a casting vote only; but no law or resolution passed by the board could take effect without his approval. He was given the veto power, but a law or resolution might be passed over his veto by a vote of a majority of all the members elected to the board. The board was given general legislative and administrative control over local,

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internal, and fiscal affairs in numerous specified cases, including highways, bridges (except over navigable streams), plank, turnpike, macadamized roads, and horse railroads, taxation and appropriation for county, town, and village purposes, the confirmation of the proceedings of towns and incorporated villages, and of county, town, and village officers (other than judicial), and the relief of such officers in certain cases, the purchase and control of county property, erection and alteration of towns and wards, improving the channels of unnavigable streams, the correction of erroneous and illegal assessments and refunding moneys paid thereon, care and support of the poor, and such other subjects as might be prescribed by the legislature, or might be within the jurisdiction of such board at the adoption of the new Constitution.

In committee of the whole Mr. Greeley moved to strike out the office of county supervisor, urging that such an office was not needed, and that it would therefore be a useless expense. He said that under the plan this officer had no real power, for his veto could be overcome by a mere majority. Mr. H. E. Smith, chairman of the committee, supported the creation of this office, on the ground that, with the large legislative powers to be vested in the board, it should have a presiding officer chosen by all the people, not representing any particular local interest, and that he should have power to check hasty or unwise legislation. This applied to the county legislature the principle applicable to the state legislature, whose action is subject to review by the state executive. Mr. Bickford said the committee was almost unanimous in favor of the veto power. The necessity of such a power arose in part from the fact that the county legislature would be composed of one body, and without such a veto power there would be no check on its proceedings. Mr. Bickford thought that this power should be vested in the

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sheriff. Others thought it might be lodged with the county judge; but the result of the committee's deliberations was to propose the election of a new officer, who should have no functions except as president of the board of supervisors. After some further discussion Mr. Greeley's motion was lost by a vote of 37 to 47. Mr. Veeder's motion to amend by providing for the election, instead of the appointment, of the district attorney was lost by a vote of 40 to 50.

Mr. Andrews moved to substitute for the 1st section the existing § 1 of article 10, relating to county officers. While this motion was pending Mr. Schumaker offered an amendment providing that, on an application for the removal of an officer by the governor, the officer should have a trial by jury in a court in the county where he resides. This amendment was lost. The Andrews amendment was adopted by a vote of 53 to 33. This disposed of the provisions for a county supervisor, and also the appointment of a district attorney. Section 2 of article 10 was substituted for the different provisions in the committee's report on the same subject. The section providing for the election of certain town officers was stricken out.

The Convention adopted, with some modification, the committee's plan concerning the powers of the board of supervisors. While the subject was under consideration, and after the provision for a county supervisor had been stricken out, Mr. Rumsey moved that all laws passed by the board of supervisors be presented to the county judge, who was given the power possessed by the governor in relation to legislative bills. A law disapproved by the county judge might be passed over his veto by a vote of two thirds of all the members elected to the board. This motion was lost. There was considerable discussion concerning the powers of boards of super-

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visors, but the Convention finally determined to vest in these boards, by a vote of a majority of all the members elected thereto, exclusive jurisdiction in cases relating to bridges over unnavigable streams, the purchase and control of real property for county purposes (but the location of county buildings could not be changed except on the vote of two thirds of two successive boards), the creation of separate road districts in special cases, the use of abandoned turnpike, plank, and macadamized roads as public highways, improvement in certain cases of highways laid out under general law, legalization of town meetings and acts of town officers, regulation of compensation of certain county officers and subordinates and borrowing money for county or town purposes. These provisions were not applicable to the board of supervisors in the county of New York.

CITIES.

I have referred to the action of the Convention of 1846 in relation to cities, and the attempt there made to provide for the incorporation of cities by general laws. The rapid increase of cities made the problem of city administration still more difficult in 1867. The Convention appointed a committee on cities which presented two reports. The majority and minority reports agreed in their principal features. Both provided for the election of a mayor by the people. The majority fixed the mayor's term at three years, and made him ineligible for the next term. Under the minority report the mayor could hold office only one year, but might be re-elected. Both provided for the removal of the mayor by the governor. Both provided that in New York and Brooklyn the legislative power should be vested in the common council, composed of a board of aldermen and a board of assistant aldermen; in other cities the legislative power was to be vested in a board

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of aldermen. The mayor of each was required to approve or disapprove every act or ordinance of the local legislature, but such an act or ordinance might be passed over the veto by a vote of two thirds of all the members elected to the board. Both reports made provision for various subordinate officers. Both provided for the division of the state into counties, towns, cities, and villages. The majority proposed to prohibit the creation of any other local division or district, or the annexation of territory to a city, except for the purpose of changing its boundaries. The minority proposed to prohibit the creation of such local divisions or districts, except for police or sanitary purposes, and also proposed to reserve to the legislature the power to provide for the preservation of the public health, and to appoint and control the police force of the state, and to create any local divisions it might deem expedient for these purposes. Both proposed to abolish the board of supervisors of New York, and to give the city exclusive power to determine the amount of taxation for local purposes. Both reserved to the legislature control over matters relating to the port of New York, and general commercial interests, and the article was not to affect the state's title to land under water in any city. Both provided for the appointment of three commissioners by the governor "to reduce into a systematic code the laws of this state relating to the government of cities." Both required the legislature, at its first session after the adoption of the Constitution, to enact a general law for the organization and government of cities. The majority proposed that justices and judges of inferior courts not of record be elected by the people. The minority proposed that they be appointed by the mayor and board of aldermen.

While the article was under consideration Mr. Landon proposed to limit its application to cities which had a

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population exceeding 50,000, leaving the smaller cities free to administer their own affairs in such manner as the legislature might direct. This suggestion was not adopted. Mr. Spencer moved to strike out the section providing for mayors, and, after some debate, the Convention adopted a substitute proposed by Mr. Curtis, and which was contained in Mr. Murphy's minority report, providing, in substance, that each city should elect a mayor for a term of two years, who should be the chief executive officer of the city.

The time apparently was not ripe for including in the Constitution the radical provision relative to cities proposed by the committee. Serious opposition to the committee's plan developed early in the debate, and after some discussion nearly all of the article was stricken out, the only parts left being those providing for the election of mayors, the enactment of general laws for the organization and government of cities, and reserving to the legislature power concerning quarantine, the port of New York, state lands under water within city limits, and the regulation of wharves, piers, or slips in any city. The restriction contained in § 17 of article 3, prohibiting extra compensation in certain cases, was made applicable to common councils and boards of supervisors. This subject will be resumed in the chapter on the Convention of 1894.

CANALS AND FINANCE.

The canals from the beginning of their history have had a potent influence in shaping our financial policy. They have necessarily had much to do with the material development of the state, and for more than a century statesmen have been engaged in devising ways and means for their construction and maintenance. In the process of constitutional evolution the canals have logically been treated as a part of our financial system. In the Conven-

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tion of 1846 the committee on canals and finance was one of the great committees, and it produced impressive and enduring results,—establishing principles concerning public debt, taxation, and appropriations that have proved, and will continue to prove, of inestimable value in protecting the people against extravagant expenditures of public money. In 1867 the subject of canals had become so large that the Convention deemed it expedient to appoint two committees, one on canals, and the other on canals and state finance, including also public debt, revenues, taxation, appropriations, and restrictions on legislative power in respect thereto. Both committees made reports which were considered together in committee of the whole. Existing financial provisions, except those relating directly to canals, were continued without substantial change. Some of the most important recommendations of these committees have since found their way into the Constitution by independent amendments, while many others have not yet passed beyond the domain of constitutional suggestion. Of this latter class it is not probable that many will ever be incorporated in the Constitution, because the conditions which at one time seemed to make them desirable have changed, and the progress of events has rendered them unnecessary. While many of these suggestions no longer have any vitality, they were once deemed important by wise and patriotic statesmen, and they are worthy of at least a casual notice in considering constitutional possibilities.

It had long been apparent that reform was needed in canal administration. This system of administration had grown up gradually from small beginnings, and from the outset extraordinary powers had been conferred on the canal commissioners. In the preliminary article on state debt, in the chapter on the Constitution of 1846, I have quoted from Governor Seward's message in 1839, his

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objection to the powers exercised by the commissioners, and his suggestion of a "board of internal improvements," with general supervision over public works. Experience had justified Governor Seward's criticism on the system, although the remedy suggested by him had received little practical attention, and the conviction in the minds of experienced statesmen that a remedy was needed had become so strong in 1867 that a change of canal administration was expected almost as a matter of course, and there was little difference of opinion in the Convention on this subject, except as to the method by which this change should be effected and the kind of administration to be substituted. The canal committee proposed to abrogate the canal board, contracting board, and the powers and duties of state engineer and surveyor as applicable to canals, and also to abolish the offices of canal commissioner and canal appraiser. The comptroller, treasurer, and attorney general were continued as commissioners of the canal fund, omitting the lieutenant governor and secretary of state, who were also commissioners under the Constitution of 1846. The powers of these commissioners were prescribed to some extent by the Constitution, and additional powers might be conferred on them by the legislature. The office of canal auditor, created in 1848, was made a constitutional office to be filled by appointment by the governor and senate.

In the article on state officers, in the chapter on the Convention of 1846, I have referred to the amendment offered by Mr. Loomis to create the office of commissioner of public works, with powers quite similar to those now vested in the superintendent of public works. The Loomis amendment was not favorably received, and was rejected almost without debate, but it shows that one of the ablest men in that Convention appreciated the importance of concentrating authority and responsibility in

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canal management. The suggestion bore fruit, however, after more than twenty years, and, in substance, was adopted by the committee on canals in the Convention of 1867, who proposed to vest the new canal administration in one officer, to be called a superintendent of public works. He was to be appointed by the governor and senate for a term of eight years, and on his recommendation the governor and senate were to appoint four assistants for a like term. Mr. Bergen and Mr. Seymour concurred in the plan for one superintendent, but thought he ought to be elected by the people. Mr. Schoonmaker, Mr. Tappan, and Mr. Champlain presented a minority report in which they dissented from the recommendation to create the office of superintendent of public works with assistants to be appointed by the governor and senate. They concurred with the majority in the necessity of changing the management of the canals, concentrating power and responsibility. They objected to the "one-man power" proposed by the majority, without direct responsibility to the people, and holding the patronage of 1,000 miles of canals. This, they said, was a fearful power to place in the hands of one man; it was a power which, in the hands of a designing politician, could be used to control political nominations and elections. The minority recommended four superintendents instead of one, dividing the canals into four distinct sections, each to be under the exclusive control of one superintendent, and the four superintendents to constitute a board with general supervision of the whole system. The superintendents were to be elected by the people for terms of eight years.

The provision for a superintendent of public works, proposed by the majority of the committee, modified by reducing the term from eight years to five, was approved by the Convention, and included in the proposed Constitution. This subject will be considered again in connec-

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tion with the Commission of 1872, and the amendments of 1876, when the office of superintendent of public works was established.

Payment of state debts.—Provision was made for the payment of the canal debt, which at this time amounted to $15,772,900, and for the creation of a canal-debt sinking fund, and the appropriation of $8,000,000, for certain specified canal improvements. The general fund debt, amounting to $5,642,622.22, was to be paid from the canal-debt sinking fund after the payment of the canal debt, or the accumulation of a fund sufficient therefor; or, if the general fund debt could not be thus paid, the legislature was authorized to make provision for its payment by a loan on the credit of the sinking fund, or otherwise. All contributions or advances to the canals since June 1, 1846, from any source except canal revenues, should be repaid into the state treasury from canal revenues as soon as consistent with other provisions of the article, and any sums so repaid, together with the canal revenues, should be applied to extinguish existing state debts. The prohibition against disposing of the canals was continued.

Canal contracts.—While the canal article was under consideration in committee of the whole an important amendment offered by Erastus Brooks was adopted, relating to canal contracts. Referring to the provision in the amendment of 1854, that all canal contracts should be let to the lowest bidder who offers adequate security, he said that under this provision numerous frauds had been perpetrated on the state by means of combination bids, under which the lowest bids would be rejected for informality, and the contract finally awarded to the highest bidder, who was in collusion with the other bidders. He proposed an amendment under which no bid could be rejected for informality until the bidder had been given

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an opportunity to correct it, and specifications could not be changed before or after the execution of the contract without the consent of the commissioners of the canal fund and of the superintendent of public works, or a majority of them. The Brooks amendment was approved, with the proviso that the contract system might be abrogated, and other methods of performing public works adopted.

Local aid for private purposes.—The committee on the organization and powers of towns, counties, and villages reported a section prohibiting a county, town, or village from giving any of its property or money, or loaning its credit, to or in aid of any individual, association, or corporation. The principal reason for proposing this section was the extent to which town bonding had been carried under statutes passed to aid in the construction of railroads. It elicited considerable debate. Several instances of unfortunate bonding in aid of railroads were cited. Unsuccessful attempts were made to amend the section by continuing existing statutes, and also by permitting bonds to be issued on the affirmative vote of a specified number of taxpayers. The section was finally modified so that, instead of including in the Constitution itself the prohibition against local aid, a provision was agreed to that "the legislature shall not pass any law authorizing any county, town, village, municipal corporation, or other territorial division to give or appropriate any money or property, or to lend its credit to or in aid of any private person, company, or corporation, or take or be interested in any stock of any company or corporation, except as in this Constitution is otherwise provided." But later the Convention reversed its action in approving this provision, and rejected it by a vote of 41 to 55, and the subject was not included in the Constitution proposed by the Convention.

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Canal enlargement.—The committee on canals and finance carefully considered the subject of canal enlargement, and in its report said that it had been requested to recommend the creation of a debt of $12,000,000, to be used in enlarging the canal locks. It was urged in support of this improvement that it would enlarge the capacity of the canals, cheapen transportation, and increase business. The committee thought the proposed enlargement would be unwise at that time. "The present enlargement of the canals is but just completed. The state has been engaged in the work more than thirty years, and has expended upon the work $39,425,334.32. A water way of seventy by seven, with expensive and permanent structures has been secured, capable of transporting boats of 250 tons burden. It is claimed that $12,000,000 will accomplish the proposed work, but, according to all the past history of the state in constructing public works, the expenditure will double that sum. Enlarged locks may necessitate an enlarged water way, and a change of other structures involving tens of millions more of debt and expenditure. The capacity of the Erie canal to do business has never been reached, and scarcely approached. There is now, and will be for an indefinite period in future, abundant capacity in the Erie canal to transport all the property which will be brought to it." The committee quoted from the report of the canal auditor of 1866 that a boat could be passed through a lock in less than five minutes, and who on this basis estimated the capacity of the canal at 6,393,600 tons each way, which was more than double the amount ever brought to tide water in one year.

TAXATION.

While the finance article was under consideration Mr. Rathbun proposed a section providing for equal taxation

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of real and personal property. Mr. A. F. Allen proposed an additional provision, requiring every person to render a sworn statement of the value of all property in his possession or under his control. Mr. McDonald offered a substitute providing for the taxation of all property in the state, that all deductions for debts should be uniform, that exemptions should be uniform and could be authorized only by a two-thirds vote of the legislature, and requiring sworn returns of property. S. Townsend proposed to tax personal property represented by corporate or associated capital, and exempt all other personal property from taxation. The Allen amendment was once adopted; afterwards Mr. Opdyke proposed to deduct debts, and M. I. Townsend added a provision that, if the returns disclosed debts, they should be assessed against the creditors. Both of these amendments were rejected. Erastus Brooks proposed an article authorizing the governor and senate to appoint three state assessors, with general jurisdiction of the subject of taxation, and with power to appoint three assessors in each county, and these county assessors might appoint three assessors in each town or tax district. This proposition was also rejected. Mr. Bickford proposed to include the value of state and municipal property in the apportionment of state taxes among the several counties. Mr. Gould proposed a tax commission to report a system of taxation for the consideration of the legislature. S. Townsend proposed to apportion state taxes among the counties, according to the ratio of their population. Mr. Van Campen proposed to authorize exemption from taxation of property used for municipal, educational, literary, scientific, religious, and charitable purposes. Mr. Rumsey proposed that "personal property of nonresidents within this state shall be taxed in like manner as the

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property of residents." All of these propositions were rejected.

After some further discussion, the provision requiring the statement of property was omitted. The Convention finally agreed to a section providing that "real and personal property shall be subject to a uniform rule of assessment and taxation."

EDUCATION.

The Convention of 1894 incorporated in the Constitution several important provisions concerning education. All of these provisions were the subject of serious consideration in the Convention of 1867, and one of them—the provision relating to common schools—was once adopted and then rejected by the Convention of 1846. The subject of education in its relation to the Constitution will be considered at length in the chapter on the Convention of 1894, but in an orderly development of the subject, until its culmination in that Convention, it will be proper to consider briefly here the principal changes proposed in or by the Convention of 1867.

The committee on education, of which George William Curtis was chairman, submitted an article continuing, in substance, the provisions of the existing Constitution relative to the various educational funds, with several new provisions. The capital of the college land-scrip fund and the capital of the Cornell endowment fund were added to those which the Constitution declared to be "inviolate," and the revenues of these two funds were devoted to the use of Cornell University. The article prescribed the manner of investing the various educational funds, and the legislature was authorized to provide for the endowment of educational institutions. Provision was made for the election by the legislature of a superintendent of education who should hold office four

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years. The legislature was required to create a state board of education to be composed of seven members, of which board the superintendent of education, secretary of state, and the comptroller were to be *ex officio* members, and the remaining four were to be elected or appointed as the legislature might direct. This board was to have "general supervision of all the institutions of learning, and were required to perform such other duties as the legislature might direct." The legislature was to prescribe the term of office and compensation of members. The article closed with the provision that "instruction in the common schools and union schools of this state shall be free, under such regulations as the legislature may provide." It will be observed that the proposed article embraced three important recommendations, and two others of a subordinate character. The three principal recommendations related, first to Cornell University, which was to be put into the Constitution, second, the abolition of the state university and the substitution in its place of a state board of education, designed to effect the administrative union of the university and the department of public instruction; and the third insured free instruction in common and union schools.

Cornell University.—This institution, which has grown to such magnitude, and has become such an important factor in our educational system, was then in its infancy. The desire of its friends in the Convention to place it under the absolute protection of the Constitution was not realized, because the people did not accept the entire work of the Convention, and since that time Cornell University has developed and grown without constitutional aid, and occupies such a secure place among our institutions that it does not need a constitutional shield. This is another illustration of the truism that constitutions develop by the logic of events, and a consti-

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tutional reform that to one generation seems indispensable becomes unnecessary in the next; conversely, reforms which seem unnecessary to-day will be inevitable to-morrow. The committee's propositions concerning Cornell University were approved by the Convention and submitted to the people. The proposed amendment elicited a long and interesting debate from which the reader may easily gather the facts relating to the inception of the movement which culminated in the creation of this university. The subject has passed into history, probably not to be revived as an element of constitutional evolution; but it occupied so much of the time and thought of a great Convention, and it is such a striking illustration of national development, that it cannot fail to interest the student of our constitutional history.

The records of Congress show that on the 14th of December, 1857, Justin S. Morrill, of Vermont, introduced in the House of Representatives, a bill donating, according to a prescribed ratio, 6,340,000 acres of land to the several states and territories "which may provide colleges for the benefit of agriculture and the mechanic arts." In his speech on the bill, on the 20th of April, 1858, Mr. Morrill said there had been "no measure for years which has received so much attention in the various parts of the country as the one now under consideration, so far as the fact can be proved by petitions which have been received here from the various states, north and south, from state societies, from county societies, and from individuals." He referred to numerous instances of grants of land to individual states for educational purposes, including the act of 1823, which set apart an entire township in each of the districts of east and west Florida for the use of a seminary of learning to be located by the Secretary of the Treasury, the act of 1827 under which an incorporated deaf and dumb asylum of Kentucky was author-

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ized to locate land in Florida or Arkansas and use the proceeds for its benefit, and the act of 1846 releasing to Tennessee 1,300,000 acres of public land in that state for the endowment of a college. He said that over 50,000,000 acres of swamp land had been given to different states. The policy expressed in these specific instances reached its climax in this bill, which proposed to grant land to every state to aid in fostering higher education. Mr. Morrill argued at some length in favor of the policy of making a general grant to all the states for the purpose of providing facilities for instruction in agriculture and the mechanic arts. He said that other branches of learning and industry had been fostered by the government, but so far agriculture had been almost entirely neglected. On the same day Mr. Morrill introduced a substitute bill, omitting territories, and granting to the states 5,920,000 acres of public lands, on condition that each state receiving the prescribed ratio should, within five years, establish and maintain "at least one college where the leading object shall be, without excluding other scientific or classical studies, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." The committee on public lands reported the bill adversely, but it was passed by the House on the 22d of April, 1858, by a vote of 105 to 100. The bill was amended in the Senate by omitting the total number of acres granted and adding territories, and was passed by that body on the 7th of February, 1859, by a vote of 25 to 22. The bill reached President Buchanan in due course, and was vetoed by him February 24, 1859, on two grounds: First, that it was inexpedient for several specified reasons, one of which

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was that such a large tract of land ought not to be withdrawn from the market and the Treasury deprived of the proceeds, which for the next fiscal year were estimated at $5,000,000; second, that the bill was unconstitutional, because Congress had no power to make a donation of public lands to the states; that Congress could not appropriate money from the Treasury for the purpose of education in the individual states, and that an appropriation of public lands was equivalent to an appropriation of money. The bill was not passed over the President's veto.

On the 16th of December, 1861, Mr. Morrill again introduced the bill in the House. It was referred to the committee on public lands, where it was held until May 29, 1862, when it was reported adversely. In the meantime, on the 5th of May, 1862, the bill was introduced in the Senate by Benjamin F. Wade, of Ohio. It was passed by that body on the 10th of June by a vote of 32 to 7, and sent to the House on the 11th. On the 17th the House, without referring the Senate bill to a committee, passed it by a vote of 90 to 25. The new bill was substantially the original Morrill bill, which had been vetoed by President Buchanan, but it contained some new provisions. It excluded mineral lands, and required acceptance of the grant within two years. The emergency suddenly thrust upon the nation by the Civil War, which then had been in progress a year with a great army of untrained volunteers, suggested and emphasized the need of better military preparation in the future. The new bill therefore added military tactics to the course of instruction required under the original bill in colleges which might become beneficiaries of the grant. In other respects the instruction required or permitted remained unchanged. It will be remembered that when the Wade bill was passed the southern confederacy had been

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formed, and eleven states were, therefore, not represented in Congress. When the Morrill bill was passed the Union was intact, and the President in his veto message said that thirty-three states might have availed themselves of its provisions. The continuance of the war rendered acceptance by the southern states impracticable within the two years limited by the act of 1862. Under the original Morrill bill the ratio of distribution was fixed at 20,000 acres for each senator and representative; the Wade bill increased this ratio to 30,000 acres. This entitled New York to 990,000 acres. The bill was approved by President Lincoln July 2, 1862.

In 1863 the legislature, by chapter 20, accepted the provisions of the act of Congress, and by chapter 511 appropriated the income derived from the sale of lands to the People's College at Havana, Schuyler county, on condition that the trustees should within three years establish a college with a specified number of professors, and with prescribed equipments and accommodations. The statute also provided for free instruction in this college of youth from each county, the number to be designated by the regents, and to be chosen under rules prescribed by the chancellor and superintendent of public instruction, preference being given to sons of those who died in the military or naval service of the United States. The income to be received by the college was limited to its needs, to be determined by the regents, and the excess of income was to be distributed by the regents among other colleges, which might furnish the instruction required by the act of Congress.

In 1865 the legislature, by chapter 585, incorporated Cornell University, "to teach such branches of learning as are related to agriculture and the mechanic arts, including military tactics, in order to promote the liberal and practical education of the industrial classes in the several pur-

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suits and professions in life. But such other branches of science and knowledge may be embraced in the plan of instruction and investigation pertaining to the university as the trustees may deem useful and proper. And persons of every religious denomination, or of no religious denomination, shall be equally eligible to all offices and appointments." The act also provided for free instruction of one student from each assembly district, giving preference to sons of those who died in the military or naval service of the United States. It had already become apparent that the People's College would be unable to fulfil the conditions imposed by the act of 1863, and the legislature granted an extension of three months, thus giving the college a further opportunity to become the beneficiary of the act of Congress on complying with certain conditions, but on its failure to comply with these conditions the benefits of the grant were transferred to Cornell University, on the further condition that Ezra Cornell should make to the university an absolute gift of $500,000 within six months after the passage of the act, and also within the same time give to Genesee College located at Lima, New York, the sum of $25,000. The act also imposed conditions concerning accommodations and equipments at Ithaca, where the college was to be located. The People's College was unable to fulfil the required conditions; Ezra Cornell did comply with the conditions imposed on him, and Cornell University thus became the beneficiary of the act of Congress.

In 1866 the legislature, by chapter 481, provided for the sale of the land scrip and the disposition of the profits above a fixed price. This fixed price afterwards became known as the college land-scrip fund, and the avails above this price were known as the college endowment fund, and the committee gave this meaning to the terms used in the proposed amendment. When the consid-

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eration of this subject was reached in the Convention, Abraham Lawrence, of Schuyler county, moved to strike out the provision requiring the income of the funds to be paid to Cornell University, intending thereby to make such income available for all educational institutions that would comply with the act of Congress. He said it was apparent from the act of 1863, under which the People's College was to become the primary beneficiary of the grant, that it was not the intention of the legislature to confine the benefits of the act to one college, and he thought the proposed amendment was unfair to other institutions which might be willing to furnish the required instruction. Mr. Curtis, replying to this suggestion, said that twenty-two states had accepted the grant. Eleven had joined the fund to those already existing in certain institutions, eleven had established new institutions to be founded on this grant, and only one, Massachusetts, had made any division of it. There the fund was divided unequally between two institutions. Mr. Curtis thought the grant could be made most useful by limiting it to one institution, and that its purposes would be dissipated and defeated if the funds were distributed among several colleges. The Convention declined to adopt Mr. Lawrence's amendment to distribute the income of the funds, but did adopt an amendment offered by Mr. Folger providing that payments should be made to Cornell University only so long as it complied with the conditions imposed by its original charter. With this modification the committee's recommendation was sustained and included in the proposed Constitution.

Abolition of the state university.—The committee recommended the establishment of a state board of education to have supervision of all educational institutions. In its report accompanying the educational article the committee said that, "so long as the state maintains com-

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mon schools, subsidizes academies, and supervises colleges, it is obviously better that all these interests should be the charge of a single department." Mr. Gould, commenting on the proposed amendment, said that education was a unit; that the training up of the youthful mind of this state for the purposes of usefulness in life was a unit, that it was one act, and that it should be performed by one body having definite aims and objects in view. Also that the body intrusted with this great and all-important work should be one which comprehended fully all that was required of them; that they should be men who were trained for their work by special studies and by special occupations, so that they might comprehend precisely what was needed in this great matter. It appears from remarks made in the course of the debate that numerous petitions had been presented to the Convention for the abolition of the university; that there was an antagonism between the department of public instruction and the board of regents, and it was charged that the petitions were prepared in the department. The regents had many friends, and after considerable debate the proposed section was stricken out.

Common schools.—The committee recommended a section providing that "instruction in the common schools and union schools of this state shall be free, under such regulations as the legislature may provide," and in its report said this was intended to "give to the freedom of the common schools the protection of the Constitution." Mr. Barto proposed to limit the annual maximum tax rate imposed by the legislature for school purposes to one fourth of a mill. The Convention declined to limit the amount of the school tax. Mr. Rumsey proposed to require the legislature to provide by law for the education of all children of the state. Later he offered another amendment, that "the first legislature chosen after this Constitution shall have been adopted shall provide by law

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for the compulsory attendance at a public or private school, for at least three months in each year, of every child between the ages of seven and thirteen years, whose health will permit its attendance."

Compulsory education, or what Mr. Curtis called "obligatory education," had many advocates, but the Convention declined to incorporate this subject in the Constitution. After some discussion the common-school section was stricken out; afterwards, while the report of the committee on revision was under consideration, the Convention, on motion of Mr. Beals, adopted the following section by a vote of 87 to 9: "The legislature shall provide for the free instruction in the common schools of this state, of all persons between seven and twenty years of age;" and this was included in the proposed Constitution. It will be recalled that the Convention of 1846 near its close adopted a resolution to submit separately a provision for free common schools, but in the afternoon of the same day rescinded the resolution. The Convention of 1867 took up the subject, and at one time decided not to include common schools in the Constitution, but later reversed its action and submitted the above section. The failure of the Constitution of 1867 left the subject open for further consideration, which was resumed by the Convention of 1894, resulting in the adoption of the provision guaranteeing a system of free common schools. All the recommendations of the committee on education were rejected, except those relating to Cornell University and the common schools.

CORPORATIONS.

Two committees on corporations were appointed, one on currency, banking, and insurance, and one on corporations except municipal. The two committees united in a joint report intended to cover the whole subject.

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This report continued without change several sections in the former Constitution, but proposed some alterations and new provisions. The report renewed the recommendation of the committee on corporations in the Convention of 1846, and proposed an absolute prohibition of legislative power to create corporations by special act, but added to the former recommendation a provision authorizing the creation of municipal corporations. It was also proposed to make the stockholders liable to the amount of their shares for all debts of the corporation. In the former Constitution this provision was limited to banking associations. Leslie W. Russell presented a minority report objecting to the prohibition against granting or amending charters by special act, and proposing to continue the existing constitutional provisions concerning the formation of corporations. He also objected to the proposed section fixing the liability of stockholders. He proposed an additional provision that "foreign corporations shall secure the performance of obligations created in this state;" remarking that this was already required of insurance companies; that there are a host of mining, mechanical, and other corporations, the creatures of other states and countries, many of them almost myths, with no pecuniary responsibility, which find it convenient, after doing business and contracting obligations here, to retire, and, like the unsubstantial pageant of a dream, leaving no trace behind; and "that extraordinary privileges should be granted to the creatures of other states only when the interest of the people of our state are fully secured." Mr. Russell's first two propositions were concurred in by Mr. Krum and Mr. Ludington. Mr. Beadle, Mr. Huntington, Mr. Veeder, Mr. Eddy, and Mr. Hitchman proposed to continue the section in the former Constitution, fixing the liability of

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stockholders in banking corporations, which was not included in the majority report.

The principal discussion was over the section relating to the power of the legislature to create corporations. The section proposed was in the following form:

"Corporations may be formed under general laws, but shall not be created or amended by special act, except for municipal purposes. All general laws (and special acts) passed pursuant to this section, or which may have been heretofore passed, may be altered from time to time, or repealed."

Mr. Bell offered an amendment prohibiting the legislature from amending general laws. Mr. Alvord objected to this, because a general law would then become practically a part of the Constitution, and could not be amended by the legislature. Mr. Bell's amendment was modified so as to permit all laws to be amended, and in this form it was adopted.

The section was agreed to on the 20th of August, and it does not seem to have been considered again until the 1st of February, when Judge Comstock offered an amendment that corporations for literary, scientific, charitable, or benevolent purposes might be created by special act. Judge Comstock said he made the motion in the interest of charity, which he thought would be obstructed and impeded if the section were adopted in its present form. He said the rule had been settled in this state after a contest of several years, that a gift to any educational, literary, scientific, benevolent, or charitable institution was impossible, unless sustained by legislation. He said that charitable institutions might in most cases be formed under the general law, but this law contained a property limitation which prevented the organization of corporations with large endowments. He said the

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property limitation was a wise mortmain policy; that "charity and mortmain in law always go hand in hand, each attending the footsteps of the other." He thought the property limitation ought to be moderate, so that the legislature could control the disposition of large estates. Under this system Vassar College, Cornell University, and the other colleges in the state could not have been created, or could not exist, under the statutory limit. The charities often projected by wealthy persons could not come into existence under the general law. He thought these persons ought to be at liberty to apply to the legislature for a special charter "permitting them thus to create or endow their charities." The constitutional inhibition against special acts was not aimed at any evil growing out of this class of charters. The evil resulted from legislation sought and enacted concerning business enterprises. Applications for the creation of charitable corporations "do not appeal to the lobby, and are rarely, if ever, opposed in the legislature." Judge Comstock's amendment was adopted without objection.

While the section was in committee of the whole, Amasa J. Parker proposed to add a provision prohibiting the consolidation of railroad companies with an aggregate capital exceeding $15,000,000, which limit he subsequently increased to $20,000,000, but, on Mr. Van Campen's motion, the capital limitation was omitted, and in its final form the clause prohibited the legislature from authorizing the consolidation of railroad companies owning parallel or competing lines of road. The section on the liability of stockholders was stricken out, and the former section relating to liability of stockholders in banks was substituted. The debate on this article shows the possibilities of constitution making, if every man's notions were adopted in framing the fundamental law. Thus, the Convention was asked to say in the Consti-

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tution that the stockholders of a corporation must consent to the sale or transfer of its franchise; that a corporation could not absorb or control, by purchase or otherwise, a corporation of a competing character; that all corporations chartered by special act since January 1, 1830, must reorganize under general laws; that no bank of issue should be established under the authority of this state; that stock and stockholders should have equal representation in the management of the corporation; that boards of directors should be chosen by minority representation; that no corporation should be organized with a capital exceeding $20,000,000, and that property exceeding that amount after one year from its organization should be devoted to the payment of the state debt; that the transportation of passengers and freight through and from any railroad crossing or uniting with another railroad in this state, on just and equal terms of compensation, should be secured by law; that the capital of corporations should be paid in cash, and that they should make annual reports showing assets, liabilities, income, and expenditures; that the legislature might amend the charter of any corporation, but only within the provision and in view of the general law under which the corporation was formed.

PRISONS.

The history of prisons in New York is accessible to every reader, and need not be repeated here. It has no place in this work, except so far as necessary to elucidate the plan of prison management which has found its way into the Constitution. In the article on state officers, in the chapter on the Convention of 1846, I have given a brief sketch of the creation and development of the office of state prison inspector, and the proceedings of the Convention which resulted in providing for the election of

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inspectors by the people. That system did not prove satisfactory, but it will not be profitable to trace here in detail the causes that led to a change in the method of prison supervision. That subject was considered quite fully in the debates of the Convention of 1867, and Governor Fenton in his message of that year called special attention to prison management, and recommended the removal of the prison system "from the fluctuations of political organizations," and that a permanent and more efficient policy be instituted. The majority of the committee on state prisons reported a section creating the office of superintendent of prisons, and defined his powers. The superintendent of prisons was to be appointed by the governor and senate for a term of seven years. The office of state prison inspector was to be abolished. Mr. Loomis, in the Convention of 1846, had recommended the creation of the office of commissioner of public works with supervision of state prisons, but that Convention concluded to continue the existing system of inspection and management, and made the system permanent in the Constitution. Governor Morgan, in his message of 1859, had also recommended a change in prison management. He said that 'before our prison system will be a model for the imitation of others, as it ought to be, it will require such a change in the organic law as will confer upon one person the power and authority now given to the present inspectors, thus putting one general in command instead of three. He should be appointed by the governor and senate, and be removable for cause, at the discretion of the former. The committee in its report observed "that the mode of governing prisons, established by the Convention of 1846, was essentially defective;" that in the reports of the prison inspectors there was an absence of those broad views of their duties in relation to the improvement of prison dis-

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cipline, and the reformation of offenders, which they might reasonably expect to find if the inspectors had been men who were selected on the ground of their personal fitness; that the total excess of expenditure over income in the prisons since 1846 was $2,215,099.43; that this financial result might have been expected from men "elected almost by chance and without intelligent selection;" that the Constitution had failed to secure the services of competent men for the government of prisons; that many of the inspectors had disregarded the law requiring them to spend one week each month at the prison and keep a journal of their proceedings; that usually the party convention nominated the inspector last, and he was often a disappointed candidate for some higher office, while prison contractors were skilfully stationed around the room to suggest the name of someone in their interests, to delegates who knew nothing, or cared nothing, of the nominee; that the people had practically no choice in the nomination, and no knowledge of the candidate; that partisan inspectors were obliged to make partisan appointments to subordinate places; that keepers of gambling houses and saloons, shoulder hitters, and persons of disreputable character, men often more depraved than the convicts, had been frequently appointed as underkeepers; and that, if a man were appointed possessing capacity and intelligence and a sincere desire to promote the real welfare of the convicts, he had little incentive to study and increase his usefulness, because of the unstable tenure of his position and the probability that, with the turn of political fortune against his party, he would be compelled to give place to a "hungry politician who had not a single qualification for his duties." The committee reviewed the financial conditions connected with prison administration, referred to the time "when our prison system was superior to that of any

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other in the world," receiving the commendation of foreign experts; but which time had long since passed, and many European prisons were "far in advance of ours in every element of usefulness and of reformatory influence;" considered current discussion concerning discipline and improvement in prison management, and concluded with the opinion that the defects and evils of the existing system could best be cured by "the adoption of a single head for the government of prisons."

The committee recommended an article embracing the superintendent, a warden for each prison to be appointed by the governor and senate, the visitation of penitentiaries, county jails, and other penal institutions by the superintendent, the appointment of a local board of visitors for each prison, and the governor's power of removal of the superintendent of prisons and the wardens.

Mr. Cochran, from the prison committee, concurred in the majority report, except that he recommended the election, instead of the appointment, of the superintendent. C. C. Dwight proposed a board of five managers to be appointed by the governor and senate for ten years, and, when the subject was under consideration in committee of the whole, moved to substitute his plan for the majority plan of one superintendent. Mr. Gould, chairman of the committee, in a long speech covering the whole subject of prison administration, asked whether it is not shown by the universal sense of mankind that "when uniformity of plan and unity of action are a prerequisite of success, a single head is immeasurably superior to many heads. . . . The management of the prisons is no exception to the universal rule. The whole prison administration would be largely improved if placed under the control of 'one man who understands his business.' . . . We are called upon by every motive which can act upon us as men, as Christians, as

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politicians, and as statesmen, to inaugurate a new system, which elsewhere has been crowned with very great success, and which I am fully persuaded would prove as successful here as it has been in Europe."

There was a two days' debate on the prison article, but the plan submitted by the majority of the committee was deemed too radical, and at the conclusion of the discussion the Dwight amendment was adopted, providing for a board of five managers of prisons, and this plan was included in the proposed Constitution.

MILITIA.

The committee on militia and military officers reported an article proposing several important changes in the organization of the militia. The article contained the express declaration that "a militia force shall be maintained in order to repel invasion, suppress insurrection, and to aid in the enforcement of the laws." All able-bodied male citizens between the ages of eighteen and forty-five years were to be annually enrolled, and were divided into active and reserve forces. The active force was to be designated the national guard, and the reserve force was to consist of all enrolled persons not belonging to the national guard. All persons honorably discharged from the Army or Navy of the United States were to be exempt from militia service in time of peace. Provision was made for the appointment and removal of various officers, and for the duration of their commissions, which were limited to ten years. The legislature was required to provide in the national guard a list of reserve officers "to be composed of officers of the national guard of not less than ten years' service in the same grade," and of officers honorably discharged from the volunteer service of the United States who may be citizens of this state.

While the article was in committee of the whole the

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Convention adopted an amendment offered by Mr. Ballard, exempting from militia service in time of peace all persons honorably discharged from the volunteer forces of the United States. The legislature of 1867, by chapter 502, had exempted them from militia service, placing them in the same class as persons discharged from the regular army. Mr. Ballard's amendment made this exemption permanent in the Constitution; but, on Mr. Barto's motion, the exemption was made applicable only to those who had served one year. Mr. Verplanck proposed to fix the number of the national guard at 30,000, and later proposed that the guard should not exceed 36,000 in time of peace; but the Convention concluded to leave this subject with the legislature. Some minor amendments were adopted concerning the appointment of militia officers, but the article as a whole did not elicit much debate. It was adopted substantially as presented by the committee.

OFFICIAL CORRUPTION.

Recent legislative history had directed the attention of the Convention to the subject of bribery of public officers, and, for the purpose of giving it proper consideration, a special committee was appointed. This committee took testimony and inquired into circumstances connected with the alleged bribery of members of the legislature, and, as a result, reported an article intended to prevent official corruption and provide for its adequate punishment. The article defined bribery of public officers, and provided for its punishment by imprisonment for not less than three years. The offense could not be pardoned, nor the sentence commuted, except on satisfactory proof of innocence. The committee proposed a radical change in the law as declared by the bribery act of 1853, namely, the briber was not to be punishable

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if the bribe was accepted, but only the person receiving the bribe was guilty of a criminal offense; an attempt to bribe was made a felony, punishable in the same manner as the offense of receiving a bribe: a person receiving or offering a bribe might be compelled to testify against himself. The article required justices of the supreme court to act as examining magistrates, and the district attorney to take criminal proceedings against the alleged offender. A judge or district attorney failing in his duty might be removed by the governor. The committee, in its report accompanying the article, said that official corruption was a "crime of deep turpitude, of growing prevalence, and dangerous tendency." The committee thought the time had come when this evil should be corrected by constitutional provision, and no longer left subject to the discretion of the legislature. The punishment proposed was less severe than that prescribed in existing statutes, but the offense could not be pardoned nor the sentence commuted. Concerning the proposition to exempt the giver of the bribe from punishment, the committee say that "experience proves the absolute necessity of exempting from punishment one of the parties to an act of bribery, if we would convict either. Our present statutes hold both equally guilty, and liable to the same penalties; and our Constitution declares that no person shall be compelled, in any criminal case, to be a witness against himself. We have thus sealed the lips of the only witness cognizant of the fact that bribery has been committed. It is notorious that neither the giver of bribes nor those who receive them are now punished. Our present laws afford perfect immunity to both. No one can doubt that it would be better to exempt a part than the whole, especially in view of the fact that it would be an effective means of suppressing the crime altogether." The committee thought

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that in most cases the criminality of the giver of the bribe was far less than that of the corrupt official, that he was the less guilty of the two, and that the state might properly exempt him from punishment; that it sometimes happened that officers refused to do their duty, and that public-spirited citizens without any private interest might be prompted to give the fees demanded for the sake of promoting the public welfare; also that sometimes legitimate public measures could be obtained from officers only by corrupt purchase. "This is bribery, but the criminality of the giver does not approach that of the receiver." That even in extreme cases, where the officer takes money for performing an act outside his official duty, he is more guilty than the giver of the bribe, because, in addition to any other element of offense, he is guilty of a violation of his oath, "and a sacred public trust confided to him by the people." He is therefore guilty of a threefold offense, namely, "bribery, perjury, and a breach of a public trust, constituting together a crime against society which should be regarded as second only to treason in infamy."

Martin I. Townsend, a member of the committee, dissented because he thought the article unnecessary, and he objected particularly to the proposition to exempt from punishment the giver of the bribe. The debate disclosed conditions which clearly demanded relief; among other things, the fact was said to be established by testimony before the committee that a certain railroad company at the last session of the legislature had paid $205,000 to procure desired legislation, and other instances were cited of a similar character. The provision for punishment was amended on motion of Judge Comstock, making the penalty five years' imprisonment or a fine of $5,000, or both. The article in its final form omitted the provisions prohibiting a pardon or commutation of

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the sentence, prescribing the duty of the justices of the supreme court and district attorneys in examination for bribery, and authorizing the removal of a judge by the governor. A section was added authorizing a person charged with offering or receiving a bribe to be a witness in his own behalf. The provision authorizing the removal of the district attorney for neglect of duty under the article was retained. The article, substantially as proposed by this Convention, was recommended by the Commission of 1872, and adopted by the people in 1874.

FUTURE AMENDMENTS AND CONVENTIONS.

The Convention considered practically only two questions in connection with this subject. One related to the time which must elapse after an amendment had been proposed in the legislature before it could be considered again previous to its submission to the people. The Constitution of 1846 required the amendment to be "referred to the legislature to be chosen at the next general election of senators." The senators were then all elected at one time. This Convention proposed an alternate election,—only half of the senators being chosen at the same time. It was thought that this required a change in the plan of considering amendments, and the Constitution was accordingly modified, so that an amendment could be considered by the legislature in two successive years. It will be remembered that this was the practical effect of the Constitution of 1821 by reason of the rotation plan adopted in choosing senators. It was also thought that there was ambiguity in the Constitution of 1846 concerning the number of votes necessary to call a convention,—that is, whether an affirmative majority of the votes cast on the question of calling a convention was sufficient, or whether the Constitution

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required for this purpose a majority of all the votes cast at the same election on any question or for any officer. This supposed ambiguity was removed by the specific provision that the question of calling a convention should be decided by a majority of all the votes cast on that question alone. An attempt was made to enlarge the interval between conventions to twenty-five years, but the Convention adhered to the twenty-year rule established in 1846, providing, however, that the first election for this purpose under the new Constitution should be held in 1888.

MISCELLANEOUS.

Weights and measures.—The committee on Industrial Interests, in its report on the resolution requesting it to inquire into the propriety of providing by constitutional enactment "that the measures of capacity or quantity be based upon weight where practicable, and that the expansion and subdivisions of such units of weight shall be in the ratio of decimals," said that "the regulation of weights and measures, or the fixing of a standard thereof, seems to be properly within the province of the legislature, and may be left to that body;" that, "while recognizing the convenience and utility of a decimal system of weights and measures which should correspond to our decimal system of coinage, the introduction of any radical change in commercial denominations or values ought to be determined by Congress, or be based on some international plan indorsed by the commercial world." This report was agreed to, and no constitutional amendment was suggested.

Practice of medicine.—The committee on this subject recommended a provision requiring the legislature to create a state medical board with exclusive authority to license physicians. A majority of the members of the

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board could not belong to any one school of medicine. The unauthorized practice of medicine was made a criminal offense. The practice of pharmacy was also to be regulated by statute. There was evidently a light attendance in the Convention when this subject was under consideration, for almost without debate the proposed amendments were rejected by a vote of 11 to 19.

Salt springs.—A majority of the committee on salt springs recommended that the salt springs and lands "shall never be sold, leased, or otherwise disposed of," except when authorized by special law, and until such sale salt should be subject to a duty of not less than $.03 a bushel. Judge Comstock presented a minority report recommending a provision authorizing the legislature to make appropriations for the development of the salt springs, their care and management, and the inspection of salt, and to impose a duty on salt sufficient, only, to reimburse the state for such expenditures. At the conclusion of the debate the Convention, on motion of Martin I. Townsend, adopted the existing constitutional provision relating to salt springs, as a substitute for the section recommended by the committee.

Canal bridges.—It was also proposed that no bridge should be built over a canal or feeder at state expense, except at a point where such a bridge was located and maintained by the state prior to January 1, 1867, and no appropriation should be made by the state for any damages or injuries sustained by the construction, navigation, or use of the canals, nor from any breakage or defects therein, nor for any extra allowance or compensation on any canal contract; nor should the immunity of the state be waived by the legislature or by any public officer or body.

State aid.—The section adopted in 1846 prohibiting the loan of the credit of the state in aid of private enter-

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prises was amended by prohibiting also the loan of the money or property of the state in aid of any individual, association, or corporation; but the Convention did not adopt this amendment.

Deficiency loans.—Anticipating possible deficiencies in sinking funds it was provided that "no deficiency loan shall be made by or on behalf of the state for a longer period than is necessary to enable the sinking fund, provided for its payment, to accumulate an amount sufficient to discharge it;" and in no case was such loan to be made for more than six years.

Bounty debt.—The proposed constitution as finally perfected authorized the comptroller to renew the state bounty debt by new stock payable October 1, 1886.

State not to be stockholder in corporations.—The state was prohibited from becoming the owner, except by bequest, of any stock in any company or corporation, or investing any funds therein.

PROHIBITION.

In the chapter on the interval between 1847 and 1867 I have referred to the movement for a constitutional amendment prohibiting the sale of intoxicating liquors, including the presentation to the legislature of petitions and propositions intended to accomplish this result. In 1855 the legislature passed a strong excise law, the "Act for the Prevention of Intemperance, Pauperism, and Crime," chapter 231, but the court of appeals thought it was too strong, and in *Wynchamer* v. *People* (1856), 13 N. Y. 378, declared it unconstitutional, because it interfered with fundamental rights of private property, and also because it deprived persons charged with its violation of the right of trial by jury. Numerous petitions on this subject were presented to the Convention of 1867, and it was deemed so important that a select

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committee of eight on adulterated and intoxicating liquors was appointed. There was a wide difference of opinion among the members of the committee, and their views were embodied in several reports. Four members recommended the adoption of a provision that "the legislature shall not pass any law prohibiting the manufacture or sale of distilled or fermented liquors, or wines, but may regulate the sale thereof by general laws having a uniform operation throughout the state, and all existing laws inconsistent herewith shall be void." Two others took an opposite view, and reported a provision that "the legislature may pass laws prohibiting the sale of strong and spirituous liquors." The remaining two members thought a prohibitory law might be valid without an express constitutional provision, but, to remove any doubt, concurred in the last report, expressing the opinion, however, that a prohibitory law at that time would hurt, rather than help, the cause of temperance.

During the discussion of these reports Mr. Fowler proposed to prohibit the legislature from authorizing any license for the sale of intoxicating liquors. This proposition was rejected, but the vote is not given. The Graves amendment, authorizing the enactment of prohibitory laws, was lost by a vote of 21 to 25; apparently only forty-six out of one hundred and sixty delegates voted on this question. There was some debate on the proposition to restrain the legislature from enacting prohibitory laws, but the Convention rejected the proposed amendment, and declined to adopt any provision on the subject.

THE NEW CAPITOL.

The new capitol enterprise, initiated in 1863 by the purchase of lands, permanently inaugurated in 1865, confirmed in 1866, and continued in 1867 by an appropria-

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tion based on plans for a capitol to cost not more than $4,000,000, might have received a serious check if the recommendation concerning it made by the committee on canals and finance had been approved by the Convention and the people. This committee proposed that "the rebuilding of a new capitol shall not be undertaken within ten years from the adoption of this Constitution; nor shall any money be hereafter appropriated for that object until the expiration of that period." The committee, of which Mr. Church was chairman, said it was satisfied that the $4,000,000 would "fall far short of accomplishing the object, and that an annual tax of $1,000,000 at least for ten years will be required." The committee conceded that the old capitol was inadequate in some respects, but thought it was sufficient for present purposes, and, in view of the high prices of materials, and "to save an overburdened people from additional taxation," the committee recommended a suspension of the work for ten years, during which time it was thought the public debt would either be paid or so materially reduced as not to be oppressive.

The act of 1865 had authorized the erection of a new capitol on condition that the people of Albany should donate certain land to the state. This condition was fulfilled, and in 1866 the legislature ratified and confirmed the previous statute locating the new capitol in Albany. The committee, while recommending the suspension of work on the new capitol for ten years, recognized the justice of the claims of Albany in view of its contributions to the project, and proposed to include in the Constitution a provision that "the new capitol of the state is hereby permanently located at the city of Albany."

In view of the recent completion of the new capitol at an expense of about $23,000,000, the subject of sus-

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pending its erection in 1867 now has only an academic interest, but it was deemed then of sufficient importance to engage the Convention in serious debate. When the subject was reached in committee of the whole Mr. Alvord moved to strike out the section, for the reason that the subject of completing a new capitol was one which should properly be left to the discretion of the legislature; and he also objected to the permanent location of the capitol in Albany. Mr. Gerry moved to amend by providing for the permanent location of the capitol in New York. This amendment was defeated, but the vote is not given. Mr. Bergen's motion to amend by suspending work for five years instead of ten was lost by a vote of 47 to 48. Mr. Alvord's motion to strike out the section was lost by a vote of 43 to 43, but afterwards in Convention the motion was renewed by Ira Harris and carried by a vote of 48 to 34. The opponents of the new capitol did not let the matter rest here; when the committee on revision presented its report a motion by M. H. Lawrence to add a section suspending the work on the new capitol for five years was carried by a vote of 46 to 44. Several days later Erastus Brooks moved to limit the annual expenditure for the erection of the new capitol to $500,000. This was defeated by a vote of 22 to 72, and his motion to limit the total expense to $5,000,000 was defeated by a vote of 19 to 73. Then three days before the Convention adjourned the Lawrence motion was reconsidered, and defeated by a vote of 32 to 60. Thus ended a curious controversy over a provision which logically could have no place in the Constitution, and the legislature was left free to continue the great work of erecting a new capitol, now the pride of the state.

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INDIANS.

The committee on the relation of the state to the Indians was composed of seven members. Mr. Van Campen, chairman, and two others signed a report recommending an article containing four sections. The 1st section, relating to contracts with Indians, was already in the Constitution, and had been adopted as a part of the Bill of Rights. The other three sections were as follows:

"2. The legislature shall have power to provide for an equitable subdivision of a necessary and sufficient portion of the several Indian reservations for the use and occupation in severalty of the several Indian tribes holding the same, and for the leasing any parts unapportioned; and any such subdivision and occupancy in severalty shall be deemed and taken to be the possession and occupancy of such tribe or nation, and the joint interest of any such Indian tribe shall not be dissolved except by their consent.

"3. The legislature shall have power to confer citizenship on any of the Indians of this state, under such conditions and qualifications as shall be deemed wise and expedient.

"4. When the public exigency requires the use and occupancy of any of the lands or water privileges of the several Indian reservations for the construction of railways, common roads, bridges, manufacturing or other purposes, such lands or privileges should be so appropriated, and such tribe or nation holding such reservation shall receive a reasonable compensation therefor."

Mr. Axtell concurred in this report, except as to that part which permitted the Indian lands to be taken for manufacturing or other purposes. Mr. Bergen and Mr. S. Townsend presented a minority report objecting to the division of the Indian lands, to Indian suffrage, and also to the provision authorizing the lands of Indians to be taken for manufacturing purposes without their con-

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sent. Mr. McDonald declined to sign either report, for the reason that the state had no jurisdiction over the subject. The discussion of the article was confined to the proposition to divide the reservations and apportion the lands in severalty, and confer citizenship on Indians. Mr. Van Campen and Mr. Alvord argued strongly for the adoption of the article. Judge Comstock opposed it, suggesting that it was probably "an attempt on the part of the whites bordering upon these reservations to root out and destroy these Indian tribes, under the pretense of humanity and civilization." He said the article authorized the legislature to compel the Indians to accept citizenship whether they wished it or not. "The more we let them alone, the better off they will be." He thought the scheme of the article was obnoxious to the Federal Constitution, and that the power specified could not be delegated to the legislature. The state has no power to obliterate the nationality of Indian tribes. Congress possesses this power to the exclusion of the state. Judge Comstock further urged that the power to provide for the occupation of Indian lands in severalty was already possessed by the legislature, and had been exercised through the statutes.

The section on Indian contracts was stricken out because already adopted in another part of the Constitution; the remainder of the article was indefinitely postponed, and does not appear in the proposed Constitution.

CHARITIES.

Governor Fenton, in his message of 1867, referring to the large appropriations made to charitable institutions, said that no adequate provision had been made for their inspection or for any effectual inquiry into their operations and management. The Governor thought the state should exercise a reasonable degree of supervision

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over these institutions, and for that purpose recommended the appointment of a board of commissioners, to serve without compensation, and which should exercise such powers as the legislature might deem expedient. The legislature at the same session adopted the Governor's suggestion, and created a state board of charities with general supervision and right of visitation of all charitable and correctional institutions receiving state aid, except prisons. The recent growth of appropriations to charitable institutions had attracted wide attention, and the policy of aiding sectarian institutions with public funds had been vigorously condemned. A large number of petitions against continuing sectarian appropriations were presented to the Convention, and the subject was deemed of sufficient importance to warrant the appointment of a standing committee on charities and charitable institutions. On the 30th of August, Erastus Brooks, chairman of this committee, presented an article prepared by Theodore W. Dwight, embodying a scheme of administration of charities and supervision of charitable institutions. The first three sections are as follows:

"1. The legislature shall establish a board of commissioners of charities, consisting of eight persons, a majority of whom shall constitute a quorum, who shall have power to visit, inspect, and to require reports from charitable institutions of every nature and description whatever, whether established by individuals, or supported or aided by the state, except religious organizations of a sectarian character, penal and correctional institutions, and educational institutions otherwise controlled by law. Such board shall report to the legislature. It shall also give notice to the attorney general of any breach of trust in the management of such institutions or their funds, who shall thereupon refer the question of such breach of trust to the proper court. The

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members of such board shall be appointed by the governor with the consent of the senate. Their term of office shall be eight years, and they shall be so classified that one shall go out of office each year.

"2. Any person or persons may establish or increase the endowment of a charitable institution for the support of the poor, the advancement of learning, and other lawful and public purposes. Such institution shall be established, and its funds administered, in accordance with the rules of courts of equity; but the legislature shall have power to limit the amount which a testator may devise or bequeath for charitable purposes.

"No charitable gift, devise, or bequest shall be declared invalid for want of a trustee, and the proper court shall, if necessary, appoint a trustee. Whenever property is devised or bequeathed in trust for charitable purposes, but not to an institution authorized by statute law to take it, the board of charities shall inquire and report whether there is any objection to the trust growing out of the condition of the testator's family or of any claimants on his bounty. If the report is adverse, the charitable provision shall fail; if favorable, the proper court shall carry the trust into effect. It shall be no objection to a charitable trust that it is perpetual. The board of charities may, at the end of thirty years after the establishment of a charity, inquire whether it is practicable that the property should be continued in its present employment; on their report that such employment is no longer practicable, such property may, under the sanction of the court, be devoted to other public uses. This section shall not apply to the institutions excepted in the 1st section of this article.

"3. No charitable institution shall receive state aid, except under the following conditions:

"(1) Application for such aid shall be made to the board of charities at least two months before the meeting of the legislature.

"(2) The board shall examine into the circumstances of the case, and report that the institution claiming such aid tends to relieve the state from expense with the amount of

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such relief, and that it is not religious or sectarian in its character, and that a majority of its managers are not members of one religious denomination.

"(3) If the same institution has previously received state aid, it must be reported that such aid has been fairly applied to the purposes for which it was bestowed."

The 4th section provided for the investment of donations for charitable purposes.

The report was not reached in committee of the whole until January 15. Mr. Brooks then read a long speech intended to cover every aspect of charity, charitable institutions, and kindred subjects. He considered charity in its various forms, and evidently had given the subject an exhaustive study. He presented a mass of statistical information showing the growth and development of charitable institutions, and expenditures for their maintenance, and the causes and results of ignorance, pauperism, and crime. The student of our social system will find a perusal of this address both interesting and profitable. Mr. Brooks was followed by Mr. Curtis, who moved to amend the 1st section by providing that a majority of the state board of charities should not be of one religious denomination. Mr. Spencer, a member of the committee which presented the article, objected to it because it had no place in the Constitution, and because it required an examination into the religious opinions of a candidate for office. The governor could not appoint, nor the senate confirm, without first ascertaining whether the candidate belonged to a religious sect. Judge Comstock made a vigorous attack on the article, characterizing Mr. Brooks's address as able and interesting, but observing that it had a very remote, if any, relation to the article. He thought it was not expedient to meddle with the subject. He said the article proposed to establish "another law of charity," and that it was framed with

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very imperfect conceptions of the existing state of the law. He reviewed the history of charities as affected by legislation and judicial decisions, and said the written law was the only foundation of gifts and donations for public purposes. This article proposed to change and subvert that great principle of law, and permit any person to found any institution for a lawful purpose. He thought it was "the most mischievous provision that could be incorporated into the Constitution." He said that under the operation of the article a charitable donation would take effect or would not take effect according to the religious opinions of the state board of charities, instead of being governed by the written law of the state: that such a provision was without precedent or example, and that it could not be found in the Constitution of any state. Mr. Brooks said the article ought to be adopted in the interest of economy, and that it would prevent the repetition of abuses that had occurred in the legislature in making appropriations to private institutions. Mr. Devlin, referring to the assertion that the Roman Catholics had received more than their share of appropriations, said that "the Christian world is divided into two great denominations,—the Protestant and the Catholic;" and that the aggregate appropriations made to Protestant institutions should be counted in comparing appropriations made for Catholic institutions, and that it would be unjust to make the comparison between all Catholic institutions, and the institutions controlled by one Protestant denomination.

Mr. Prosser proposed to substitute for the 1st section, providing for a state board of charities, the provision that "no appropriation for a charitable purpose shall be made by the legislature after the adoption of this Constitution, except to such institutions as shall be wholly under the control and management of the state." This

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was subsequently modified in form, but after considerable discussion was rejected. It was urged against it that it would prevent appropriations for a large number of local and private institutions which served a public purpose, and, although not under direct state control, relieved the state and subordinate civil divisions from expenditures which would otherwise be required for charitable purposes. Mr. Murphy thought the state ought to aid private institutions in carrying on their good work, and that this article should not be incorporated in any form in the Constitution. Martin I. Townsend thought the public treasury was already sufficiently protected by the provision which required a two-thirds vote of the legislature to make an appropriation for a charitable institution. He also objected to the article because on this subject it made the legislature subordinate to the state board of charities. He was opposed to creating a board which should be superior to the legislature, and without whose sanction the legislature could not make an appropriation for a charitable institution. He said the members of the board would hold "privileged and irresponsible positions," and would stand as an obstruction against the will of the men chosen by the people "to dispense the government," and "would have a controlling power over the action of the legislature itself." He said the article was also evidently intended to destroy the limitation on trusts, and to allow an unlimited power of creating trusts for charitable uses, observing further that just prior to the time of Queen Elizabeth three fifths of all the land in England was held in mortmain, and that the article would permit an unlimited disposition of land for charitable purposes.

Several other delegates participated in the discussion, and most of them opposed the adoption of the article. The Curtis amendment relating to the religious opinions

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of members of the proposed state board of charities was rejected, and on Mr. Spencer's motion the 1st section of the article was stricken out. This practically disposed of the subject. The committee of the whole rose and reported progress, and afterwards, while the question of granting leave to sit again was pending, the report, on motion of Mr. Brooks, was laid on the table.

While the scheme of charitable administration, prepared with such elaborate care, and so earnestly advocated by Erastus Brooks, failed to receive the sanction of the Convention, the labor, study, and discussion devoted to it were not wholly lost. It was urged against the proposition to make the state board of charities permanent by constitutional provision, that it had only recently been created, and was an experiment, that the legislature might conclude to repeal the statute and abolish the board, and that it was not wise at that time to deprive the legislature of this power. The board was not abolished, and, after twenty-seven years of additional development of charities, the Convention of 1894 resumed consideration of the subject, with the result which will be described in the chapter on that Convention.

SUMMARY.

I have now given a sketch of the principal amendments proposed by the Convention, together with several reported by committees and seriously considered, but which were not included in the revised Constitution. The debates have been searched to find the occasion of proposed amendments and the reasons which induced the committees or delegates to recommend their adoption as a part of our fundamental law. The reader has doubtless already observed that many proposed reforms, while then seeming to be important, were of a temporary character; probably the state did not suffer any loss by the refusal

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of the Convention or the people to approve them, and went forward under the Constitution as it was without serious check or hindrance. There is little probability that the Constitution will be too narrow, or that it will impose fetters on the real power of the people. The tendency has been to include too much in the Constitution, and make of it a statute with numerous details, instead of a statement of general principles. This tendency has been manifest in every convention, and is shown in numerous independent amendments submitted to or by the legislature; but usually the aggregate good sense of the convention, the legislature, or of the people has kept the Constitution within reasonable limits, and the net result of constitutional change has been quite moderate.

The amendments adopted by the Convention have already been noted in connection with the discussion of various subjects, but the reader will probably obtain a clearer and more comprehensive view of the work of the Convention by a synopsis of the amendments proposed and included in the revised Constitution. I have therefore added a summary of the amendments, some of which are quoted in full, and others are stated in substance in connection with the subject to which they relate, with a note in each case showing whether the proposed amendment has since been adopted. The result of the Convention's work can thus be ascertained, and its value determined in its effect on later constitutional reform.

The revised Constitution included the following amendments:

Authorizing a jury of less than twelve in justices' courts. Not adopted.

The fee of land taken by condemnation for railroad purposes was to remain in the owner, subject to the "sole

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possession of the railroad company while used for such purposes." Not adopted.

Authorizing by general laws only, owners or occupants of agricultural lands to construct drains or ditches across the lands of others. Adopted with modifications in 1894.

Prohibiting unreasonable seizures and searches. The Fourth Amendment to the Federal Constitution. Not adopted.

Increasing the limit of agricultural leases from twelve to twenty years. Not adopted.

"The right to take fish in any of the international waters bordering on this state shall not be denied or restrained." Not adopted.

The suffrage provision, article 2, § 1, was amended by conferring on each citizen the right to vote "upon all questions which may be submitted to the vote of the people of the state;" also by reducing the required residence in an election district from thirty to ten days, and requiring a thirty days' residence in a town or ward. Adopted, 1874, except that the words "of the state" were omitted from the first amendment.

Abrogating the property qualification of colored voters. Adopted, 1874.

Excluding from the right of suffrage persons guilty of bribery in connection with the election. Adopted, 1874.

"The legislature shall provide for a registry of citizens entitled to vote in each election district to be completed four days before each general and special state election and charter election in cities. No person shall vote at such elections who is not registered according to law, and the mode of registration shall be uniform in all cities." Adopted with modifications in 1894.

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Any elector shall be eligible to the office of senator and member of assembly. Not adopted.

Fixing the term of state senator at four years, and providing for the election of one half the number every two years by odd-numbered and even-numbered districts respectively. Not adopted.

Increasing the number of members of assembly from one hundred and twenty-eight to one hundred and thirty-nine, and providing for their election by counties instead of by districts. In 1894 the number of members of assembly was increased to one hundred and fifty; the remainder of the amendment has not been adopted.

Fixing the annual salary of members of the legislature at $1,000, with one mileage at the rate of $.10 per mile going and returning, the speaker to receive $500 extra. Adopted in 1874, fixing the salary at $1,500, with mileage, but with no extra compensation to the speaker.

The section prohibiting members of the legislature from accepting appointments from the governor, etc., was amended by changing the word "term" to "time" for which he shall have been elected. Adopted, 1874.

Requiring the secretary of state to preside at the opening of the assembly until the speaker should be chosen; and providing that no member of the legislature should be expelled twice for the same offense. Not adopted.

Amending the section limiting local bills to one subject by providing that, "if the title contains only one subject, the law shall be valid as to that, and void as to all other subjects." Not adopted.

"On the day of its final adjournment the legislature shall adjourn at 12 o'clock at noon." Not adopted.

Prohibiting the audit by the legislature of private claims against the state. Adopted in 1874.

Prohibiting the legislature from granting extra compensation to public officers or contractors. Adopted in

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1874, including also boards of supervisors and common councils of cities.

Providing that in case of elective offices persons appointed to fill vacancies should hold until their successors were elected and qualified. Not adopted.

"No local or private bill shall be passed unless notice of the intention to apply therefor shall have been given in the manner now or hereafter to be provided by law; nor shall such notice ever be waived, and the fact or omission of notice shall always be open to inquiry." Not adopted.

Prohibiting local or special laws—

Authorizing the sale, mortgaging, or leasing of the real property of minors or other persons under disability. Not adopted.

Changing the names of persons. Adopted in 1874.

For laying out, working, or discontinuing public or private roads or highways. Adopted, with modifications, in 1874.

Granting to any individual, association, or corporation the right to lay down railroad tracks. Adopted in 1874.

Also prohibiting local or special laws "in any case for which provision now exists or shall hereafter be made by any general law." Not adopted.

Laws authorizing the construction of street railroads must require the consent of local authorities and of the owners of one third in value of adjoining property, or of the supreme court. Adopted, in 1874, increasing the property consent from one third to one half.

Prohibiting the legislature at a special session from considering any subject not included in the governor's proclamation calling such session. Not adopted.

Giving the governor ten days for the consideration of bills after adjournment of the legislature. Adopted in 1874, enlarging the period to thirty days.

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Changing the election of secretary of state, comptroller, treasurer, and attorney general so that they would be elected at the same time and for the same term as the governor. Adopted in 1894.

The lieutenant governor and secretary of state were discontinued as commissioners of the canal fund. The new commissioners being the comptroller, treasurer, and attorney general, who were given power to appoint and remove revenue officers in the canal department, and, with the superintendent of public works, fix the canal tolls, which, however, could not, without the consent of the legislature, be reduced below those in force in 1867, until the canal debt had been paid or provided for. Not adopted.

Creating the office of superintendent of public works, and reorganizing the canal department. Adopted, with modifications, in 1876.

Prohibiting appropriations for the construction of bridges over canals, except for state use, where a bridge had not been maintained by the state prior to January 1, 1867. Not adopted.

"No money shall be appropriated or paid by the state or out of the canal revenues for any damages or injury sustained in the navigation or use of any of the canals, or of the feeders or structures connected therewith, nor as extra allowance or compensation to any person for the performance of any contract relating thereto." The first part, relating to damages, has not been adopted; the second part, relating to extra compensation, was adopted with modifications in 1874.

Claims for damages growing out of the construction, maintenance, or repair of the canals could not be heard or allowed after two years from the time the claim accrued; nor for land appropriated for canal purposes after two years from notice of appropriation. Not adopted.

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Bids on contracts for work or materials on canals could not be rejected for informality without notice to the bidder. Alterations of plans and specifications could not be made, except on the consent of the commissioners of the canal fund and the superintendent of public works, or a majority of them. Not adopted.

Creating a court of claims composed of three judges appointed for terms of five years by the governor and senate, with power to hear and adjudicate claims submitted to it under general laws, and prescribing certain details of procedure; also providing for a solicitor of claims to represent the state in all matters before this court. Not adopted. The board of claims was created by statute in 1883, and changed to a court of claims in 1897.

Abolishing the canal board, contracting board, and the offices of canal commissioner and canal appraiser. The canal board has not been abolished; the canal commissioners were abolished in 1876; the canal appraisers in 1883.

Providing for the payment of the old canal debt, the general fund debt, the canal enlargement debt, and the floating debt loan aggregating $21,375,522.22, out of canal revenues, and an increase in the sinking fund for that purpose; and after paying the debt the treasury was to be reimbursed for advances to the canal fund from the proceeds of taxation; the surplus canal revenues were then to be available for canal improvement or for other general purposes. Not adopted.

A new judiciary article. Adopted in 1869.

Providing for the election of county treasurers and registers of deeds in certain counties. Adopted, as to registers, in 1894; not adopted as to county treasurers.

"There shall be in each county a board of supervisors, to be composed of such members, and elected in such

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manner, and for such period, as is or may be provided by law; said boards shall have such powers as are or may be conferred by law, until revoked or modified by the legislature; and, subject to legislative modification, shall have exclusive jurisdiction in the following cases:

"1. The location, erection, purchase, and repair of bridges, except over navigable streams, where the general or existing special laws of the state shall be insufficient to accomplish the object; but where such bridges shall be between adjoining counties, the concurrent action of the boards of supervisors of such counties shall be necessary.

"2. The purchase of real estate, and the location, erection, and care of buildings for county purposes; but no change of location of any county buildings shall be made unless by the vote of two thirds of the whole number composing said boards for two years successively, under such regulations as shall be established by law.

"3. The erection of portions of public highways into separate road districts in the cases not provided for by general laws.

"4. The use of abandoned turnpike, plank, and macadamized roads as public highways.

"5. The improvement of public highways, laid out in pursuance of general laws, in cases where such laws may be insufficient for the purpose.

"6. The legalization of informal acts of town meetings in raising moneys authorized to be raised by law, and the legalization of irregular acts of town officers on the recommendation of the county court.

"7. The regulation of the salaries of county officers, except as otherwise provided in this Constitution, and the number, grade, and pay of clerks and subordinates in county offices whose compensation may be a county charge.

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"8. The borrowing of money for town and county purposes in anticipation of taxation authorized by law.

"9. But jurisdiction in the cases aforesaid shall not be exercised without the assent of a majority of all the members elected to such board, to be determined by yeas and nays, which shall be entered on its journal.

"The board of supervisors of the county of New York shall have no other power or jurisdiction than such as is now, or shall hereafter be, conferred upon it by law, subject to repeal or modification by the legislature." The first paragraph was adopted with modifications in 1874. The remainder of the section has not become a part of the Constitution, but the several subdivisions may, in substance, be found in the county law of 1892.

Providing for the election in each city of a mayor who should have general supervision of all city officers, with power to investigate their acts, and suspend or remove them for misconduct or neglect of duty. Not adopted.

Article 7, § 7. "Nothing in this article shall affect the power of the legislature over quarantine, or in regard to the port of New York, or the interest of the state in the lands under water and within the jurisdiction or boundaries of any city, or to regulate the wharves, piers, or slips in any city." Not adopted.

Article 8, § 5, providing for the enforcement of claims against corporations, was amended by adding a provision that "the moneys arising from such claims shall be applied to the payment of state stock, or to repay the money which may be advanced to pay the same." Not adopted; the original section was abrogated in 1894.

Requiring debts contracted to meet deficits or for "unexpected expenses" not provided for to be paid within two years. Not adopted.

"No deficiency loan shall be made for a longer period than is necessary to enable the sinking fund provided

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for its payment to accumulate an amount sufficient to discharge it; and in no case shall such loan be made for more than six years." Not adopted.

Requiring all moneys to be paid from the state treasury on warrant of the comptroller, who was also required to sign all bonds, stocks, and other securities. Not adopted.

"Real and personal property shall be subject to a uniform rule of assessment and taxation." Not adopted.

Authorizing the comptroller to renew and extend the bounty debt till October 1, 1886. Not adopted.

"The state shall not subscribe for, purchase, or in any way own, except by bequest, shares or stocks in any company or corporation, nor invest any portion of its funds in the same." Not adopted.

The capital of the college scrip fund and the capital of Cornell endowment fund were added to the fixed funds specified in §1 of article 9. Not adopted.

"The legislature shall provide for the free instruction in the common schools of this state of all persons between seven and twenty years of age." Adopted, with modifications, in 1894.

"Corporations may be formed under general laws. They shall not be created, nor their powers increased or diminished, by special act, except for municipal, literary, scientific, charitable, or benevolent purposes." Not adopted.

The legislature shall not authorize the consolidation of railroad corporations owning parallel or competing lines of road. Not adopted.

Creating a board of managers of prisons, to be composed of five members appointed for terms of ten years by the governor and senate, to have charge and superintendence of the state prisons, and with such jurisdiction over other penal institutions as might be prescribed by the legislature. Not adopted in this form; but the prison

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committee's plan providing for a superintendent of prisons was in substance adopted in 1876.

Requiring the annual enrolment of all able-bodied male citizens between the ages of eighteen and forty-five years as militia, divided into active and reserve forces, the active force to be known as the national guard, but which should not in time of peace exceed 30,000. The reserve force was to be composed of all enrolled persons not in the national guard. The officers of the reserve force were to be members of the national guard of ten years' standing, and of officers honorably discharged from the volunteer service of the United States. Not adopted in this form; the militia article was revised in 1894.

Article 13, relating to bribery, providing, in substance, that any public officer accepting a bribe was declared guilty of a felony and liable to imprisonment for five years, or a fine of $5,000, or both. Any person offering a bribe, if it was accepted, was not liable to civil or criminal prosecution therefor, but, if the bribe was rejected, the person offering it was declared to be guilty of a felony, punishable the same as an officer who accepted a bribe. The officer and the person offering the bribe were declared to be competent witnesses in their own behalf in a civil or criminal prosecution therefor. A district attorney neglecting to prosecute for bribery was liable to removal by the governor, and the expenses incurred by a county in a prosecution for bribery of a state officer were made a charge against the state. Adopted, with modifications, in 1874.

A clause was added to the oath of office intended to cover cases of corruption at elections, and an officer who neglected or refused to take such oath, or who might be convicted of taking a false oath, should forfeit his office. Adopted, with modifications, in 1874.

Providing specifically that the question of calling a

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constitutional convention should be determined by a majority of the votes cast on that question only. The Convention thought the rule was not clearly stated in the Constitution of 1846. The proposed amendment in a different form was adopted in 1894.

Providing that the second legislature which agrees to a constitutional amendment should itself submit the amendment to the people. The Constitution did not, and does not, require the submission by that legislature. Not adopted.

An analysis of this summary shows that about one half of the distinct propositions, including entire articles, submitted by the Convention, have since been incorporated in the Constitution. Most of those not adopted are of minor importance, and would not now be seriously considered if suggested by independent amendment.

SUBMISSION AND RESULT.

The statute calling the Convention required it to meet on the first Tuesday (4th) of June, and the result of its work was to be submitted to the people the same year at the general election to be held on the 5th of November. The Convention worked diligently until the latter part of September, when it became evident that it would be impracticable to complete its labors in time to submit the revised Constitution at the November election. On the 23d of September Mr. Curtis introduced a resolution providing that on the 24th the Convention would adjourn until November 12. On the 24th this resolution was debated at some length. Mr. Weed proposed to adjourn until the first Monday of May, 1868, urging as one reason for the long adjournment that, if the Convention were to adjourn beyond the time fixed by the statute for submitting the Constitution, an enabling act would be necessary before it could go on with its work. Mr. Kernan

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concurred in the view that an enabling act would be necessary if the Convention should adjourn beyond the November election. Mr. Greeley pointed out that an adjournment till May would require the Convention to resume its labors in the midst of an exciting presidential campaign, and the proposed constitution would have to be submitted at a presidential election, when, for obvious reasons, it could not receive the consideration which ought to be given to radical and important changes in the fundamental law. Mr. Tilden thought there could be no legal submission of the revised Constitution except under the statute, and that, if the Convention continued beyond the statutory date without a new statute providing for a submission of the Constitution, the work of the Convention would perish forever. He thought the Convention had no power except that which it derived from the statute calling it, that the powers and functions of the Convention were expressly limited and confined to the period fixed by the statute, that the legislature might extend the commission of the Convention, and that such an extension would be necessary if the Convention should continue beyond the statutory date, and that without further legislation the deliberations of the Convention could not be submitted to the people. Mr. Van Cott did not agree with Mr. Tilden as to the power of the Convention. He said the Convention received its commission from the people, and not from the legislature, that the powers of the Convention were derived from, and measured by, the Constitution itself, and that they could not be limited or extended by any act of the legislature. "If we have our existence as a convention by force of the Constitution, we have the power to go on and do the whole work as a convention under the Constitution and under the commission we derive from it and from the people, and not under any authority we derive from the legislature." The power

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of the Convention to complete its labors could not be impaired by the "mistaken guess" of the legislature that the new Constitution might be submitted at the November election. Replying to a question by Mr. Tilden, Mr. Van Cott said that, if the Convention continued beyond the statutory date, an enabling act would be necessary in order to submit the new Constitution to the people. Mr. Beckwith agreed with Mr. Van Cott that the Convention derived its power from the people, and not from the legislature, and quoted from the Constitution the provision submitting to the people the question whether there should be a convention. He said the people alone could determine the question, and, when they had decided it in the affirmative, the legislature had no further power over the subject, except to provide for the election of delegates to the convention. He expressed the opinion that the legislature had no power to limit the time within which a convention should act, remarking that, if the legislature could limit it to the 1st of November, it might limit it to the 1st of August, and thus make it practically impossible for the convention to do the work committed to it by the people. Mr. Kernan moved as a substitute for the Curtis resolution that the Convention perfect the articles on the court of appeals and suffrage to be submitted separately at the coming election, and then adjourn without day. This was defeated by a vote of 41 to 76. The Weed amendment to adjourn till May received thirty votes. The Curtis resolution was then adopted by a vote of 78 to 40, and the Convention was thereby adjourned until November 12.

On the 21st of February, 1868, the committee on submission reported in favor of submitting the Constitution in two parts, namely, the judiciary article in one proposition, and the remainder of the Constitution in another; also that the question whether the portion of article 2,

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§ 1, of the Constitution of 1846, imposing a property qualification on colored voters, should be retained, be submitted separately. The committee also recommended the adoption of the following resolution:

"Resolved, that this Convention has the power, and it is its duty, to fix the time for the submission of the Constitution."

The committee recommended that the Constitution be submitted at the November election in 1868. The report prescribed the form of the ballot in each case, and the secretary of state was required to publish the form of ballot, the proposed Constitution, and notice of submission at least twice prior to the election, in every public newspaper published in the state. Judge Daly, a member of this committee, discussing the report, said he thought the Convention did not have the power to fix a time for submission of the Constitution, and that the date of submission should be determined by the legislature. Amasa J. Parker and Mr. Chesebro, also members of the committee, concurred in this view. Mr. Alvord, discussing the question of power to fix the date of submission, said it was evident from the Constitution itself that the disposition of the work of a convention was left to the delegates themselves, and that the legislature "transcended its authority" in assuming to fix the time when the revised Constitution should be submitted to the people. Mr. Church thought the Convention had no power to fix the date of submission, and "for this simple reason: A constitutional convention has no power to do anything which shall have the effect of law,—which shall be of any binding force." He thought, however, that this question was not important, because the legislature would be likely to take any action that might be necessary to carry the recommendation of the Convention into effect. Martin I. Townsend said he had no doubt that the Convention

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had power to submit the Constitution at any time it saw fit, and that the Convention might even adopt a constitution without any submission to the people, "although the exercise of such a power would be most unwise." Matthew Hale said the power to submit the Constitution was incidental, and that the Convention might determine the time and mode of submission without reference to the act of the legislature; but that legislation would be necessary to provide the machinery before the action of the Convention could take effect. He thought the Convention ought to fix the time, and trust the legislature to provide the needed machinery. Judge Comstock said there should be no collision between the Convention and the legislature, and the submission should be at a time agreeable to all the authorities; so that, if the Constitution were adopted, there could be no question concerning its validity.

A motion by Mr. Williams to submit the Constitution at a special election in June was defeated by a vote of 40 to 65, and a motion by Mr. Ferry to refer the question of submission to the legislature, with a recommendation that the Constitution be submitted to the people before or after the next general election, was also defeated by a vote of 21 to 76. The committee's recommendation to submit the Constitution at the general election was adopted by a vote of 61 to 31. This was on February 27. The Convention rejected a motion by Mr. Francis to submit separately the articles on finance and canals. The Convention also rejected Mr. McDonald's motion to remit and refer to the legislature the whole question of fixing the time of the submission of the Constitution. On Mr. Murphy's motion the Convention then struck out that part of the committee's report which expressed the opinion that the Convention had power to determine the time when the Constitution should be submitted. The

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question was then put on agreeing to the report as amended, and was lost by a vote of 49 to 64. On the same day Mr. Cooke offered a resolution to submit the Constitution in two propositions; first, the Constitution as a whole, including the judiciary article and all other provisions agreed to by the Convention, and second, the question of continuing the property qualification of colored voters, which was to be submitted separately. The next day the Convention again changed its mind and concluded its fluctuations by adopting a resolution offered by Mr. Cooke,—"that this Constitution be submitted at such time as the legislature shall provide." Mr. Cooke's resolution also contained the plan of submission included in his resolution offered the previous day. The Convention adopted a resolution offered by Mr. Merritt, chairman of the committee on submission, renewing the recommendation contained in the report concerning the publication of the Constitution, form of ballot, and notice by the secretary of state, providing that "the resolutions relating to the submission of the Constitution and its publication be properly engrossed, signed by the president and secretary of this Convention, and filed in the office of the secretary of state with the Constitution." The resolutions were adopted. The Convention also adopted a resolution offered by Mr. Alvord, permitting delegates not present to sign the Constitution in the office of the secretary of state at any time before November 3, 1868. The Constitution was agreed to on the 28th of February by a vote of 84 to 31. The Convention then adopted an address to the people, presented by Mr. Folger, chairman of a select committee appointed for that purpose. This address contained a statement of the principal changes proposed by the revised Constitution, which changes appear in the foregoing summary and need not be re-

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peated here. After summarizing the work of the Convention, the address continues:

"The discussion and conclusions of the Convention have not resulted in many or great changes in the theory of a state government, but have come principally to amending the modes, the alteration of details, the putting stops upon abuses, and the well working of the whole by easing the friction in the parts.

"The Convention has conceived that, as its amendments are numerous, affecting every article of the present Constitution, often dependent one upon another, and together making a Constitution, in the judgment of the Convention, complete and harmonious, it is not judicious or practicable to take any part from the others to be passed upon by the people separately.

"The Convention therefore presents to the people the Constitution as a whole, as the form and manner which will enable the electors best to judge between the old and the new.

"The Convention believes that if its work shall find favor with the people, and shall by the people be adopted, that, shaped by it, the government of the state will be safe and beneficent, and the commonwealth, with the favor of the Ruler of all events, be borne forward for another generation in increasing happiness and prosperity."

The Constitution signed by the delegates present was then delivered by the president to Homer A. Nelson, secretary of state, who had attended the Convention for that purpose. President Wheeler in his closing remarks expressed the hope that the people, after examining the proposed Constitution, "may determine that our labors have not been altogether fruitless, that the changes suggested by us in the organic law are such as will further the well-being and advancement of the commonwealth; and as-

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sure for the future the pre-eminence to which she is justly entitled, and which has so long distinguished her." The Convention then adjourned.

The assembly of 1868 passed a bill to submit the Constitution to the people at the general election that year. In addition to the submission of the Constitution as a whole, the judiciary article was to be submitted separately, and also the provision relating to property qualifications of colored voters. The senate did not pass the bill. On the 2d of May the legislature, by chapter 538, enacted that the convention law of 1867 "shall be construed as having authorized the continuance of the session of the said Convention after the first Tuesday of November, 1867," but that "nothing herein contained shall be held or construed to affirm or ratify any form or mode of submission to the people of the Constitution by said Convention proposed." This statute ratified the action of the Convention in continuing its proceedings beyond the time fixed for the submission of its deliberations to the people. This ratification was probably not necessary. I think it is very clear that the legislature has no power to limit the deliberations of a constitutional convention; such a convention may make or unmake the legislature itself. While the legislature represents the people, it represents them for the purpose of exercising the lawmaking power, and not the power to make a constitution, nor to direct or control the action of other representatives of the people chosen for the express purpose of revising the Constitution. The power to make a constitution is one thing, the legislative power is quite another.

In the chapter on the Convention of 1821 I have quoted from Chancellor Kent's veto of the first convention bill of 1820, in which he held that the legislature had no power to call a constitutional convention, for the reason

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that, although the Constitution was silent on this question, the power to make or amend the Constitution was vested in, and must be exercised by, the people themselves, and they alone could determine whether a convention should be held to revise the Constitution. Having determined to hold such a convention, the delegates were the direct representatives of the people, and not subject to any legislative control. Doubtless the legislature may, by controlling the machinery incident to a convention, limit its powers to some extent, or by fixing, as it did in 1894, the period when the compensation of delegates should cease, suggest to the convention a practical reason why its deliberations should be terminated. But this does not involve a question of power. A convention may, like the Convention of 1894, continue its labors when it is no longer entitled to compensation; but clearly its deliberations during this subsequent period would be perfectly valid. A provision, therefore, in this and other statutes, providing for the submission of the work of the convention at a specified time, cannot be construed to mean that, if the convention's deliberations are not concluded in time, the result of its work shall, nevertheless, be submitted to the people on the day fixed by the legislature. If it is not convenient for a convention to complete its labors in time for a submission of the Constitution on a specified day, then the convention may fix a day, and it would be the clear duty of the legislature to provide the machinery necessary for carrying the will of the convention into effect. The Convention of 1867 once adopted this view, but later concluded to leave the date to the discretion of the legislature. This action by the Convention was proper, but not necessary, and transferred to the legislature the right to fix the day for the submission of the new Constitution.

Early in the session of the senate of 1869, Mr. Folger

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introduced a bill to submit the Constitution to the people on the fourth Tuesday of April. The bill followed the recommendations of the Convention providing for submitting the Constitution as a whole, and also the question relating to property qualifications of colored voters. The bill was referred to the senate judiciary committee, which included Mr. Folger, Mr. Hale, and Mr. Murphy, who had been members of the Convention of 1867. Mr. Folger presented a majority report of the committee recommending the passage of the bill. Mr. Murphy presented a minority report, with a bill to submit the Constitution at the November election in 1869, with a further provision that the judiciary article be submitted separately. During the progress of the bill through the senate it was amended by providing, also, for a separate submission of the provision relative to uniform taxation, and in this form was passed. The act provided for the submission of the Constitution in four parts: First, the whole Constitution; second, the judiciary article; third, the tax provision; and fourth, the provision relating to property qualifications of colored voters; declaring, in accordance with the recommendation of the Convention, that, if a majority of the votes were in favor of the property qualification, the provision on this subject in the Constitution of 1846 should be added to § 1 of article 2 in case the whole Constitution were adopted. It will be observed that the legislature ignored the recommendation of the Convention that the Constitution be submitted as a whole, and selected two portions of it, the judiciary article and the tax section, for separate submission. This action is perhaps consistent with the declaration of the legislature in the act of 1868 (chapter 538) that it should not be deemed to affirm or ratify any form or mode of submission proposed by the Convention.

Where did the legislature find authority to control the

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method of submitting a constitution prepared by a convention? This, again, is not legislative power, and, when the people have determined to revise the Constitution, and a convention has been chosen for that purpose, such a convention is the sole depository of power concerning constitutional revision, and of the time and manner of submitting a new constitution to consideration by the people. It seems perfectly clear that the legislature has no power to prescribe beforehand the method or form of submitting either the whole or any part of a constitution which may be framed by a convention; and if the legislature cannot do this in advance, it seems equally clear that it cannot take a constitution prepared by a convention, dissect and disintegrate it, and submit it in fragments, or in any manner different from that determined by the convention itself. The Convention had prepared a revised Constitution supposed to be consistent and harmonious and intended to form one instrument; and it had determined that this instrument should be considered and acted on as a whole. Was it a legitimate exercise of the lawmaking power for the legislature to attempt to frustrate the will of the people, as expressed by their representatives in convention, and to prevent the adoption of the Constitution as one instrument? Under the act, if the people had approved the whole Constitution, the judiciary article and the tax section must have been excluded, unless also approved by a separate ballot, for the statute expressly declares that this would have been the result, although the general ballot was for the Constitution, without indicating the omission of any part of it. The adverse vote on the whole Constitution precluded the practical consideration of this question, but it is nevertheless pertinent now as a question of legislative power. Even if the statute were irregular in assuming authority to submit the Constitution in parts, the people, by accept-

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ing the issue in this form, may be deemed to have acquiesced in the partial submission, and the affirmative vote on the judiciary article must be deemed an expression of popular opinion in favor of that article, even if the remainder of the Constitution was disapproved. What might have been the state of the question if the people had adopted the whole Constitution, ignoring the separate ballots, we need not now conjecture. Notwithstanding the result in this instance, it is, I think, very doubtful whether the legislature had any power to alter the plan prescribed by the Convention, and prevent the full effect of an affirmative vote on the Constitution as revised and recommended by that body. It should be noted also, in this connection, that the Constitution furnishes only two methods of amending it. One authorizes the legislature to submit amendments, the other provides for a convention. Legislative amendments require previous action by two legislatures, while a convention is independent of the legislature. If a portion of the work of a constitutional convention is taken by the legislature for submission independent of the entire instrument, or independent of other amendments recommended by the convention, then such independent submission becomes to that extent a legislative submission, and it lacks the prior constitutional sanction of two legislatures. Strictly construed, it is neither a legislative, nor a convention, submission. If the rule that the legislature possesses all power not prohibited by the Constitution applies to the act of amending the Constitution, as well as to the ordinary exercise of legislative power, then the legislature is at liberty to do what it pleases with the constitution adopted by a convention, and submit, or decline to submit, the whole or any part of it, and take such action as it sees fit. But I think that such a construction of legislative power is utterly inconsistent with our theory of gov-

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ernment, because it vests in the legislature powers which the people themselves, acting through a convention, are unable to control.

The Constitution in the form prescribed by the statute was submitted to the people on the 2d of November, 1869. The judiciary article was approved by a vote of 247,240 to 240,442. The tax question was rejected by a vote of 183,812 to 273,260, and the remainder of the Constitution by a vote of 223,935 to 290,456. The proposition to continue the property qualifications of colored voters was adopted by a vote of 282,403 to 249,802.

This Convention apparently had less to do than its predecessor of 1846 or 1821, yet it sat nearly four times as long as the Convention of 1821, and twice as long as the Convention of 1846. It sat longer than the Convention of 1776–7, and that Convention devoted less than six weeks to the actual work of making a constitution,—the remainder of its labors being required to institute and carry on a provisional government, and devise ways and means for prosecuting the war. While the Convention of 1867 continued its session nine months, including adjournments, and apparently had time enough to consider fully and perfect any needed reforms, its work, except the judiciary article, was not accepted by the people. The rejection of a large part of its work was doubtless a source of regret to the members of the Convention, but that regret must have been tempered by the reflection that many of the most important reforms proposed by the Convention, and not then accepted, were soon afterwards recommended again by the Constitutional Commission of 1872. Thus the work of the Convention was not wholly lost. Perhaps the Convention did too much. Looking back over thirty-six years, and studying the constitutional changes proposed by that Convention, it seems quite clear that some things were recommended

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which this generation would not be willing to accept. The revised Constitution submitted by that Convention presented to the people a problem not always easy to solve, for, with the excellent and unobjectionable recommendations, were others which many people thought they could not approve. So the question was presented whether it would be better to approve the Constitution as a whole, overlooking its objectionable features, or reject it as a whole because it did not seem wise to incorporate them in the fundamental law, and trust the wisdom of the future to eliminate them. The people chose the latter alternative, and the fact that their objections were not aimed at the Constitution as a whole is manifest from the readiness with which they adopted a large number of important amendments submitted in 1874 and 1876, and which originated in the Convention of 1867.

But, aside from these considerations, which had great weight in determining the result, it is worth while to remember that the fate of that Constitution was probably sealed before the Convention adjourned. I have already referred to the scanty attendance of delegates and the lack of interest in its deliberations manifested by many members. It is evident also from the debates that partisan differences would seriously affect the final work of the Convention. On the 27th of February, 1868, the day before the Convention adjourned, Martin I. Townsend, discussing the question of the time and method of submitting the proposed Constitution, said it was "doomed to defeat, hopelessly doomed." He asked what the "silence" of the political minority signified, and said he did not hesitate to look at political distinctions; that the majority "should not be beguiled and led into traps;" and that, if the minority wished the Constitution adopted, they could say so, "and when they say so all question of conflict is past. But if they wish to commit us, and

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leave themselves at liberty to adopt such a policy as the exigencies of the times shall bring up, we certainly should take such a course as will fairly carry this matter before the electors of the state, so that we can at least address ourselves to those individuals who are willing to vote for this Constitution upon its merits." Mr. Hale, referring to the prejudices which were said to exist throughout the state against the new Constitution, said, if there were such prejudices, they would be vastly increased if the Constitution were submitted at a special election. Mr. Verplanck also referred to statements in the Convention that its work was "unpopular throughout the state." Judge Comstock, a member of the minority, replying to Mr. Townsend, said that no member of the Convention was then called on to make any avowal of his intentions concerning the proposed Constitution. But that he was "free to say" that his impressions were in favor of the Constitution as a whole, but that he would not pledge himself absolutely, and thought that no delegate should do so. "It will be the duty of all of us, although we have sat here together in framing the Constitution, to examine it carefully as a whole, and say whether it ought to command our condemnation or our approval." Concluding his remarks, he said he should enter on the examination with favorable impressions, but beyond this he thought no one ought to commit himself.

The opposition to the revised Constitution which had been manifested by the minority in the Convention was formally declared by the Democratic State Convention in 1869, in the following resolution adopted as a part of its platform:

"That the amended Constitution of this state, in its various schedules to be submitted to the electors, does not commend itself to the favor of the Democrats of the state, either by the motives in which it was conceived, or

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by the manner in which it was presented or by its intrinsic worth."

This arrayed against the new Constitution the political party which was then in the ascendency in the state. The Democrats carried the state that year by 20,000 majority. The Constitution was defeated by 66,000. The Republican platform contained no reference to the new Constitution, and the members of that party were therefore free to use their own judgment without any suggestion from their representatives in a state convention. But it is not to be assumed that the vote on the Constitution was wholly on party lines; and it should also be remembered in this connection that the total vote on the Constitution was 128,000 less than the total vote on the state ticket. But, whatever other causes may have contributed to defeat the Constitution, the general opposition of a great political party was sufficient to produce the result, even if the instrument had contained no provisions which men of all parties might reasonably have considered of doubtful utility.

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CONSTITUTION PROPOSED BY THE CONVENTION OF 1867.

[It was submitted to the people at the general election in November, 1869, but was all rejected, except the Judiciary Article.]

ARTICLE I.

§ 1. **Rights of citizens.**— 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.

§ 2. **Jury trial preserved; when may be waived.**— The trial by jury in all cases in which it has heretofore been used shall remain inviolate forever; except that in suits in justices' courts provision may be made by law for trial by a jury of less than twelve men; but a jury trial may be waived by the parties in all civil cases.

§ 3. **Religious liberty.**— The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state; and no person shall be incompetent to be a witness on account of his 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 the state.

§ 4. **When writ of habeas corpus not to be suspended.**—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.

§ 5. **Excessive bail, fines, and punishment prohibited; rights of witnesses.**—Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted, nor shall witnesses be unreasonably detained.

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§ 6. **Rights of accused in criminal cases; taking private property for public use.**—No person shall be held to answer for a capital or otherwise infamous crime unless on indictment by a grand jury, except in cases of impeachment, and in cases arising in the militia when in actual service, and in the land and naval forces in time of war, or in the forces which the state may keep with the consent of Congress in time of peace, and in cases of petit larceny under the regulations of the legislature. In any trial in any court the party accused shall be confronted with the witnesses against him, and be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

§ 7. **Procedure on taking private property; private roads; drainage.**—When private property shall be taken for public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case, the necessity of the road, and the amount of damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, with the expenses of the proceedings, shall be paid by the person to be benefited. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the sole possession of the railroad company while used for such purposes. General laws may be passed permitting the owners or

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occupants of lands to construct and maintain necessary drains and ditches for agricultural purposes, across the lands of others, under proper restrictions, and with just compensation; but no special laws shall be enacted for such purposes.

§ 8. **Freedom of speech and press; evidence in libel cases.**—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. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear that the matter charged as libelous is true and was published with good motives and for justifiable ends, the accused shall be acquitted; and the jury shall have the right to determine the law and the fact.

§ 9. **Unreasonable seizures and searches prohibited.**—The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue without probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

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

§ 11. **Sovereignty in real property; 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.

§ 12. **Feudal tenures abolished.**—All feudal tenures of every description, with all their incidents, are declared

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to be abolished; saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

§ 13. **Absolute ownership of estates.**—All lands within the 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.

§ 14. **Agricultural leases limited.**—No lease or grant of agricultural land hereafter made for a longer period than twenty years, in which is reserved any rent or service, shall be valid.

§ 15. **Restraints on alienation prohibited.**—All fines, quarter sales, or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

§ 16. **Common law continued.**— Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the laws of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, and of the convention of the state of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired or been repealed or altered, and such acts of the legislature as are now in force, shall be and continue the law, subject to repeal or to such alterations as the legislature shall make. But all such parts of the common law, and such of the said acts or parts thereof as are repugnant to this Constitution, are hereby abrogated.

§ 17. **Royal grants and charters preserved.**—Grants of land within the state, made by the King of Great Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred

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and seventy-five, shall be void; but nothing in this Constitution shall affect any grants of land made by the authority of the said King or his predecessors, or shall annul any charters to bodies politic or corporate, by him or them made before that day, or shall affect any such grants or charters since made by the state, or by persons acting under its authority, or shall impair the obligation of any debts contracted by the state or individuals or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

§ 18. **Indian lands, when contracts for invalid.**—No purchase of lands, or contract for the sale thereof, made since the fourteenth day of October, one thousand seven hundred and seventy-five, or which may hereafter be made, of or with the Indians, shall be valid, unless made under the authority and with the consent of the legislature.

§ 19. **Fishing in international waters.**—The right to take fish in any of the international waters bordering on this state shall not be denied or restrained.

§ 20. **Divorce, how granted.**—No divorce shall be granted in this state, except by the judgment of a court of competent jurisdiction.

ARTICLE II.

§ 1. **Qualifications of voters.**—Every male inhabitant, of the age of twenty-one years, who shall have been a citizen for ten days, and a resident of the state for one year next preceding an election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election, in the election district of which he shall be at the time a resident, and not elsewhere, for all officers that now are, or hereafter may be, elective by the people, and upon all

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questions which may be submitted to the vote of the people of the state; provided that such citizen shall have been, for thirty days next preceding the election, a resident of the town or ward, and for ten days of the election district in which he offers his vote.

§ 2. **Bribery at election.**—No person who shall receive, expect, or offer to receive, or pay, offer, or promise to pay, contribute, offer, or promise to contribute to another, to be paid or used, any money or other valuable thing, or who shall make any promise to influence, or as a compensation or reward for the giving or withholding a vote at an election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the inspectors or other officers authorized for that purpose receive his vote, shall swear or affirm before such inspectors or other officers, that he has not received nor offered, does not expect to receive, has not paid, offered, or promised to pay, contributed, offered, or promised to contribute to another, to be paid or used, any money or other valuable thing, nor made any promise to influence, or as a compensation or reward for the giving or withholding a vote at such election. The legislature, at the session thereof next after the adoption of this Constitution, shall, and from time to time thereafter may, enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime, and for depriving every person who shall make, or become directly or indirectly interested in, any bet or wager depending upon the result of any election, of the right to vote at such election.

§ 3. **Voting residence.**—For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his ab-

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sence, while employed in the service of the state, or of the United States; nor while engaged in the navigation of the waters of the state or of the United States; or on the high seas; nor while a student of any seminary of learning; nor while kept in any almshouse or other asylum; nor while confined in any public prison. The legislature shall prescribe the manner in which electors, absent from their homes in time of war, in the actual military or naval service of the state or of the United States, may vote; and shall provide for the canvass and return of their votes.

§ 4. **Registration of voters.**—Laws shall be made for ascertaining, by proper proofs, the citizens who are entitled to the right of suffrage hereby established. The legislature shall provide for a registry of citizens entitled to vote in each election district, to be completed four days before each general and special state election and charter election in cities. No person shall vote at such elections who is not registered according to law; and the mode of registration shall be uniform in all cities.

§ 5. **Elections to be by ballot.**—All elections shall be by ballot, except for such town officers as may by law be directed to be otherwise chosen.

ARTICLE III.

§ 1. **Legislative power; eligibility to legislature.**—The legislative power shall be vested in a senate and assembly. Any elector shall be eligible to the office of senator and member of assembly.

§ 2. **Senate districts.**—The state shall be divided into thirty-two senate districts, each of which shall choose one senator; and the term of office shall be four years.

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The senate districts shall be as follows:

First District: The counties of Suffolk, Queens, and Richmond.

Second District: The First, Second, Third, Fourth, Fifth, Seventh, Eleventh, Thirteenth, Fifteenth, Nineteenth, and Twentieth wards of the city of Brooklyn, in the county of Kings.

Third District: The Sixth, Eighth, Ninth, Tenth, Twelfth, Fourteenth, Sixteenth, Seventeenth, and Eighteenth wards of the city of Brooklyn, and the towns of Flatbush, Flatlands, Gravesend, New Lots, and New Utrecht, of the county of Kings.

Fourth District: The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Thirteenth, and Fourteenth wards of the city and county of New York.

Fifth District: The Eighth, Ninth, Fifteenth, and Sixteenth wards of the city and county of New York.

Sixth District: The Tenth, Eleventh, and Seventeenth wards of the city and county of New York.

Seventh District: The Eighteenth, Twentieth, and Twenty-first wards of the city and county of New York.

Eighth District: The Twelfth, Nineteenth, and Twenty-second wards of the city and county of New York.

Ninth District: The counties of Westchester, Putnam, and Rockland.

Tenth District: The counties of Orange and Sullivan.

Eleventh District: The counties of Dutchess and Columbia.

Twelfth District: The counties of Rensselaer and Washington.

Thirteenth District: The county of Albany.

Fourteenth District: The counties of Greene and Ulster.

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Fifteenth District: The counties of Saratoga, Montgomery, Fulton, Hamilton, and Schenectady.

Sixteenth District: The counties of Warren, Essex, and Clinton.

Seventeenth District: The counties of St. Lawrence and Franklin.

Eighteenth District: The counties of Jefferson and Lewis.

Nineteenth District: The county of Oneida.

Twentieth District: The counties of Herkimer and Otsego.

Twenty-first District: The counties of Oswego and Madison.

Twenty-second District: The counties of Onondaga and Cortland.

Twenty-third District: The counties of Chenango, Delaware, and Schoharie.

Twenty-fourth District: The counties of Broome, Tioga, and Tompkins.

Twenty-fifth District: The counties of Cayuga and Wayne.

Twenty-sixth District: The counties of Ontario, Yates, and Seneca.

Twenty-seventh District: The counties of Chemung, Schuyler, and Steuben.

Twenty-eighth District: The county of Monroe.

Twenty-ninth District: The counties of Niagara, Orleans, and Genesee.

Thirtieth District: The counties of Wyoming, Livingston, and Allegany.

Thirty-first District: The county of Erie.

Thirty-second District: The counties of Chautauqua and Cattaraugus.

The senators first elected under this Constitution, in districts bearing odd numbers, shall vacate their office

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at the end of two years, and those elected in districts bearing even numbers, at the end of four years; and vacancies occurring by the expiration of term shall be filled by the election of senators for the full term.

§ 3. **Census; reapportionment of senators.**—An enumeration of the inhabitants of the state shall be made, under the direction of the legislature, in the year one thousand eight hundred and seventy-five, and in every tenth year thereafter; and the senate districts shall be so arranged by the legislature at the first session after the return of every enumeration, that each district shall contain, as near as may be, an equal number of inhabitants of the state, excluding aliens, and shall consist of contiguous territory, and shall remain unaltered until another enumeration. No county shall be divided in the formation of senate districts, unless it shall be entitled to two or more senators.

§ 4. **Assembly.**—The assembly shall consist of one hundred and thirty-nine members, who shall be chosen by counties, and shall be apportioned among the several counties of the state, as nearly as may be, according to the number of inhabitants thereof, excluding aliens, and shall hold office for one year. Each county shall be entitled to at least one member, except that the counties of Fulton and Hamilton shall elect together, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. No new county shall be made unless its population, according to the last preceding enumeration, shall entitle it to a member. The members of assembly shall be apportioned by the legislature, at its first session after the adoption of this Constitution, upon the enumeration of the inhabitants of the state, excluding aliens, made in the year one thousand eight hundred and sixty-five. A like apportionment shall be made by the legislature at its first session after

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every such enumeration, and every apportionment shall remain unaltered until another enumeration.

§ 5. **Compensation of members of legislature.**—The members of the legislature shall each receive an annual salary of one thousand dollars, and ten cents for every mile they shall travel in once going to and returning from their place of meeting, by the most usual route. The speaker of the assembly shall receive an additional salary of five hundred dollars; but the legislature shall provide by law for a deduction from the salary of members for nonattendance.

§ 6. **Members not to receive civil appointment; certain Federal officers disqualified.**—No member of the legislature shall be appointed to any civil office within the state, by the governor, the governor and senate, or by the legislature, during the time for which he shall have been elected; and all such appointments and all votes given for any such member therefor shall be void. Nor shall any member of Congress or any judicial or military officer under the United States hold a seat in the legislature. If any person, after his election to the legislature, shall be elected to Congress or appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat.

§ 7. **General election day; legislative session.**—The election of members of the legislature shall be held on the Tuesday succeeding the first Monday in November, unless otherwise directed by law. The first election shall be held in the year one thousand eight hundred and sixty-nine. The legislative term shall begin on the first day of January, and the legislature shall every year assemble on the first Tuesday in January, unless a different day be appointed by law. The members of the legislature who may be in office on the first day of January,

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one thousand eight hundred and sixty-nine, shall hold their offices until and including the thirty-first day of December of that year, and no longer.

§ 8. **Quorum; general powers of the two houses.**—A majority of each house shall constitute a quorum. Each house shall determine the rules of its own proceedings, and be the judge of the election, returns, and qualifications of its members; shall choose its own officers; and the senate shall choose a temporary president to preside when the lieutenant governor shall not attend as president, or shall act as governor. The secretary of state shall call the assembly to order at the opening of each new assembly, and preside over it until a presiding officer thereof shall have been chosen and shall have taken his seat. No member shall be expelled by either house, except by a vote of a majority of all the members elected to that house, and no member shall be twice expelled for the same offense.

§ 9. **Journals of proceedings; public sessions; adjournments.**—Each house shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

§ 10. **Privileges of members.**—For any speech or debate in the legislature the members shall not be questioned in any other place.

§ 11. **Bills may originate in either house.**—Any bill may originate in either house of the legislature; and bills passed by one house may be amended by the other.

§ 12. **Enacting clause.**—The enacting clause of bills shall be "The People of the state of New York, represented in senate and assembly, do enact as follows," and no law shall be passed except by bill.

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§ 13. **Procedure on passage of bills.**—No bill shall be passed unless by the assent of a majority of the members elected to each house. The question upon the final passage shall be taken immediately upon the last reading; and the yeas and nays shall be entered on the journal.

§ 14. **Limitations on private and local bills.**—No law shall embrace more than one subject, which shall be named in the title; but if the title contain only one subject, the law shall be valid as to that, and void as to all other subjects. No law shall be revived, altered, or amended by reference to its title only; but the act revived, or the section or sections thereof, as altered or amended, shall be re-enacted and published at length.

§ 15. **Legislature to adjourn at noon.**—On the day of its final adjournment, the legislature shall adjourn at twelve o'clock at noon.

§ 16. **Legislature not to audit private claim.**—The legislature shall not audit or allow any private claim or account against the state, or pass any special law in relation thereto, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

§ 17. **Extra compensation prohibited.**—The legislature shall not grant any extra compensation to any public officer, servant, agent, or contractor, nor increase or diminish any compensation, except that of judicial officers, during the term of service.

§ 18. **Vacancies in office.**—The cases in which any office shall be deemed vacant shall be defined by general laws when no provision is made for that purpose in this Constitution; and the legislature shall provide for filling vacancies in office. In case of elective offices, any person appointed to fill a vacancy shall hold the office until

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a successor shall be elected and duly qualified according to law.

§ 19. **Removals.**—Provision shall be made by law for the removal, for misconduct in office, of all officers, except judicial, whose powers and duties are not local or legislative, and who shall be elected at general elections, and also for filling vacancies caused by such removal.

§ 20. **Official terms to be prescribed.**—When the term of any office is not prescribed by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

§ 21. **Political year and legislative term.**—The political year and legislative term shall begin on the first day of January.

§ 22. **Certain offices abolished.**—No office shall be created for weighing, gauging, culling, or inspecting any merchandise, manufactures, produce, or commodity whatever; but nothing in this section shall affect any office created for the purpose of protecting the public health or the interests of the state in its property, revenue, tolls, or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any offices for such purposes.

§ 23. **Lotteries prohibited.**—Lotteries and the sale of lottery tickets are prohibited.

§ 24. **Notice of proposed local or private bill.**—No local or private bill shall be passed, unless notice of the intention to apply therefor shall have been given in the manner now, or hereafter to be, provided by law; nor shall such notice ever be waived; and the fact or omission of notice shall always be open to inquiry.

§ 25. **Certain special laws prohibited.**—The legislature shall not pass local or special laws:

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Authorizing the sale, mortgaging, or leasing of the real property of minors, or other persons under disability;

Changing the names of persons;

For laying out, working, or discontinuing public or private roads or highways;

For granting to any individual, association, or corporation the right to lay down railroad tracks;

Or in any case for which provision now exists or shall hereafter be made by any general law.

The legislature shall pass general laws providing for the cases before enumerated in this section, and for all other cases which, in its judgment, can be provided for by general law.

But no law shall be passed granting the right to construct and operate a street railroad within any city, town, or incorporated village, without the consent of the local authorities having the control and management of the street or highway proposed to be occupied, and also the consent of the owners of at least one third in value of the property, according to the assessment roll of the previous year, bounded on that portion of each street or highway over which it is proposed to construct the same; or, in case the consent of such property owners can not be obtained, then without the consent of the general term of the supreme court of the district in which such road is proposed; such consent to be obtained and authenticated in such manner as the legislature shall, by general law for that purpose, provide.

ARTICLE IV.

§ 1. Governor and lieutenant governor.—The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant governor shall be chosen at the same time and for the same term.

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§ 2. **Who eligible.**—No person shall be eligible to the office of governor or lieutenant governor, except a citizen of the United States, who shall have attained the age of thirty years, and have been five years next preceding his election a resident of the state.

§ 3. **When chosen.**—The governor and lieutenant governor shall be elected at the times and places of choosing members of the assembly. The persons having the highest number of votes for governor and lieutenant governor shall be elected; but in case two or more shall have an equal vote, and the highest number of votes for either of said offices, the legislature, at its next annual session, shall forthwith, by joint ballot, elect one of the said persons to the office for which he shall have received said vote.

§ 4. **Governor's general powers and duties.**—The governor shall be commander-in-chief of the military and naval forces of the state. He shall communicate by message to the legislature at each annual session the condition of the state, and recommend such measures as he shall judge expedient. He shall transact all necessary business with the officers of government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed. He shall, at stated times, receive for his services a compensation, to be established by law, to be first fixed by the legislature at its next session after the adoption of this Constitution, which compensation shall neither be increased nor diminished after his election or during his term of office.

§ 5. **When lieutenant governor may act.**—In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon

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the lieutenant governor for the residue of the term, or until the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of a military or naval force thereof, he shall continue commander-in-chief of the forces of the state.

§ 6. **Extraordinary sessions.**—The governor may convene the senate on extraordinary occasions, and may call special sessions of the legislature by proclamation, in which shall be stated the particular object or objects for which they are called; and no law shall be enacted at any special session except such as shall relate to the objects stated in the proclamation.

§ 7. **Reprieves, commutations, and pardons.**—The governor shall have the power to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason he shall have power to reprieve until the case can be reported to and acted upon by the legislature, which shall, at the same session, either grant a reprieve, pardon, or commutation of the sentence, or direct its execution. He shall annually communicate to the legislature each case of reprieve, commutation, or pardon, stating the name of the convict, the offense of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve.

§ 8. **President of the senate.**—The lieutenant governor shall be president of the senate, but shall have only a casting vote. If, during a vacancy of the office of governor, the lieutenant governor shall be impeached, removed, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the

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president of the senate shall act as governor until the vacancy is filled or the disability cease.

§ 9. **Lieutenant governor's compensation.**—The lieutenant governor shall receive for his services a compensation, to be established by law, to be first fixed by the legislature at its next session after the adoption of this Constitution, which shall neither be increased nor diminished after his election or during his term of office; and he shall not receive or be entitled to any other compensation, fee, or perquisite, for any duty or service he may be required to perform by this Constitution or by law.

§ 10. **Executive consideration of bills.**—Every bill, before it becomes a law, shall be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large on its journal, and proceed to reconsider it. If, after such reconsideration, two thirds of the members elected to such house shall agree to pass the bill, it shall be sent, with the objections, to the other house, by which it shall also be reconsidered, and if approved by two thirds of all the members elected to such house, it shall thereupon become a law. But in all such cases the votes in each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on its journal. If any bill is not returned by the governor within ten days, Sundays excepted, after it has been presented to him, it shall be a law unless the legislature, by its adjournment, prevent its return. No bill shall become a law by the approval of the governor after the end of the session at which the same was passed, unless it shall be sent by him to the office of the secretary of state, within ten days (excluding Sundays) after the end of the session.

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ARTICLE V.

§ 1. **State officers.**—The secretary of state, comptroller, treasurer, and attorney general shall be chosen at the same time and for the same term as the governor, except that the secretary of state, comptroller, treasurer, and attorney general elected at the general election held on the Tuesday succeeding the first Monday of November, one thousand eight hundred and sixty-nine, shall hold their respective offices until and including the thirty-first day of December, one thousand eight hundred and seventy, and no longer.

§ 2. **Suspension of treasurer.**—The treasurer may be suspended from office by the governor, during the recess of the legislature, and until thirty days after the commencement of its next annual session, whenever it shall appear to him that such treasurer has violated his duty. The governor shall appoint a competent person to discharge the duties of the office during such suspension.

§ 3. **Salaries of state officers.**—The officers named in this article shall receive for their services a salary, to be established by law, which shall not be increased or diminished during their official term. They shall not receive to their own use any fees, costs, perquisites of office, or other compensation. The moneys received by any such officers, except their salary, and all costs or allowances recovered by the attorney general in legal proceedings, shall be paid into the treasury.

§ 4. **Commissioners of canal fund.**—The comptroller, treasurer, and attorney general shall be the commissioners of the canal fund. They shall have power to appoint and remove all officers intrusted with the ascertainment, collection, and safe keeping of the revenues derived from the tolls on the canals of the state; and, with the superintendent of public works, shall determine

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the rates of toll, which shall not, except with the concurrence of the legislature, be reduced below those for the year eighteen hundred and sixty-seven, until the canal debt, so called, shall be paid or provided for.

§ 5. **Superintendent of public works.**—The governor shall nominate, and with the consent of the senate, appoint, a superintendent of public works, who shall hold office for five years, and whose salary shall be determined by law. He shall be required by law to give security for the faithful execution of his office before entering on the duties thereof. He shall be charged with the execution of all laws relating to the construction, repair, and navigation of the canals, and of any improvement thereof which may be authorized by law; and, subject to the control of the legislature, he shall make the rules and regulations for the navigation or use of the canals, feeders, and structures connected therewith. He may be suspended from office and removed by the governor, for incompetency, neglect of duty, or malfeasance in office; but no such removal shall be made unless he shall have been served with a copy of the charges against him, and shall have had an opportunity of being heard in his defense. In case of a vacancy in the office of the superintendent of public works, or of his suspension, removal, or inability to serve, from any cause, during the recess of the senate, one of the assistant superintendents of public works, to be designated by the commissioners of the canal fund, shall act in his stead; but not for a period beyond the end of the session of the senate next after such vacancy, suspension, removal, or inability. The governor, upon the recommendation of the superintendent of public works, may nominate, and, with the consent of the senate, appoint, four assistant superintendents of public works, who shall hold their office for five years, at an annual salary to be determined

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by law. The assistant superintendents shall be subject to the control of the superintendent, and may be removed by him for cause; all other officers, except financial, and all persons employed in the care and management of the canals, shall be appointed by the superintendent, subject to removal by him.

§ 6. **Canal bridges; damages; extra allowance on contracts prohibited.**—No money shall be appropriated or paid by the state, or out of the canal revenues, for the construction or maintenance of any bridge, except for the use of the state, over any of the completed state canals or feeders, at any point where a bridge was not maintained at the expense of the state prior to the first day of January, eighteen hundred and sixty-seven; nor for any damages or injury sustained in the navigation or use of any of the canals, or of the feeders or structures connected therewith; nor as extra allowance or compensation to any person for the performance of any contract relating thereto. No claim for damages growing out of the construction, maintenance, or repair of the canals, feeders, or structures connected therewith shall be heard or allowed, unless made within two years after it shall arise, except claims for damages for appropriations of property, in which case it shall be made within two years after notice of such appropriation, as shall be provided by law; but, if the claimant shall be under legal disability, the claim may be made within two years after the removal of the disability.

§ 7. **Informal bids, when not rejected.**—In all contracts for materials or work upon the canals, no bid shall be rejected for informality until the party or parties making it shall have had notice to correct such informality; and no alteration of the plan or of any specification shall be made before or after the execution of any contract, except with the consent of the commissioners of

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the canal fund and of the superintendent of public works, or a majority of them; but this section shall not be held to continue the contract system, or prevent the superintendent of public works or the legislature from adopting any other mode of doing the public work.

§ 8. **Court of claims.**—There shall be a court of claims composed of three judges appointed by the governor with the consent of the senate, in which shall be adjudicated such claims against the state as the legislature shall, by general laws, direct. Such claims shall be tried without a jury; but the facts found by the court shall be stated in each adjudication. When claims for the value of, or damages to, real estate shall amount to five hundred dollars or more, the judges of said court shall, and in all other cases may, view the property in question, and in deciding thereon their estimate of such value or damages shall be taken in connection with the evidence. In other respects such court shall be governed by the rules of law heretofore applicable to cases between the state and the citizen. The laws of limitation, except as provided in the sixth section of this article, shall prevail in favor of the state as in favor of individuals. The limitation shall begin to run from the adoption of this Constitution; but this shall not be construed to revive claims already barred by existing statutes. The jurisdiction of such court shall be exclusive; and its decisions may be reviewed on the law on appeal to the court of appeals. The judges of said court shall hold their offices for five years, unless sooner removed according to law, and shall receive at stated times for their services a compensation to be established by law, which shall not be diminished during their continuance in office.

§ 9. **Solicitor of claims.**—There shall be a solicitor of claims appointed in the same manner and for the

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same term as the judges of the court of claims, whose duty it shall be to take charge of the interests of the state in all matters depending in the court of claims; and who shall receive for his services a compensation to be established by law. He may be removed by the governor for misconduct, incompetency, or neglect of duty, upon the recommendation of said court; and whenever, in the judgment of the legislature, the office of solicitor of claims shall become unnecessary, it may be abolished.

§ 10. **Certain canal offices abolished.**—The canal board, the contracting board, and the office of canal commissioner and canal appraiser are abolished from and after the first day of January, eighteen hundred and sixty-nine; but until the appointment and qualification of a superintendent of public works and the organization of a court of claims, as provided by this article, said boards and officers shall discharge their duties as heretofore.

[Article VI. was approved and is known as the Judiciary Article of 1869. It will be found in the Introduction.]

ARTICLE VII.

§ 1. **Local officers.**—Sheriffs, county treasurers, clerks of counties, the register of the city and county of New York, and the registers of deeds in all the counties where such registers are or may be authorized by law, coroners, and district attorneys, shall be chosen by the electors of the respective counties once in every three years, and as often as vacancies shall happen. Sheriffs shall hold no other office, and shall be ineligible for the next three years after the end of their term. They may be required by law to renew their security, and, in default of so doing, their offices shall be deemed vacant. Counties shall never be made responsible for the acts of their

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sheriffs. The governor may remove any officer named in this section, after opportunity to be heard upon written charges.

§ 2. **County officers, how chosen.**—All county officers whose election or appointment is not provided for by this Constitution shall be chosen by the electors of the counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct.

§ 3. **Boards of supervisors; powers.**—There shall be in each county a board of supervisors, to be composed of such members and elected in such manner and for such period as is or may be provided by law; said boards shall have such powers as are or may be conferred by law, until revoked or modified by the legislature; and, subject to legislative modification, shall have exclusive jurisdiction in the following cases:

1. The location, erection, purchase, and repair of bridges, except over navigable streams, where the general or existing special laws of the state shall be insufficient to accomplish the object; but where such bridges shall be between adjoining counties, the concurrent action of the boards of supervisors of such counties shall be necessary;

2. The purchase of real estate and the location, erection, and care of buildings, for county purposes; but no change of location of any county buildings shall be made unless by the vote of two thirds of the whole number composing said boards, for two years successively, under such regulations as shall be established by law;

3. The erection of portions of public highways into separate road districts in the cases not provided for by general laws;

4. The use of abandoned turnpike, plank, and macadamized roads as public highways;

5. The improvement of public highways, laid out in

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pursuance of general laws, in cases where such laws may be insufficient for the purpose;

6. The legalization of informal acts of town meetings in raising moneys authorized to be raised by law, and the legalization of irregular acts of town officers on the recommendation of the county court;

7. The regulation of the salaries of county officers, except as otherwise provided in this Constitution, and the number, grade, and pay of clerks and subordinates in county offices, whose compensation may be a county charge;

8. The borrowing of money for town and county purposes in anticipation of taxation authorized by law;

9. But jurisdiction in the cases aforesaid shall not be exercised without the assent of a majority of all the members elected to such board, to be determined by yeas and nays, which shall be entered on its journal.

The board of supervisors of the county of New York shall have no other power or jurisdiction than such as is now or shall hereafter be conferred upon it by law, subject to repeal or modification by the legislature.

§ 4. **Mayors.**—There shall be chosen by the electors of every city a mayor, who shall be the chief executive officer thereof, and who shall see that the duties of the various city officers are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by persons so examined shall not be used against them in any criminal proceedings. He shall also have power to suspend or remove such officers, whether they be elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal; but no such removal shall be made without

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reasonable notice to the officer complained of, and an opportunity afforded him to be heard in his defense.

§ 5. **City, town, and village officers, how chosen.**—All city, town, and village officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed as the legislature may direct. Members of common councils shall hold no other office in cities, and no city officer shall hold a seat in the legislature.

§ 6. **Cities, how organized.**—The legislature, at its first session after the adoption of this Constitution, shall pass such laws as may be necessary to give effect to the provisions of this article. General laws shall be passed for the organization and government of cities; and no special act shall be passed, except in cases where, in the judgment of the legislature, the object of such act cannot be attained under general laws.

§ 7. **Certain legislative powers preserved.**—Nothing in this article shall affect the power of the legislature over quarantine, or in regard to the port of New York, or the interest of the state in the lands under water and within the jurisdiction or boundaries of any city, or to regulate the wharves, piers, or slips in any city.

§ 8. **Local boards not to grant extra compensation.**—The restrictions on the power of the legislature, contained in section seventeen, article three, of this Constitution, shall apply to common councils of cities, and to boards of supervisors of counties.

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ARTICLE VIII.

§ 1. **Canal debt.**—The canal debt of one thousand eight hundred and forty-six, amounting, on the first day of October, one thousand eight hundred and sixty-seven, to three million, two hundred and forty-seven thousand, nine hundred dollars; the general fund debt, amounting at the same time to five million, six hundred and forty-two thousand, six hundred and twenty-two dollars and twenty-two cents; the canal enlargement debt, amounting at the same time to ten million, seven hundred and eighty-five thousand dollars, and the floating debt loan, contracted under chapter two hundred and seventy-one of the Laws of one thousand eight hundred and fifty-nine, amounting, on the first day of October, one thousand eight hundred and sixty-seven, to one million, seven hundred thousand dollars, shall hereafter be known as the "canal debt," for the payment of which the canal revenues are hereby pledged; and the several sinking funds applicable to the payment of the said debts, together with the contributions to be made thereto, and the income thereof, shall be known as the "canal debt sinking fund."

§ 2. **Sinking fund.**—In each fiscal year, commencing on the first day of October, one thousand eight hundred and sixty-nine, after paying the expenses of collection, superintendence, and ordinary repair, there shall be set apart and paid into the canal debt sinking fund, out of the revenues of the canals, the sum of two million, four hundred and eighteen thousand dollars, to pay the interest as it shall become due, and redeem the principal of the several debts specified in section one of this article, until the said several debts shall be fully paid or provided for; and the principal and income of said sinking fund shall be applied to no other purpose. If, in any fiscal year, there shall not be contributed from said revenues the sum of two million, four hundred and eighteen thousand

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dollars, the deficiency shall be supplied by taxation the next year. The remaining revenues of the canals, in each fiscal year, may be applied by law to the improvement or completion of the canals, but shall at no time be anticipated or pledged; if not so applied they shall be and remain a part of the canal debt sinking fund. The tax authorized to provide for the sinking fund to pay the floating canal debt shall be suspended after the first day of October, one thousand eight hundred and sixty-eight.

§ 3. **Treasury, reimbursement from canal revenues.**—After the debts specified in section one are paid or provided for, according to the provisions of section two, the revenues of the canals, after paying the expenses of collection, superintendence, and ordinary repair, shall, in each fiscal year, be paid into the treasury of the state, to pay the amount advanced since one thousand eight hundred and forty-six for canal purposes by taxation, until the whole amount so advanced, with interest at five per cent per annum, shall be paid, and until any amount hereafter advanced for canal debts or other canal purposes, with interest thereon at five per cent per annum, shall be paid; but the moneys so paid into the treasury may, from time to time, be appropriated by law for the improvement of the canals, or for such other purposes as may be deemed proper. But the said moneys shall not be anticipated or pledged.

§ 4. **Surplus revenues, how used.**—After complying with the provisions of the second and third sections of this article, and after paying said expenses of collection, superintendence, and ordinary repair, the surplus revenues of the canals may, in each fiscal year, be disposed of for the improvement of the canals, or for such other purposes as the legislature may direct, but shall at no time be anticipated or pledged.

§ 5. **Claims against corporations.**—The claims of

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the state against any incorporated company to pay the interest and redeem the principal of the stock of the state, loaned or advanced to such company, shall be enforced, and not released or compromised; and the moneys arising from such claims shall be applied to the payment of said stock, or to repay the money which may be advanced to pay the same.

§ 6. **Canals not to be sold.**—The canals shall not be sold, leased, or otherwise disposed of, and shall remain under the management of the state forever.

§ 7. **Appropriations must precede payments from treasury.**—No moneys shall be paid out of the treasury of the state, or funds under its management, except in pursuance of an appropriation by law, nor unless such payment be made within two years after the passage of such appropriation; and every law making, continuing, or reviving an appropriation shall specify the sum appropriated, and the objects to which it is to be applied, and it shall not be sufficient for such law to refer to any other law for that purpose.

§ 8. **State aid to corporations prohibited; two-thirds vote.**—The credit of the state shall not be given or loaned to, or in aid of, any individual, corporation, or association. On the final passage in each house of the legislature, of any act appropriating money or property, except for the purposes of government, the question shall be taken by yeas and nays, which shall be entered on the journal, and two thirds of all the members elected to each house shall be necessary to pass the same.

§ 9. **Temporary state debts.**— The state may, to meet casual deficits or failures in revenues, or for unexpected expenses, not provided for, temporarily contract debts; but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed one million dollars; and the moneys arising from the loans creating

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such debts shall be applied to the purposes for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever; and such temporary debts shall, in all cases, be provided for at the earliest practicable period, and shall be paid within two years after they are contracted.

§ 10. **Debts for public defense.**—The state may also contract debts to repel invasion of the state or of the United States, to suppress insurrection in the state or the United States, or to defend the state or the United States in war; but the money so raised shall be applied to such purpose or to repay such debts, and to no other purpose.

§ 11. **When people must approve debt.**—Except the debts specified in the ninth and tenth sections of this article, no debt shall be contracted by or on behalf of the state, unless it shall be authorized by law for some single work or object, to be specified therein; and such law shall provide for a direct annual tax sufficient to pay the interest on such debt as it shall become due; and also to pay the principal of such debt within eighteen years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the people at a general election, and shall have received a majority of all the votes cast for and against it at such election. On the final passage of such bill, in each house of the legislature, the question shall be "Shall this bill pass, and ought the same to receive the sanction of the people?" which shall be taken by yeas and nays, to be entered on the journal. The legislature may at any time repeal such law, if no debt shall have been contracted in pursuance thereof, and may at any time forbid the contracting of any further debts under such law; but if any debts shall have been contracted, the tax in proportion thereto shall be irrepealable and be annually collected

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until the proceeds thereof shall be sufficient to pay such debt. The money arising from any loan or stock creating such debt shall be applied to the work or object specified in the act authorizing such debt, or for the repayment of such debt, and for no other purpose. No such law shall be voted upon within three months after its passage, nor at any general election when any other law or any amendment to the Constitution shall be submitted to the people.

§ 12. **Tax to be stated in law.**—Every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

§ 13. **Deficiency loans limited.**—No deficiency loan shall be made for a longer period than is necessary to enable the sinking fund provided for its payment to accumulate an amount sufficient to discharge it; and in no case shall such loan be made for more than six years.

§ 14. **Duties of comptroller.**—No money shall be drawn from the treasury except in pursuance of an appropriation by law, and on the warrant of the comptroller; and all bonds, stocks, and other securities issued by the state shall be signed by the comptroller, on behalf of the state.

§ 15. **Uniform taxation required.**—Real and personal property shall be subject to a uniform rule of assessment and taxation.

§ 16. **Bounty debt may be renewed.**—The comptroller is authorized to renew the bounty debt or any part thereof, by extending the time of its payment to the first day of October, one thousand eight hundred and eighty-six, and to issue stock for that purpose, which he may apply in exchange for the outstanding stock, or sell; and in case of sale the proceeds thereof shall be applied to

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the purchase of the outstanding stock. The rate of interest on said stock shall not exceed seven per cent per annum, payable semiannually, and said stock shall be exchanged or negotiated on the best possible terms, and in no event at less than par, nor at a lower rate than the outstanding stock can be purchased for, at the time the sale or exchange shall be effected. The principal and interest of the stock hereby authorized shall be secured by a direct annual tax to pay, and sufficient to pay, the interest thereof as it shall become due, and also to pay the principal thereof within the eighteen years from October first, eighteen hundred and sixty-eight. The legislature may appropriate, from time to time, to the payment of the principal or interest of said stock, any funds of the state not otherwise appropriated; and in case of such appropriation the tax to supply the sinking fund shall be correspondingly reduced.

§ 17. **State not to own corporate stocks.**—The state shall not subscribe for, purchase, or in any way own, except by bequest, shares or stock in any company or corporation, nor invest any portion of its funds in the same.

§ 18. **Salt springs not to be sold.**—The legislature shall never sell or dispose of the salt springs. The lands of the state adjacent thereto may be sold by authority of law, and under the direction of the commissioners of the Land Office, for the purpose of investing the moneys arising therefrom in other lands convenient for the manufacture of salt; but by such sale and purchase the aggregate quantity of such lands shall not be diminished.

ARTICLE IX.

§ 1. **Education funds preserved.**—The capital of the common school fund; the capital of the literature fund; the capital of the United States deposit fund; the capital

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of the college land-scrip fund, and the capital of the Cornell endowment fund as it shall be paid into the treasury, shall each be preserved inviolate. The revenues of the common school fund shall be applied to the support of common schools; the revenues of the literature fund shall be applied to the support of academies; and the sum of twenty-five thousand dollars of the revenue of the United States deposit fund shall each year be appropriated to and made a part of the capital of the common school fund; the revenues of the college land-scrip fund shall each year be appropriated and applied to the support of the Cornell University, in the mode and for the purposes defined by the act of Congress donating public lands to the several states and territories, approved July second, one thousand eight hundred and sixty-two, so long as the University shall fully comply with and perform the conditions of the act of the legislature establishing it; and the revenues of the Cornell endowment fund shall each year be paid to the trustees of the Cornell University, for its use and benefit.

§ 2. **Free schools guaranteed.**—The legislature shall provide for the free instruction, in the common schools of this state, of all persons between seven and twenty years of age.

ARTICLE X.

§ 1. **Corporations, how created; railroad consolidations limited.**—Corporations may be formed under general laws. They shall not be created nor their powers increased or diminished by special act, except for municipal, literary, scientific, charitable, or benevolent purposes. All such laws may be altered or repealed. The legislature shall not authorize the consolidation of railroad corporations owning parallel or competing lines of road.

§ 2. **Dues from corpora-**

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tions shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law.

§ 3. **Corporations defined.**—The term "corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any of the privileges or powers of corporations, not possessed by partnerships or individuals. Corporations shall have the right to sue and may be sued in all courts by their corporate names.

§ 4. **Registration of bank bills; suspension of specie payments.**—The legislature shall provide for the registration of all bills or notes issued or put in circulation as money, by virtue of any law of this state, and shall require ample security for the redemption of the same in specie. No law shall be passed authorizing or sanctioning the suspension of specie payments. In case of the insolvency of any bank or banking association, the bill holders thereof shall be entitled to preference in payment over all other creditors.

§ 5. **Liability of bank stockholders.**—The stockholders in every corporation and joint-stock association for banking purposes, issuing notes or any kind of credits to circulate as money, shall be individually liable to the amount of their respective share or shares of stock for all of its liabilities.

ARTICLE XI.

§ 1. **Board of prison managers; powers and duties.**—There shall be a board of managers of prisons, to be composed of five persons appointed by the governor by and with the advice and consent of the senate, who shall hold office for ten years, except that the five first appointed shall, as the legislature may direct, be so classified that the term of one shall expire at the end of each

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two years during the first ten years. The board shall have the charge and superintendence of the state prisons, and shall have such powers and perform such duties in respect to the county jails, the local or district penitentiaries, and other penal or reformatory institutions, as the legislature may prescribe. The board shall appoint a secretary, who shall be removable at their pleasure, who shall perform such duties as the legislature or the board may direct, and shall receive a salary, to be determined by law. The members of the board shall receive no compensation other than reasonable traveling and other official expenses. The legislature, at its first session after the adoption of this Constitution, shall limit the amount of such expenses, which limit shall not be changed except at intervals of five years.

§ 2. **Appointment of prison officers.**—The board shall appoint the warden, clerk, physician, and chaplain of each state prison, and shall have power to remove them for cause only, after opportunity to be heard, upon written charges. All other officers of each prison shall be appointed by the warden, and be removable at his pleasure.

§ 3. **Governor may remove managers.**—The governor may remove the managers of prisons, for misconduct or neglect of duty, after opportunity to be heard, upon written charges.

ARTICLE XII.

§ 1. **Militia enrolment.**—All able-bodied male citizens, between the ages of eighteen and forty-five years, shall be annually enrolled, under such regulations as shall be established by law, as a militia force, to repel invasion, suppress insurrection, and aid in the enforcement of the laws.

§ 2. **Active and reserve militia.**—The militia shall

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be divided into the active and reserve forces. The active militia shall be called the National Guard of the State of New York, and its number determined by law; but shall not, in time of peace, exceed thirty thousand. It shall always be armed, equipped, and disciplined. All enrolled persons not belonging to the National Guard shall constitute the reserve force. All persons who, after one year's service, shall have been honorably discharged from the Army, Navy, or volunteer forces of the United States, shall be, in time of peace, exempt from service in the militia; and all citizens who, from scruples of conscience, may be averse to bearing arms, may be exempt therefrom upon conditions to be provided by law.

§ 3. **General officers, how appointed.** —The governor shall appoint the chiefs of the several staff departments, his aids-de-camp and military secretary, all of whom shall hold office during his pleasure, their commissions to expire with the term for which the governor shall have been elected; and he shall nominate, and with the consent of the senate, appoint, all major generals. All officers responsible for the military property or funds of the state shall give such security for the faithful execution of the duties of their respective offices as the legislature shall prescribe.

§ 4. **Staff officers, how appointed; commissions.**— General officers shall appoint their staff officers, who shall hold office during the pleasure of such general officers; but their commissions shall expire with the commissions of the officers appointing them. All officers of the militia shall be commissioned by the governor, and no commissioned officers except those who hold office during his pleasure or that of the general officers shall be removed from office unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the sen-

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tence of a general court-martial. All commissions shall expire in ten years from their dates, except those of the National Guard Reserves.

§ 5. **Subordinate officers, how chosen.**—The commissioned and noncommissioned officers of companies shall be chosen by the written votes of the members, and field officers of regiments and separate battalions, by the written votes of the commissioned officers of their respective regiments or separate battalions, and brigadier generals by the field officers of their respective brigades; but whenever the militia shall be in active service, such right of election shall be suspended, and all commissioned officers shall be appointed by the governor, and noncommissioned officers by the regimental or separate battalion commanders, on the recommendation of their company commanders. Regimental and separate battalion commanders shall appoint their staff officers. All officers not specified in this article shall be appointed as prescribed by law; and in case the election and appointment of militia officers, in the manner directed by this article, shall not be found conducive to the improvement of the militia, the legislature may change the same by law, provided two thirds of the members elected to each house shall concur therein.

§ 6. **Reserve officers.**—In the organization of the National Guard, the legislature shall provide for reserve officers, to be composed of officers of the National Guard of not less than ten years' service in the same grade, and of officers honorably discharged from the volunteer service of the United States who are citizens of this state. They may, upon application, be commissioned by the governor, with rank equal to the highest held by them by brevet or otherwise, in the National Guard or United States Volunteers, and they may be assigned to such

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service, and be entitled to such military privileges and exemptions, as the legislature shall by law provide.

ARTICLE XIII.

§ 1. **Official bribery.**—Any person holding office under the laws of this state, who, except in payment of his legal salary, fees, or perquisites, receives or consents to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony, and on conviction shall be punished by imprisonment in a state prison, for a term not exceeding five years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the court. This section shall not affect the validity of any existing statutes in relation to the offense of bribery.

§ 2. **Exemption of person offering bribe.**—Any person offering a bribe, if it shall be accepted, shall not be liable to civil or criminal prosecution therefor. But any person who offers or promises a bribe, if it shall be rejected by the officer to whom it was tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared to be a felony, and on conviction shall be punished as provided in the first section of this article.

§ 3. **Accused a competent witness in his own behalf.**—Any person charged with receiving a bribe, or with offering or promising a bribe that is rejected, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor.

§ 4. **Liability of district attorney.**—Any district attorney who shall fail faithfully to prosecute the violation in his county of any provision of this article which may

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come to his knowledge shall be removed from office by the governor, after due notice, and an opportunity of being heard in his defense. The expenses which shall be incurred by any county in investigating and prosecuting any charge of bribery, or attempting to bribe any state officer or member of the legislature within such county, and of receiving bribes by any state officer or member of the legislature in said county, shall be a charge against the state, and their payment by the state shall be provided for by law.

ARTICLE XIV.

§ 1. **Official oath.**—Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, before they enter on the duties of their respective offices, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the state of New York, and that I will faithfully discharge the duties of the office of according to the best of my ability, and that I have not knowingly or intentionally paid or offered to pay, contributed or offered or promised to contribute, any money or valuable thing, or made any promise to influence or reward a vote at the election in which I was chosen to fill the said office." Any person who shall refuse to take the oath herein prescribed, or who shall be convicted of having sworn falsely in taking such oath, shall forfeit his office. No other oath, declaration, or test shall be required as a qualification for any office or public trust.

§ 2. **Offices continued.**—Except as herein otherwise provided, existing offices and the terms of persons in office shall be continued as is now or hereafter may be provided by law.

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§ 3. **Amendments.**—Amendments to this Constitution may be proposed in the senate or assembly; and if agreed to by a majority of the members elected to each house, such amendments shall be entered on the journals thereof, with the yeas and nays, and be referred to the next legislature, and published for three months previous to the next general election; and if in the next legislature such amendments shall be agreed to by a majority of all the members elected to each house, it shall be the duty of that legislature to submit such amendments to the people in such manner and at such time as it shall prescribe; and if such amendments are approved by a majority of the electors voting thereon, they shall become part of the Constitution.

§ 4. **Conventions.**—At the general election to be held in the year one thousand eight hundred and eighty-eight, and in each twentieth year thereafter, and also at such other time as the legislature may prescribe, the question shall be submitted to the people, "Shall there be a convention to revise the Constitution?" and in case a majority of the electors voting on the question shall decide in favor of a convention, the legislature, at its next session, shall provide by law for the choice, by the electors, of delegates to such convention; but no constitution or amendment agreed to by the convention shall be valid until adopted by the vote of a majority of the electors voting thereon, either at a general or special election, as shall be determined by the convention.

§ 5. **When Constitution to be in force.**—This Constitution shall be in force from and including the first day of January, next after its adoption by the people, except as herein otherwise provided.

Done in convention, in the city of Albany, the twenty-eighth day of February, in the year one thousand eight

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hundred and sixty-eight, and of the independence of the United States of America the ninety-second.

In witness whereof we have hereunto subscribed our names.

WILLIAM A. WHEELER,
President and Delegate-At-Large.

LUTHER CALDWELL,
Secretary.

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CHAPTER IX.

The Constitutional Commission of 1872.

The rejection, in 1869, of the Constitution proposed by the Convention of 1867 (except the judiciary article), did not check the agitation for constitutional revision; on the contrary, many reforms included in that Constitution were so manifestly desirable that a movement was begun at the next session of the legislature to procure their adoption by independent amendment. Governor John T. Hoffman, in his annual message of 1870, alluded to the result of the vote on the new Constitution, but without comment, except to recommend the early enactment of legislation made necessary by the new judiciary article. At this session of the legislature amendments were introduced relative to a board of managers of state prisons and bribery at elections, both of which subjects had been considered by the late Convention. A new amendment to the suffrage section was offered, providing that aliens then resident in the state might vote if they had declared their intention to become citizens, had been inhabitants of the United States five years, and possessed the other qualifications required of citizen voters.

On the 26th of January, 1871, Governor Hoffman sent a special message to the legislature, calling attention to the alarming and extravagant use of money at elections, and urging the adoption of a stringent constitutional provision on this subject. He recommended the adoption of the amendments passed by the legislature in 1853, but which were not submitted to the people. I have already called attention to these amendments in the chapter on

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the period between 1847 and 1867. The following bribery amendment was passed in 1871:

"Laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of bribery or larceny, or of any infamous crime, and for depriving every person who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, or shall pay, give, or receive, or promise to pay or give, any money or other property or valuable consideration with intent to influence any elector in giving his vote, or to deter any elector from voting, from the right to vote at such election, or from holding any office voted for at such election."

An amendment was also passed at this session providing for the transfer of five hundred causes from the court of appeals to the commission of appeals, and extending the terms of the commissioners. This was again passed in 1872, and approved by the people, and became § 28 of the judiciary article.

A stringent amendment against sectarian appropriations was also introduced in the senate at this session. The senate passed the amendment providing for a board of managers of prisons. In the senate numerous amendments were introduced which were included in the rejected Constitution of 1867. These embraced the amendments relating to suffrage, legislature, state officers, suspension of state treasurer, commissioners of the canal fund, superintendent of public works, relative to construction of canal bridges, canal contracts, court of claims, method of amending the Constitution, and abolishing the canal board, contracting board, and the offices of canal commissioner and canal appraiser.

In his annual message of 1872 Governor Hoffman considered at some length the subject of the corrupt use

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of money at elections, and urged the legislature to pass the amendment relating to bribery, agreed to in 1871. The amendment was passed by both houses, but was not submitted to the people. This is the second instance I have found of the failure of the legislature to submit to the people an amendment which had been agreed to by two legislatures in the manner prescribed by the Constitution. Probably the legislature omitted to submit this amendment for the reason that a plan was under consideration at the same session for the creation of a commission to recommend constitutional amendments. An amendment was introduced at this session fixing the salary of members of the legislature at $8 a day, but not to exceed $800 in the aggregate, which, as reported by the committee on ways and means of the assembly, fixed the compensation at $1,000 and mileage. This was passed by both houses. An amendment was also passed providing that the political year and legislative term should begin on the first day of December, and the legislature should meet on the first Tuesday of December; also the amendment providing for a board of managers of prisons. The senate passed an amendment prohibiting sectarian appropriations. An amendment was introduced, but not passed, which in effect authorized the sale of some of the lateral canals by providing that the "legislature may sell, lease, or otherwise dispose of any of the canals of the state, except the Erie, Champlain, Oswego, Cayuga, and Seneca, which shall remain the property of the state forever, and under its management."

It was evident from the character and number of amendments offered in 1870 and 1871, some of which were new, but the larger part of which were borrowed from the revised Constitution of 1867, that it would be difficult, if not impracticable, for the legislature to accomplish a satisfactory revision of the Constitution.

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More time, care, and deliberation were needed than could be devoted to the subject by the legislature during an ordinary session. It was manifest from the proposed amendments already noted that there was a strong public opinion in favor of several important and radical constitutional changes. The legislature could pass only a limited number at a regular session, and give them the consideration which their importance demanded. This method of amendment would require a long time, and at best would be only fragmentary. Three plans were practicable: First, an extraordinary session of the legislature for the purpose of considering constitutional amendments, which would probably have made necessary another extraordinary session, because of the constitutional provision which required amendments agreed to by one legislature to be submitted to the legislature chosen at the next election of senators; and this new legislature, no less than its predecessor, might have found it inconvenient to devote the time at a regular session necessary for the consideration of numerous and important constitutional amendments; second, another constitutional convention might have been called; or third, the legislature might have created a commission charged with the duty of considering and proposing amendments.

Governor Hoffman's Recommendations.

Governor Hoffman devoted a large part of his annual message of 1872 to the consideration of "constitutional reform." He called attention to the failure of the people to approve the work of the late Convention, except the judiciary article, alluded to several defects in the existing Constitution, and urged the importance of immediate and general revision. He did not think another constitutional convention expedient, but suggested a commission

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of thirty-two "eminent citizens" who might consider the subject and report its recommendations to the legislature. He thought that such a commission, composed of four members from each judicial district, to be divided equally between the two great political parties, would provide a body of men adequate for the purpose; and while the Constitution did not provide for such a commission, its recommendations, when approved by two legislatures and the people, would become a part of the Constitution with the same effect as if originally made by the legislature or a convention. Governor Hoffman discussed the subject of constitutional revision with considerable detail, observing that our organic law was "full of serious defects," and he then proceeded to point out the particulars in which, in his judgment, "it fails as a means of securing the best possible administration of our public affairs." Commenting on the general difference between the Federal and state Constitutions, the Governor remarked that the Federal Constitution was framed by men who had already formed a state government, under which they had acquired experience which was found useful in constructing the machinery of a "special government," intended to embrace all the states, and which must, to some extent, affect and influence their affairs; but the difference in the scope and authority of the Federal and state governments did not, he thought, "affect the question of how the powers of government may wisely be distributed among the different departments,—executive, legislative, and judicial,—nor that of how to provide the instrumentalities through which the government is to be administered." He said that in "most of these particulars the Constitution of the United States may wisely be followed." This observation is significant in view of the fact that under the Federal system the president, vice president, senators, and repre-

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sentatives are the only officers chosen directly or indirectly by the people, and adds force to the Governor's next remark that under our Constitution "the executive department is not so organized as to insure the most efficient administration of affairs, and the most complete and direct responsibility;" that if the governor is "to see that the laws are faithfully executed," as required by the Constitution, "it is obvious that, in the selection of the subordinate officers upon whom, within their separate departments, the duty is devolved of executing the laws of the state, and administering its affairs, the chief executive ought to have a controlling voice." He then argues for a concentration of responsibility in the chief executive, saying that "the governor ought to be held responsible for every branch of the actual administration of the state's affairs;" that "under our present Constitution, all the important departments are separated from his control;" that the executive should have the directing power in the management of the finances of the state, of the canals, of the state prisons, and in the prosecution of crime; and that "all the heads of the administrative departments should be subject to the supervision and correcting power of the governor." Numerous subjects of state administration were then discussed in detail, and the Governor urged constitutional amendments for the purpose of conforming the organic law to the views expressed by him. The Commission adopted many of his views, and they were expressed in proposed amendments. The Governor's opinion on specific subjects may, I think, be more conveniently considered in notes to the sections proposed by the Commission.

The legislature adopted the Governor's suggestion, and, by chapter 884 of the Laws of 1872, created a commission of thirty-two members, four from each judicial district, to be appointed by the governor and senate, "for the purpose of proposing to the legislature, at its next session, amendments to the Constitution; provided that

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no amendments shall be proposed to the 6th article thereof." This prohibition, however, was removed by chapter 6, Laws of 1873, and the Commission was thus permitted to suggest amendments to any part of the Constitution. The following is the list of commissioners, selected equally from the two leading political parties:

First judicial district.—John D. Van Buren, George Opdyke, Augustus Schell, John J. Townsend.

Second judicial district.—Erastus Brooks, Odle Close, John J. Armstrong, Benjamin D. Silliman.

Third judicial district.—William Cassidy, Robert H. Pruyn, George C. Burdett, Cornelius L. Tracy.

Fourth judicial district.—Artemas B. Waldo, James M. Dudley, Samuel W. Jackson, Edward W. Foster.

Fifth judicial district.—Daniel Pratt, Ralph McIntosh, Francis Kernan, Elias W. Leavenworth.

Sixth judicial district.—Lucius Robinson, John F. Hubbard, Jr., Jonas M. Preston, and Barna R. Johnson, appointed in place of Francis M. Finch, who had been appointed in place of Orlo W. Chapman, both of whom resigned before the first meeting of the Commission.

Seventh judicial district.—George B. Bradley, Van Rensselaer Richmond, Horace V. Howland, David Rumsey. Mr. Rumsey resigned in January, 1873; Guy H. McMaster was appointed to succeed him, but declined, and the place was filled by the appointment of Lysander Farrar.

Eighth judicial district.—Sherman S. Rogers, Cyrus E. Davis, Benjamin Pringle, Lorenzo Morris.

Six commissioners — George Opdyke, Augustus Schell, William Cassidy, David Rumsey, Erastus Brooks, and Francis Kernan—had been members of the late Convention, and were therefore familiar with its deliberations and purposes, and understood the reasons which induced the adoption of numerous amendments which had since been introduced again in the legislature, and would doubtless be presented to the Commission.

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The high standing and character of the Commission was attested two years later by Governor Dix, who, in his annual message of 1874, commending the amendments to the second legislature, said they were "matured after the most deliberate consideration, by a body of citizens eminent for their ability and experience."

The Commission met at Albany on the 4th of December, 1872, and organized with Robert H. Pruyn, chairman, and Hiram Calkins, clerk. The different articles of the Constitution and the various subjects within the jurisdiction of the Commission were distributed among appropriate committees. Numerous amendments which had been included in the rejected Constitution were again proposed in the Commission, with others which now appeared for the first time. The Commission immediately began the discussion and consideration of proposed amendments. It will be observed that the Commission had not been instructed to propose a revised Constitution, but only amendments. Some committees reported entire articles, including existing provisions. These articles were often considered as a whole, but the Commission finally decided to report only specific amendments, omitting sections which had not been changed. On the 15th of March, 1873, the Commission adjourned, and presented to the assembly on the 24th, and to the senate on the 25th, a report containing the amendments proposed by it, with statements accompanying some of the articles, showing the reasons which influenced the Commission in recommending the proposed changes. On the 31st a joint committee, composed of seven senators and fifteen members of assembly, was appointed "for the purpose of reporting a plan for the consideration, by the legislature, of the constitutional amendments." The committee reported on the 6th of May that, in its opinion, "the interest of the state and the prosperity of its people will be promoted by the

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adoption of some, if not all, of the proposed amendments. That it is clearly the duty of the legislature now in session to consider and pass upon them in order that the amendments may be submitted to the people for adoption or rejection at the earliest possible moment." The committee thought it was impracticable to consider the amendments in connection with the regular business of the legislature, and while "the committee are fully impressed with the distinguished character of the Commission, and are not unmindful of the valuable amendments proposed to the Constitution, some of which are so well prepared as hardly to need discussion, still some of the amendments should not be adopted without mature reflection and careful consideration by the legislature. The responsibility of the adoption or rejection of the amendments rests with the legislature, and not with the Commission that proposed them." The committee recommended an early adjournment of the legislature, and an extra session for the purpose of considering the amendments. There was considerable discussion of the proposition for an extra session, during which it seems that Governor Dix intimated his unwillingness to call an extra session for the sole purpose of considering the amendments. As a result, the legislature decided to consider the amendments in connection with its regular work. The wisdom of this course was fully justified by the event. The senate concluded its examination of the amendments in three evening sessions, and the assembly used scarcely more time. The amendments were therefore agreed to by the legislature without any substantial interruption of its regular business.

If an extra session had been called, the legislature would thereupon have become substantially a constitutional convention, with power to continue in session

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indefinitely, at large expense to the state. Governor Hoffman, in 1872, had declared his objection to another constitutional convention, and it seemed clear also to Governor Dix, in 1873, in which opinion the leaders of the legislature finally concurred, that in view of the fact that the larger part of the amendments had already been fully considered by the Convention of 1867, and were included in the Constitution proposed by it, and that ample opportunity had been afforded for their examination by the people while the Convention was in session, and afterwards while the revised Constitution was pending, before the election of 1869, and since then through legislative proceedings and the work of the Commission, it was hardly necessary for the legislature to hold an extra session for the purpose of considering such amendments. There were at first some differences between the two houses concerning a few of the amendments, but these differences were readily adjusted, and the legislature agreed to a series of amendments, which, with some exceptions hereafter noted, were also approved by the next legislature and adopted by the people at the election in November, 1874.

The Amendments.

It has already been suggested that many of these amendments were carefully considered by the Convention of 1867; they had also been presented to the legislature in 1870 and 1871, and were therefore not new when presented to the Commission. The public debates of the late Convention afforded the Commission an opportunity to examine the reasons which induced the Convention to recommend their adoption by the people. I have given in the last chapter a sketch of the more important amendments which originated in or were con-

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sidered by the late Convention. It seems most convenient to consider by sections the amendments recommended by the Commission, with notes showing, so far as practicable, the development of each subject, and the reasons for its adoption. The debates of the Commission have not been published, and in ascertaining reasons for its action we are limited to reports of committees, incidental notes in the journal, the suggestions of Governor Hoffman and Governor Dix, and the arguments of delegates in the Convention of 1867.

ART. I. BILL OF RIGHTS.

No amendments to this article were recommended, but the Commission considered several propositions, including—

1. Jury trial.—Mr. Waldo proposed an amendment authorizing the legislature to provide for a verdict by ten jurors in a civil or criminal case in a court of record. This suggestion was not new, nor was it made here for the last time. I have already referred to a similar suggestion in the Convention of 1776-77.

2. Treason.—Mr. Van Buren proposed a section providing that "treason against the state shall consist only in levying war against the state, or in giving aid to the public enemy, or in the wilful making of a false return by an inspector or canvasser of elections."

The action of the Commission on this amendment shows that the principal object of it was to subject to the penalties of treason a person who violated the election law in the manner specified.

3. Ministers not to hold office.—Mr. Hubbard proposed to restore the provision contained in the first and second Constitutions, excluding ministers of the Gospel from the right to hold office, and which had been omitted from the Constitution of 1846.

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4. Eminent domain.— Mr. Howland offered an amendment to § 7, relating to taking private property for public use, by requiring that the commissioners should be appointed only by the supreme court, and that the "compensation shall be actually paid to the owner of such property before the same shall be taken for public use." I have already noticed previous attempts to incorporate in the Constitution the just and wholesome provision requiring compensation to be made before property is taken.

5. Sectarian appropriations.—Mr. Dudley proposed to add to § 9 the provision that "the legislature shall have no power to appropriate the public moneys or property to any private or sectarian purpose whatever." Mr. Leavenworth also offered a similar amendment.

6. Aliens.—Mr. Howland offered an amendment that "no distinction shall ever be made between citizens and alien friends, in reference to the purchase, conveyance, enjoyment, or descent of property, real or personal."

7. Intoxicating liquors.—Mr. Dudley proposed a section that "all persons engaged in the business of selling intoxicating liquors as a beverage in this state shall be liable for all injuries and damages caused thereby, and the premises and property occupied and used for such business, either wholly or in part, shall be liable and subject to a lien for the payment of such damages, and all recoveries had therefor;" and required legislation to carry the provision into effect. Mr. Dudley's proposition, which was introduced on the 14th of February, 1873, was not adopted, but the legislature, on the 29th of May, 1873, passed the civil damage act, chapter 646, containing stringent provisions concerning liability for injuries resulting from the sale of intoxicating liquors. The committee on intoxicating liquors having considered numerous petitions in relation to the subject of prohibi-

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tion recommended the following addition to § 10 of article 1:

"Nor shall any license for the sale of intoxicating liquors as a beverage be authorized or granted; and the legislature shall provide for the suppression and prevention of such sale by penalties and damages proportionate to the offense."

This provision was recommended by the committee of the whole without change. Afterwards the subject was sent back to the committee, and after some amendments, including one on the 10th of March by Mr. Brooks, that "the legislature shall provide by law proper penalties and damages for the consequences growing out of the sale of intoxicating liquors as a beverage," the entire amendment was rejected.

8. Drainage.—The committee on Bill of Rights recommended the following addition to § 7:

"General laws may be passed permitting the owners or occupants of lands to construct drains and ditches across the land of others, under proper restrictions, and with just compensation."

This subject was included in the proposed Constitution of 1867, but it will be observed that the provision recommended by the committee was much broader than that adopted by the late Convention. In its original form the provision was limited to the drainage of lands for agricultural purposes; but in its new form a citizen might be authorized to construct a ditch across his neighbor's land for any purpose, the legislature being made the sole judge of the "proper restrictions" which might be imposed. The evident intention to vest in landowners very broad powers over the land of their neighbors is manifest from the discussion of this pro-

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vision in committee of the whole. Mr. Dudley proposed to enlarge the scope of the provision by allowing owners or occupants of land to acquire "the right of using and conducting water across the land of others for mechanical, fire, and sanitary purposes." This proposition was rejected, as was also Mr. Opdyke's to substitute "covered drains and sewers" for "drains and ditches," and Mr. Farrar's to strike out "ditches." A motion by Mr. Davis to strike out the entire amendment was lost, and the section was reported without change. Later in the Commission, on motion of Mr. Rogers, the provision was limited to drainage for agricultural purposes, and then, on motion of Mr. Davis, the entire amendment was stricken out. I shall have occasion to refer to this subject again in the chapter on the Convention of 1894.

ART. II. SUFFRAGE.

The Commission recommended § 1 in the following form:

"Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days and an inhabitant of this state one year next preceding an election, and for the last four months a resident 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 of the state;* 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,

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and for the *return and canvass* of their votes in the election districts in which they respectively reside."

It will be observed that the first part of this section was substantially the provision recommended by the late Convention, except that a prescribed residence in a town or ward was omitted by the Commission, and the election district was made the unit of local residence; and the voter, by the new provision, was required to have resided there thirty days before election instead of thirty days in the town or ward and ten days in the election district, as provided by the proposed revised Constitution of 1867. The provision added in 1867, fixing the right of a qualified elector to vote upon all questions submitted "to the vote of the people of the state," was continued, and the committee on suffrage said, in its report, that this amendment was deemed proper, "inasmuch as the original section, as it now stands, declares such right only as to officers elective by the people." This was a clear declaration that a person qualified to vote for officers might also vote on any question submitted to the people of the state. I have already given the history of this provision and the discussion relating to it in the article on suffrage, in the chapter on the Convention of 1867. While the section on qualifications of voters was in committee of the whole, propositions were rejected to reduce the state residence from one year to six months, and the county residence from four months to one month, and the required election district residence was, on motion of Mr. Opdyke, increased from ten days to thirty.

Numerous petitions were presented to abolish distinctions on account of sex. Mr. Bradley offered an amendment that "the neglect of any qualified elector to vote at any general or municipal election, unless prevented by

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necessary absence or physical disability, shall be a misdemeanor, punishable by fine of not less than $10," to be used for the support of the poor. This amendment was reported adversely by the committee on suffrage. The Commission refused to consider a motion by Mr. Opdyke for the appointment of a special committee to consider the subject of educational qualifications of voters. The subject was laid on the table on motion of Sherman S. Rogers. Petitions were presented from fourteen counties for a change in the Constitution, reducing county residence of voters from four months to one month, also a like petition from the New York Teachers' Association. The committee on suffrage reported that the proposed change was not deemed expedient.

The paragraph on the soldier vote was amended by extending its provisions to a person absent from his election district in the military service of the state, and on this amendment the committee on suffrage stated the following reason for the change:

"The original section preserved to the elector his right, in time of war, to vote when absent *from the state* in the military or naval service of the *United States.* The proposed amendment further protects the right of suffrage when the elector may be so engaged in the military service of the *state,* and when absent, on either service, not merely from the state, but from his own *election district.* The case may arise of state troops being called to the frontier in the immediate service of the state, and, whether in the service of the state or of the United States, they may of necessity be stationed and detained at points within the limits of the state, remote from their own election districts. Their inability to cast their votes at the polls would be as absolute if they were thus serving within the state, as if

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they were beyond its bounds. The amendment securing their right of suffrage if in such military service beyond their election districts effectually protects it in either case. A slight change has been made for the sake of clearness in the order of the words of the original section, respecting the return and canvass of votes. The words 'or otherwise,' at the end of the original section, are stricken out by the amendment, as the Commission could not foresee any contingency in which the votes of absent soldiers should be returned or canvassed elsewhere than in their proper election districts."

The senate, in committee of the whole, omitted the words "of the state" at the end of the clause relating to an elector's right to vote on questions submitted to the people. I am informed by the official stenographer of the senate of 1873 that the debates on the constitutional amendments were reported, but were not published, and have not been preserved; I am therefore unable to give the reasons which may have influenced the senate in omitting this clause; but if we may assume that the members of the senate were familiar with the discussion relating to this amendment in the Convention of 1867 (and in this connection it may be worth while to remember that Norman M. Allen, chairman of this committee of the whole on the constitutional amendments, was a member of the Convention of 1867, and that Senators Jacob Hardenburgh and Henry C. Murphy were also members of the same convention), we may reasonably infer that the senate intended to reverse the policy of the clause as settled by the Convention, and expressly provide that a person qualified to vote for a local officer might also vote on any proposition or question submitted to the people of the same municipality. In the article on suffrage, in the chapter on the Convention of 1867, I have alluded to the introduction by Sanford E.

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Church of the clause defining the qualifications of voters on questions submitted to the vote of the people, and have quoted his remark that "we should have the same rule applied to the election of all officers, and to all other questions on which the people will vote;" and I have also noted the addition of the words "of the state at large" on motion of Judge Comstock, and his statement that they were added "so as to avoid the question of municipal charters." In the form proposed by the Convention of 1867 and by the Commission of 1872, the legislature would not have been precluded from enacting special provisions relating to the qualifications of voters on propositions at municipal elections. The omission, therefore, of the words "of the state," places municipal and state elections on the same basis, and the legislature has no more power to restrict to taxpayers only, or in any other respect, the right to vote on a question submitted to the people of a municipality, than it has to impose a similar restriction on the qualifications of voters at an election on a question submitted to the people of the state. The assembly concurred in the senate amendment, and in this form the section was approved by the people.

§ 2. *No person who shall receive, expect, or offer to receive, or pay, offer, or promise to pay, contribute, offer, or promise to contribute, to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding of any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged before the inspectors or other officers authorized for that purpose to receive his vote shall swear or affirm, before*

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such inspectors or other officers, that he has not received or offered, does not expect to receive, has not paid, offered, or promised to pay, contributed, offered, or promised to contribute, to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election.

The legislature, at the session thereof next after the adoption of this section, shall, and from time to time thereafter may, enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

Bribery amendments had been pending in the legislature many years, and the subject engaged the serious attention of the Convention of 1867. I have already referred to Governor Hoffman's messages on this subject in which he recommended stringent provisions against bribery at elections. In the Commission, the bribery section was presented in various forms which need not be repeated here. It will be noted that the existing § 2 was in part added at the end of the new section, omitting, however, larceny as one of the crimes which might be made the basis of an exclusion from the right of suffrage. The section was amended in the senate by omitting the words "inspectors or" in relation to challenges, and in this form it was approved in 1874. The Commission declined to recommend the provision proposed by the late Convention, requiring a registration of voters, to be completed four days before an election, and requiring the registration to be uniform in all cities.

ART. III. LEGISLATURE.

The Commission reported a complete article 3, but

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with several sections not amended; some were amended in minor respects and others in form. The article also contained many new provisions.

§ 1. **Legislative power.**—The legislative power of this state shall be vested in a senate and *an* assembly.

This was the existing section, modified by inserting "an" before "assembly." The section as proposed in 1867 contained the clause that "any elector shall be eligible to the office of senator and member of assembly." The Commission considered the subject of qualifications, including propositions that no person should be eligible except an elector, a male citizen, and a citizen of the United States; and one proposition that a senator must be thirty years of age, and another that he must be twenty-five; the latter proposition was once adopted, but the Commission finally decided to omit any provision concerning qualifications.

§ 2. **Senate.**—The senate shall consist of thirty-two members. The senators shall be chosen for four years.

Section 3 divided the state into eight senate districts, and provided for the election of four senators in each, so classified that one senator in each district would be elected every year, thus restoring the senate organization prescribed by the Constitution of 1821.

This plan continued the number of senators without change, but the term was increased from two years to four. The late Convention had also proposed a four-year term, with senators divided into two classes, to be chosen alternately once in two years from the odd-numbered and even-numbered districts respectively.

There was considerable diversity of opinion in the

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Commission concerning the proper number, distribution, and terms of senators. Thus, propositions were submitted to fix the number at 32, to be chosen for two years, also for four years, also for five years; at 40, to be chosen from eight districts, five from each for terms of five years, and so classified that one senator should be elected from each district every year; at 30, with provision for a periodical increase according to population. The state was to be divided into five districts, each to choose five senators, and five were to be chosen from the state at large; also 30, to be chosen equally from ten districts; also 30, to be chosen equally from five districts for three years; at 33, to be chosen equally from eleven districts; at 33, with eight districts, three senators to be chosen from each district, except the first, embracing the city of New York, which should be entitled to six, and six senators were to be chosen from the state at large; at 36, to be chosen for four years from eight districts, six each from the first and second districts and four each from the remaining six; at 35, giving Kings county one additional senator and New York county 2; at 36, thirty-two by districts, and four from the state at large. There was also a proposition for eight districts, to correspond with the judicial districts; this plan did not prescribe the number of senators.

In the last chapter I have given a sketch of the discussion in the Convention of 1867 concerning senate districts, and have there noted the fact that several of the most prominent members of the Convention supported a plan for eight districts. It is evident that several members of the Commission substantially favored a return to the number of senate districts established by the Constitution of 1821.

Governor Hoffman, in his message of 1872, recom-

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mending the constitutional commission, made some observations on the senate, which I quote:

"The chief office of a senate should be to review the action of the other house, to check and restrain improvident, hasty, or unwise legislation; and, for the best discharge of this duty, it should be composed of men well versed in public affairs. Its name imports that it is to be a council of men of long experience. Every inducement should be held out to attract the right men to service in this body. The public cannot expect, any more than a private person, to command valuable services unless it offers an adequate reward. This reward need not be wholly pecuniary; the dignity of an office is often a more powerful inducement to the class of men we need in the public service. A long term and a large constituency would greatly enhance the dignity of the office of senator, and make it attractive to our most distinguished citizens. If the senatorial term were made four or five years and the state were divided into a small number of senatorial districts, so as to throw the choice of senator upon a large constituency, and the compensation made a fair one, I do not doubt that the ablest and most experienced of our public men would be found ready to apply themselves in the senate to the important duty of securing good laws for the people."

The committee on the legislature in the Commission reported a plan already noted for thirty senators, with twenty-five to be chosen equally from five districts and five from the state at large, with provision for a periodical increase according to population. While this report was under consideration it was proposed to divide the state into nine districts, one to be composed of the city and county of New York; eight senators were to be chosen from the New York district, and four from each of the others, making forty in all. The Commission, in

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committee of the whole, once fixed the number of districts at nine, one district to be composed of the city and county of New York, which was to be a double district, and fixed the number of senators at thirty,—six from New York, and three from each of the other districts. After much discussion the Commission agreed to the senate plan contained in the foregoing sections, and submitted to the legislature a report stating the reasons which induced the proposed change in the organization of the senate. After referring to the large mass of "special and ill-digested" legislation annually enacted, and the effort to check it by an "extensive use of the veto power," which, however, was deemed inadequate because it was physically impossible for one man to examine carefully all the bills submitted to him during the legislative session, the opinion was expressed that there should be "a reviewing power" in addition to the governor, "which shall, to some extent, be like him, free from mere local influence. This reviewing power must necessarily be found in the senate. In order to make the senators free from too narrow a local influence, so as to enable them to look upon bills submitted to them with reference to the general interests of the state, it is proposed to give to them a much larger constituency than heretofore." The state was therefore divided into eight great districts, "each of which is more or less bound together by a community of business interests," and the choice of men to the important office of senator "will be made by a much larger portion of the people, and therefore will be more wisely made. . . . The office will be one which the ablest and most experienced men in the district will be willing to compete for and to accept;" and by the plan of classification the senate would always have a large number of experienced members. In conclusion the Commission thought that the

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proposed plan would "tend to impart to our legislation a quality it much needs; to wit, steadiness."

The senate modified the Commission's plan by providing for thirty-five senators, and making the eight districts coterminus with the existing judicial districts. Six senators were to be chosen from the first district, five from the second, and four from each of the others. The amendment, thus modified by the senate, was sent to the assembly, and there §§ 2 and 3 were stricken out on motion of Smith M. Weed, who had been a member of the late Convention. A conference committee sustained the action of the assembly, and as a result §§ 2 and 3 of the existing Constitution remained unchanged.

The assembly.—The Commission did not recommend any change in the structure of the assembly. The only changes related to details, including a provision requiring the apportionment of members in the city and county of New York, to be made by the board of aldermen, and also a provision authorizing the legislature to abolish the county of Hamilton. The discussion in the Commission related chiefly to the question of abolishing assembly districts and electing members of assembly by counties, and to the question of increasing the number of members. In previous chapters I have noted attempts at different times to increase the number of members of assembly. The question of increase was seriously considered in the Conventions of 1846 and 1867, and the latter Convention recommended an increase to 139. The agitation for an increase was continued in this Commission, but without result. The suggestions concerning the number of members show a wide difference of opinion on this subject, and some of them present curious plans of apportioning representation in the assembly. The committee on the legislature reported to the Commission a plan for 256 mem-

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bers of assembly, to be chosen annually by single districts, with provision for an increase after each enumeration on a ratio of 17,000 to each member. The assembly districts were to be established by the boards of supervisors, and each district was to have two members. In addition to this plan propositions were submitted for an assembly of 160, of 128 members chosen for two years, and of 129 members, to be chosen annually from forty-three assembly districts—three from each—into which the state was to be divided. A plan for minority representation was also proposed. Mr. Bradley proposed the following provision relative to the assembly:

"At the general election for members of assembly every elector may vote for one member of assembly, and every qualified elector of this state who shall receive at any such election four thousand votes for that office shall be a member of assembly for the year commencing on the 1st day of January next succeeding such election."

And also a provision that

"A fraction of the ratio of population requisite for a member or members in excess thereof in any county equal to 50 per cent of such ratio shall entitle such county to an additional member of assembly. And there shall be such additional number of members as this fractional representation may produce."

The fraction was afterwards increased from 50 per cent to 55, with a provision that the number of members apportioned on such fractions should be in addition to the regular number established by the Constitution. This was once agreed to in committee of the whole, but was afterwards stricken out. The principle of the provision apportioning an additional member on a majority frac-

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tion of the excess over the ratio was incorporated in the Constitution of 1894. Governor Hoffman, in his message of 1872, recommended the abolition of assembly districts, and the election of all members from the county on a general ticket; but the Commission did not concur in this view. The legislature approved the Commission's assembly plan, and it was submitted to the people and adopted in 1874.

The last sentence of § 5, namely, "nothing in this section shall prevent division at any time of counties and towns, and the erection of new towns and counties by the legislature," apparently had its origin in a condition produced by the decision of the court of appeals in *Lanning* v. *Carpenter,* 20 N. Y. 447, declaring unconstitutional the act of 1854, chapter 386, erecting the county of Schuyler from parts of the counties of Steuben, Chemung, and Tompkins. The new county embraced parts of two senate and two judicial districts. The court held that the senate and assembly districts could not be changed except after a decennial enumeration. By the act, the organization of Schuyler county was complete except for senate, assembly, and judicial district purposes, and senate and judicial district boundaries were in fact altered by the erection of this county, although for election purposes the operation of the statute was postponed until after the next enumeration. But the court thought that this postponement did not obviate the difficulties presented by the Constitution, and the act was therefore declared invalid. The last sentence of § 5 was not included in the report of the committee on the legislature, but on motion of Mr. Bradley, a resident of Steuben county, a part of which had been included in the new county, the following sentence was added by unanimous consent of the Commission: "Nothing in this section shall prevent division at any time of

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towns and counties to be effectual for the purposes of town and county administration." This was afterwards modified by the committee on revision and stated in the form appearing in the report. It may be noted here that this sentence in its final form was construed by the court of appeals in *People ex rel. Henderson* v. *Westchester County,* 147 N. Y. 1, 30 L. R. A. 74, 41 N. E. 563 (1895), sustaining the act of 1895, annexing to New York a part of the county of Westchester.

§ 6. **Compensation.**—*Each member of the legislature shall receive for his services an annual salary of one thousand dollars. The members of either house shall also* receive the sum of one dollar for every ten miles they shall travel, in going to and returning from their place of meeting, *once in each session,* on the most usual route. *Senators, when the senate alone is convened in extraordinary session, or when serving as members of the court for the trial of impeachments, and such members of assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional allowance of ten dollars a day.*

The same salary was recommended by the Convention of 1867 and by the legislature of 1872. Referring to the subject of compensation, Governor Hoffman, in his message of 1872, said that "the provision in the existing Constitution limiting the session of the legislature to one hundred days, has had no good practical effect. It has not lessened the amount of legislation, it has simply caused the members to act with more haste. The restriction should be removed, and a fair annual salary be paid to senators and assemblymen. There is no true economy in withholding from public servants a just compensation for their labor. As a better restraint upon undue prolongation of a session I suggest that

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power should be given to the governor to prorogue the legislature at any time after it shall have been in session for one hundred days."

Governor Dix, in his message of 1873, recommended an increase in the compensation of members of the legislature, remarking that "the present compensation was fixed more than half a century ago, and in the meantime the expenses of living are more than doubled. It is neither just nor creditable to the state that its legislators should be kept at a distance from their homes, to labor for the welfare of the people, and to protect the interest of their constituents, and be compelled to have recourse to their private means to meet their personal expenses. All who give their time and talents to the state should receive a compensation for their services proportionate to the importance of their duties, and to the expenditures which they must necessarily incur in performing them."

The committee on the legislature reported a plan giving senators $1,500 and members $1,000, with mileage in both cases. While the Commission's report was pending in the legislature the assembly increased the compensation from $1,000 to $1,500. The senate concurred in the increase, and as thus amended the section was submitted and adopted.

Section 7, prohibiting members of the legislature from receiving certain appointments, was amended by changing the word "term" to "time," as proposed by the Convention of 1867, and also extending the prohibition to appointments "from any city government." Early in the session of the Commission Mr. Van Buren proposed to amend this section by prohibiting members of the legislature from receiving appointments "from any municipal or local government in the state;" but the local prohibition was finally limited to cities. This section was approved by the legislature and adopted.

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§ 8. **Who not eligible to legislature.**—*No person shall be eligible to the legislature who, at the time of his election, is, or within one hundred days previous thereto has been, a member of Congress, a civil or military officer under the United States, or an officer under any city government.* And if any person shall, after his election as a member of the legislature, be elected to Congress, or appointed to any office, civil or military, under the government of the United States, or *under any city government,* his acceptance thereof shall vacate his seat.

This section was a substitute for the existing section of article 3, and the substantial changes in it consist in fixing the time limit of eligibility, and extending the prohibition to city officers. This prohibition had been proposed by the late Convention. In the Commission this provision seems to have had its origin in an amendment to § 8 proposed by Mr. Van Buren, providing that "no person, being a member of Congress or holding any civil or military office under the United States, or holding any civil office under the government of this state, or under any municipal or local government therein, shall be eligible to the legislature." This was very broad, and, without any limit of time, excluded any person holding an office specified in the section; and it will be observed that not only city officers, but county, town, and village officers were also rendered ineligible to the legislature. The proposed provision would almost inevitably have created confusion and difficulty in determining the election of members of the legislature. Under it a candidate might resign the day before election and thus render himself eligible, but the voters of his district, having been informed of his ineligibility, could not in many cases be informed of his resignation. To obviate this objection and give ample opportunity for a resignation by a person intending to become a candidate,

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and also to enable voters to ascertain the eligibility of a candidate, the Commission determined to fix a limit of ineligibility for a specified time before election, and one hundred days was deemed a reasonable time for this purpose. While the section was pending a motion was made to reduce the time limit to fifty days, but this was rejected, and also a motion that it should apply to United States officers whose salary did not exceed $1,000. According to the journal, John D. Van Buren first proposed this amendment, had charge of it in its progress through the Commission, and presented the section which was finally adopted and became a part of the Constitution. It will be noted that the new section imposes a time limit on United States officers which did not exist under the former Constitution. On many provisions recommended by the Commission it was substantially unanimous, but this section was adopted by a vote of 19 to 13. The legislature approved the amendment with verbal modifications and it was adopted in 1874.

§ 15. **Private or local bills.**—No private, *special,* or local *law* shall embrace more than one subject, and that shall be named in the title; *and any such law which shall embrace more than one subject shall be void. No law shall be revived or amended by reference to its title only; but the act revived, or the section or sections amended, shall be inserted at length. No general law shall embrace any provision of a private, special, or local character.*

This was § 16 of the existing Constitution, amended and rewritten. The Convention of 1867 proposed a section on this subject, but it was not so comprehensive as the section proposed by the Commission. This subject provoked serious and prolonged discussion in the Commission, and numerous plans intended to restrict

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special legislation were proposed and considered. Thus it was proposed to prohibit the introduction of a private or local bill unless notice of the intention to apply therefor, stating the nature of the bill, had been given, as prescribed by law. A similar provision was recommended by the Convention of 1867. It was also proposed that "if the title contain only one subject the act shall be valid as to that and void as to all other subjects." The question was presented in many forms, finally resulting in the foregoing section. It was stricken out by the legislature, and the corresponding § 16 in the Constitution of 1846 remained unchanged, and has not since been amended.

§ 16. Laws not to be enacted by reference.—No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.

This was part of a plan intended to accomplish a reform in methods of legislation. The Convention of 1867 had proposed the same reform by § 14 of article 3 of the revised Constitution, providing that "no law shall be revived, altered, or amended by reference to its title only, but the act revived, or the section or sections therein altered or amended, shall be re-enacted and published at length."

In the Commission the foregoing section was agreed to without a division and apparently without debate. It was approved by the legislature and adopted with other amendments in 1874.

§ 17. Procedure on bills.—*Every bill shall be considered and read twice, section by section, in the senate and as-*

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sembly. Every bill shall have three readings, no two of which shall be on the same day, and the bill and all amendments thereto shall be printed and distributed among the members of each house, at least one day before the vote shall be taken on its final passage. The question on the final passage shall be taken immediately upon the last reading, *section by section*, and *shall be taken by yeas and nays, and the yeas and nays shall be* entered upon the journals. *No bill shall be passed unless by the assent of a majority of the members elected to each house.*

This was a substitute for the former § 15, with important additions relating to the consideration of bills and the distribution of printed copies before final passage. This subject, in some of its aspects, was considered in the Convention of 1867, but that Convention did not agree on an amendment limiting the consideration of bills. Governor Hoffman in 1872 said that "provision ought to be made in the Constitution securing the actual reading of every proposed law on three separate days in each house, and forbidding any substitute for the full and free discussion which pertains to consideration of a bill in committee of the whole house." The section in its original form required every bill to be printed and distributed among the members before the vote should be taken on its final passage, but without limiting the time; on motion of Mr. Bradley this distribution was to be made twenty-four hours before the final vote, which was afterwards changed to one day. The legislature rejected this proposed section, and the former § 15 remained unchanged. Section 15 was amended in 1894, and the provision recommended by the Commission, requiring bills to be printed, was adopted and extended. This subject will be considered again in the chapter on the Convention of 1894.

§ 18. Limitation on introduction of bills.—*No private,*

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

As first presented to the Commission this section prohibited the introduction of any special bill after the 1st of March, or of any private or local bill within the last ten days of the session, without the recorded consent in each case of three fourths of all the members of the legislature. The legislature did not approve this section, but the agitation for some restriction on the introduction of bills was continued. In 1895 a law was passed (chapter 1025) creating a commission to investigate in relation to the organization and government of the legislature, the introduction and progression of bills, and generally in relation to legislative business and methods. The report of this commission was presented to the legislature in January, 1896. The commission recommended several changes in legislative procedure, proposing, among other things, to require a petition for the enactment of a private or local bill, with notice to every interest to be affected by it, that counsel be provided for the committees on revision in each house, that bills for "public measures" be first submitted to the statutory revision commission, that persons proposing private or local bills should bear some portion of the expense of printing them, and that notice of a bill affecting a department be given to the head of the de-

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partment, with an opportunity of being heard before the bill is passed. The legislature has not adopted these suggestions.

§ 19. Certain private or local laws prohibited.—*The legislature shall not pass a private, special, or local bill in any of the following cases:*

Changing the names of persons.

Laying out, opening, altering, working, or discontinuing roads, highways, streets, or alleys, or for draining swamps, marshes, or other low lands.

Locating or changing county seats.

Regulating the internal affairs of towns or counties.

Providing for changes of venue in civil or criminal cases.

Incorporating villages or changing or amending the charter of any village.

Providing for the election of members of boards of supervisors.

Selecting, drawing, summoning, or impaneling grand or petit juries.

Regulating the rate of interest on money.

The opening and conducting of elections or designating places of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Remitting fines, penalties, or forfeitures.

Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual, the right to lay down railroad tracks.

Granting to any private corporation, association, or individual, any exclusive privilege, immunity, or franchise whatever.

Providing for building bridges, and chartering companies for such purpose, except on the Hudson river below Water-

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ford, and on the East river, or over the waters forming a part of the boundaries of the state.

The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws.

But no law shall be passed granting the right to construct and operate a street railroad within any city, town, or incorporated village, without the consent of the local authorities having the control and management of the street or highway proposed to be occupied, and also the consent of the owners of at least one half in value of the property, according to the assessment roll of the previous year, bounded on that portion of each street or highway over which it is proposed to construct such road; or, in case the consent of such property owners cannot be obtained, then without the consent of a board of three commissioners, to be appointed by the supreme court at a general term thereof, in the district in which it is proposed to construct such road. Such commissioners shall not be residents of any county in which any part of such railroad is to be constructed.

This subject had received serious consideration in the Convention of 1867, and after much discussion the section was agreed to intending to prohibit private or local laws on certain specified subjects. That section will be found in another part of this work. But the subject was not new in that Convention; in the chapter on the Convention of 1846 I have referred to the unsuccessful attempts then made to provide safeguards against needless special legislation. The evil continued to grow, and was a subject of comment in numerous executive messages. Governor Hoffman, in his message of 1872, recommending the Commission, collated much valuable information relating to the enactment of laws, and urged a radical constitutional provision which would compel the enactment of general statutes to cover a great variety of private, local, and special classes of legislation. He

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said that during the preceding twenty years the laws passed averaged five hundred a year; and for the preceding six years eight hundred a year; that "there can be no necessity for this mass of legislation;" that a thousand bills were passed during a session, and that proper deliberation by the legislature was impossible; that he had found himself obliged in the course of three sessions to withhold his official approval from an aggregate of three hundred and ninety-one bills, and more than a hundred other bills were recalled for amendment; that it was "not right to rely solely upon the governor to review proposed legislation;" and that it was almost inevitable that objectionable bills would "escape his scrutiny, and to which, if his attention had been called to them, he would have objected." Continuing his remarks the Governor said: "Uniformity of the several classes of local governments—counties, towns, and villages—ought to be secured by constitutional guaranty, so as to prevent special legislation with regard to them. It is impracticable to frame a uniform charter for all our cities, but there are certain fundamental characteristics which ought to be found in all city charters, and ought to be secured by constitutional provision. There should be more specific constitutional restraints upon legislative power to grant special charters for private corporations; and upon special legislation generally." The wide range of discussion in the Commission is manifest from the large number of subjects of prohibited special legislation suggested, but not finally recommended. Thus it was proposed to require general laws relative to granting divorces; changing the names of places; "vacating roads, town plots, streets, alleys, and public grounds;" regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables; incorporating cities or

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towns, or changing or amending the charter of any town or city; providing for the management of common schools; chartering or licensing ferries or toll bridges; amending existing charters by granting the right to lay down railroad tracks; laying out, opening, or altering public grounds; adding to the prohibition against amending local charters the provision that "this shall not prevent the amendment of any village or city charter by special or local law, if such amendment shall have first been submitted to the electors of such city or village, at a general or special election, and approved by them, and the legislature shall, by general law, provide for the manner of such submission;" also providing that a local charter should not be amended "unless with the approval, previously obtained, of the general term of the supreme court of the judicial district in which such city or village is located;" adding to the proposed mandate requiring the legislature to pass general laws on specified subjects the provision that "the supreme court is hereby authorized to issue a writ of mandamus in case the legislature shall neglect to comply with this provision;" and providing that where the legislature passed a special or local law for the reason that, in its opinion, a general law could not be made applicable, "such opinion shall, in terms, be expressed in such special or local law." (Such a rule would often be troublesome to the legislature when granting charters that might be obtained under general corporation laws.)

The Commission, in its report to the legislature accompanying the amendments relating to special legislation, said "that the experience of the legislature and the judgment of the people" had demonstrated the "wisdom of requiring general laws to take the place of special acts;" that so marked had been the increase in special legislation, that "three fourths of the laws have become

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special acts;" that "had the Constitution been mandatory upon the legislature, to pass general laws upon the subjects named in the accompanying article, instead of permissive merely, the amount of legislation would have been reduced one half in quantity, leaving far more time to devote to the general laws and interests of the state." The Commission further said that the legislature did not actually devote more than sixty-five days to legislative business during the session, and that it was therefore physically impossible to give four thousand pages of bills the examination required for an intelligent opinion concerning the propriety of their enactment; and that it was still more difficult for the governor "to understand in a becoming manner" a thousand laws within the limited time allowed to him for their examination; that without the compulsory clause the existing evils would continue, but with it the pressure for local legislation, often irresistible, would be withdrawn, relief in special cases could be obtained without resort to the legislature, and that body could devote its time and abilities to the consideration of subjects affecting the welfare of the whole state.

The legislature changed the section in several particulars: omitting the provisions relating to streets, draining marshes, "regulating the internal affairs of towns and counties," changing or amending the charter of any village, the sale or mortgage of real estate belonging to minors or others under disability, the protection of game or fish, remitting fines, penalties, or forfeitures, changing the law of descent, and modifying the street railroad clause. The full text of the section in its final form, as proposed by the legislature and adopted by the people, will be found in the Introduction.

§ 20. Legislature not to audit private claims against

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the state.—The legislature shall neither audit nor allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

A similar section was recommended by the late Convention, with the additional provision that the legislature should not pass any special law in relation to a private claim. The legislature approved this section without change.

Sections 21 and 22, proposed by the Commission, were the same as §§ 13 and 14 of article 7 of the Constitution of 1846.

§ 23. Boards of supervisors.—*There shall be in the several counties, except in cities whose boundaries are the same as those of the county, a board of supervisors, to be composed of such members, and elected in such manner, and for such period, as is or may be provided by law.*

This subject was considered in the Convention of 1846, but without substantial result, except that the legislature was authorized to confer legislative power on boards of supervisors. The Convention of 1867 gave serious and very careful attention to the structure and powers of boards of supervisors, and reported an elaborate provision conferring on such boards exclusive jurisdiction in specified cases. The subject was considered in various aspects, and many radical provisions were proposed. I have given a sketch of this discussion in the chapter on the Convention of 1867. Governor Hoffman, in his message of 1872, discussing the policy of decentralization adopted and partially put into operation by the Convention of 1846, said: "Decentralization consists in giving to the people of every county or other political subdivisions complete control of their own

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proper local affairs; not in giving to the people of a county the selection of state officers, of officers whose duties are exclusively connected with the general affairs of the state and the enforcement of the laws of the state. It is singular that true decentralization, which is to be found in enlarging the powers of the boards of supervisors of the several counties, was not provided for in the Constitution, except by leaving the matter to be regulated by the legislature." In the Commission many plans were proposed for carrying into effect the views expressed by the Governor, defining the jurisdiction and enlarging the powers of boards of supervisors. Mr. Howland offered the broad proposition that "the boards of supervisors of the several counties in this state shall have exclusive right and power of local legislation and administration of all matters within their respective counties." Mr. Dudley proposed a board to be composed of one supervisor from each town and ward, and every town or ward having a population exceeding 2,000 was to have an additional supervisor for each 2,000 of such excess. There was also to be a supervisor at large, who should be chairman of the board, but without any vote except in case of a tie. He was required to review the action of the board, and for this purpose was clothed with the power vested in the Governor in relation to legislative bills, including the veto, which might be overruled by a two-thirds vote of the board. The board was to possess the powers conferred on it by the legislature. This plan was also presented to the Convention of 1867. A proposition to specify the subjects within the peculiar and exclusive jurisdiction of boards of supervisors was not adopted, and the result of the Commission's deliberations was the foregoing section requiring a board in each county, and continuing the former section authorizing the legislature to confer on such boards powers of local legislation,

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adding the provision that such powers must be conferred by general laws, which was not required by the Constitution of 1846. The Commission, in its report accompanying this article, said there was no express provision in the Constitution authorizing these local boards, and that their existence was entirely dependent upon the will of the legislature. In view of the present and prospective powers of the board it was deemed only "proper that a board clothed with such powers should be recognized in the organic law of the state, and the legislature required to provide for the election of these important local officers and to provide for representation according to population, if deemed expedient." In the legislature the section was modified by providing that in counties in which there was no board of supervisors "the duties and powers of a board of supervisors may be devolved upon the common council or board of aldermen thereof," and as thus amended the section became a part of the Constitution in 1874.

§ 24. **Powers of board.**—The legislature *shall, by general laws,* confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as *the legislature may, from time to time, deem expedient.*

This was § 17 of the existing Constitution, modified by requiring powers of local legislation to be conferred on boards of supervisors by "general laws." Under the former Constitution such powers might have been conferred by special law, and the Commission in its report said that this change would "tend not only to check many of the evils incident to special legislation, but to secure a uniform system throughout the state." This section was approved by the legislature without change.

§ 25. **Extra compensation prohibited.**—The legislature

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shall not, nor shall the common council of any city, or any board of supervisors, grant any extra compensation to any public officer, servant, agent, or contractor.

A similar section was proposed by the Convention of 1867, applicable in terms only to the legislature, but by another section was made applicable to common councils and boards of supervisors. The new section embraced the whole subject. Governor Hoffman, in his message of 1872, said "there should be more specific constitutional restraints upon legislative awards of extra compensation to claimants under contracts and otherwise." As first presented in the Commission the section provided that "the legislature shall not grant any extra compensation to any public officer, servant, agent, or contractor," and omitted any local prohibition. One proposed form of the section was as follows:

"The legislature shall not grant compensation to any public officer, servant, or agent in addition to his salary, nor make additional allowance to any contractor." The legislature approved the section without change.

§ 26. Certain sections not applicable to revision commission bills.—*Sections fifteen, sixteen, seventeen, and nineteen of this article shall not apply to any bill or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes.*

The legislature, in 1870, passed an act (chapter 33) providing for a commission to revise the general laws of the state; by later statutes, passed in 1873 and 1875, the commission was also authorized to report civil, political, and penal codes, and codes of civil and criminal procedure. This revision commission was in office and engaged in the performance of its duties while the Con-

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stitutional Commission was preparing amendments. After the foregoing sections relating to special legislation had been adopted by the Commission, it evidently concluded that, in view of the scope and character of the work of the revision commission, and the method of presenting it to the legislature, prescribed or authorized by the act of 1870, its bills should not be subject to the restrictions contained in those sections, but that the commission might, within the limitations prescribed by the act creating it, present its bills in such form or manner as it might deem expedient. Accordingly, on the 20th of February, Erastus Brooks, from the committee which presented the sections relating to special legislation, proposed the foregoing § 26, which, in its original form, applied to commissioners "who have been appointed pursuant to law to revise the statutes or codify the laws relating to one or more subjects of legislation." On motion of Mr. Van Buren the last clause—"or codify the laws relating to one or more subjects of legislation"—was stricken out and the Commission refused to adopt an amendment proposed by Mr. Johnson, inserting the words "or hereafter shall be" before "appointed," thus specifically making the section applicable to future commissions. I have not had access to the debates of the Constitutional Commission, and am therefore unable to determine whether the proposed section was not intended to be applied to future revision commissions, or whether the form of the section, as presented, was deemed sufficient to include such commissions. The courts, however, have treated the section as applicable to commissions appointed since the section was adopted, thus making the section a continuing provision on this subject. The section was continued in the revised Constitution of 1894. In 1889 the legislature created another revision commission, which was terminated in 1900. During its existence it prepared

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a large number of revision bills, several of which became laws. It will be observed that under the foregoing § 26 a local bill might be presented by the commission, free from the restrictions specified in §§ 17 and 18 of the present Constitution. The courts, on several occasions, in determining the validity of statutes, have sought evidence of the source of the bill; namely, whether it originated in the legislature directly, or whether it was proposed by a revision commission. For six years, 1895–1900, I was chairman of this revision commission. No bill was presented by the commission intended to avoid the effect of §§ 17 or 18. Once during that period the commission was requested to propose a local bill to avoid the effect of § 18. That request was refused, and the proposed bill was afterwards enacted as a general law.

The legislature did not approve the foregoing §§ 15, 17, and 18, as proposed by the Constitutional Commission. This action left in force the former §§ 15 and 16. Section 17 of the former Constitution became § 23 in the new article, and the Commission's §§ 16 and 19 became §§ 17 and 18 respectively. The proposed § 26 became § 25, and was modified by making it applicable only to the new §§ 17 and 18.

Council of Revision.—On the 9th of January Erastus Brooks presented the following amendment to article 3:

"There shall be a Council of Revision, who shall meet from time to time while the legislature is in session; and no bill that has passed the senate and assembly shall become a law without a two-thirds vote of all the members elected, unless it receive the approval of said council that the same is in proper form and not inconsistent with the Constitution and the public good.

"2. Said council shall consist of two senators, the chief justice or one of the judges of the court of appeals, the at-

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torney general, and the governor; and the governor shall annually designate who of said judges and senators shall compose the Council of Revision for the term of one year.

"3. No special bills shall be introduced during the last ten days of the time named for the close of the session without the recorded consent, by yeas and nays, of three fourths of all the members of the legislature; the presence of the said three fourths to be ascertained by the presence and count of members."

Mr. Armstrong proposed to vest in this council the power to grant reprieves, commutations, and pardons, substantially the power then and now vested in the governor. It will be noted that the structure of the proposed council was quite different from the Council of Revision under the first Constitution. That council was composed of the governor, chancellor, and judges of the supreme court. The new council was to represent all the branches of government,—executive, legislative, and judicial,—but the legislative and judicial members of the council were to be appointed by the governor. Under the plan of choosing state officers, following Governor Hoffman's recommendation, the attorney general was to be appointed by the governor, who thus directly or indirectly would have appointed all his associates in the council. The council was to possess substantially the powers vested in the former Council of Revision, and which, on its abolition, were vested in the governor alone. In former chapters I have given a sketch of the creation of the first council, its practice in considering bills, have pointed out some of the causes that led to its abolition, and have made some observations on the importance of a substitute for it, including a suggestion that the opinion of the court of appeals be procured concerning constitutional questions supposed to be involved in proposed legislation. I do not discover any good reason for making members of the senate members also

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of such a council. They must already have passed on the proposed legislation, and would here sit in review of their former action. A council of revision should be independent of the legislature. The Brooks amendment was referred to the committee on state officers. That committee reported the amendment adversely, and expressed the opinion that "while it might be in some respects a valuable safeguard against hasty and improper legislation, it would probably be found too cumbersome and dilatory in its operation to meet with general approbation. The experiment was tried and signally failed in the early history of the state." I cannot believe that this committee carefully examined the history of the first Council of Revision. My study of its records and work leads me to the conclusion that instead of having "signally failed" it was a signal success as a part of our early legislative system. It fully appreciated its responsibility for legislation, and its vetoes and other memoranda concerning bills show that it brought to its duties broad scholarship, devoted patriotism, judicial learning, and ability of the highest order, and a sincere purpose to enact only such laws as should conserve the best interests of the state.

The Clintons, Jay, Lewis, Tompkins, the Livingstons, Lansing, Kent, Yates, Thompson, Spencer, Hobart, Benson, Radcliff, Van Ness, Platt, Woodworth, and others who sat in that council during the first forty-five years of our history can hardly be said to have "signally failed" in administering a governmental institution so important as this, and which several of them had assisted in constructing while members of the first constitutional convention. The small number of laws passed during this period which have since been declared unconstitutional sufficiently attests the value of the work of the Council of Revision. In recent years the legislature has felt the

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need of the preliminary preparation and examination of bills, and in 1893 the revision commission was required by statute "on request of either house of the legislature or of any committee, member, or officer thereof, to draft or revise bills, and to render opinions as to the constitutionality, consistency, or other legal effect of proposed legislation." During the last eight years of its existence the Statutory Revision Commission drafted, examined, and revised several thousand independent bills in addition to the regular revision work in which it was engaged, and besides this preliminary examination, bills presented by the legislature to the governor for his approval were first submitted by him to the revision commission for examination as to their form, consistency, and legal or constitutional effect. This was largely the work performed by the Council of Revision under the first Constitution. During the four years immediately following the termination of the commission, 1901–04, this examination for the governor was made in the attorney general's office; but Governor Higgins, at the beginning of his term, in 1905, appointed a counsel to the governor under an act passed in 1900, authorizing such an appointment, and making it the duty of the counsel to "advise the governor in regard to the constitutionality, consistency, and legal effect of bills presented to the governor for his approval." By an amendment in 1901 to § 23 of the legislative law, the temporary president of the senate and the speaker of the assembly were authorized to appoint persons to draft bills and advise concerning their "consistency, or other effect of proposed legislation."

There is a wide field of usefulness for a permanent council of revision, with power to consider bills both before and after their passage, and aid the legislature in preparing statutes which shall be in proper form, con-

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sistent with other statutes, and free from constitutional objections. With a council producing such results the work of the legislature would be much easier, and the governor's consideration of bills would be limited almost exclusively to questions of propriety and policy. The growth of legislation, and the increasing difficulties attendant upon the proper preparation of bills, will probably, before many years, prompt the legislature to create such a council, and vest in it adequate authority for the purpose intended, but without affecting the final jurisdiction and responsibility of the lawmaking power. Such a council cannot supersede the legislature, but may render very valuable assistance in the preparation of our laws.

ART. IV. EXECUTIVE.

Sec. 1. Governor.—The only change consisted in extending the term of the governor and lieutenant governor from two years to three; but this extension was not to apply to the governor and lieutenant governor elected immediately before the amendment should take effect.

Under the first Constitution the governor's term was three years; under the second and third Constitutions it was two years. The Convention of 1867 proposed to continue the term at two years. Governor Hoffman, in his message of 1872, in connection with his recommendation that state officers be appointed by the governor, proposed to extend the governor's term to three years. While this section was pending in committee of the whole in the Constitutional Commission the term was once fixed at four years, but it was soon changed to three. The Commission rejected an amendment providing that no governor should be eligible for two successive terms. The Commission, in its report accompanying the article,

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said that "in extending the term of the office of the governor and lieutenant governor to three years, the commissioners believed that the change would be in accordance with general public sentiment, and would advance the interests of the state by obviating too frequent changes in policy and offices, and, in some degree, increase the respectability and dignity of the offices." This section was approved by the legislature and took effect January 1, 1875. Under it Samuel J. Tilden, elected in 1874, at the same time the amendment was adopted, held office only two years. Lucius Robinson, a member of the Commission, was the first governor elected for the new term. Seven elections of governor were held while this provision was in force; namely, 1876 (Robinson), 1879 (Cornell), 1882 (Cleveland), 1885 (Hill), 1888 (Hill), 1891 (Flower), and 1894 (Morton); but, by the Constitution of 1894, which took effect January 1, 1895, and which reduced the term to two years, the governor and lieutenant governor elected in 1894 could hold office only until the end of the year 1896.

Sec. 2. Eligibility.—The only change consisted in making the section applicable also to the lieutenant governor. This section was approved by the legislature.

Section 3 was not changed by the Commission.

Sec. 4. Duty of governor.—Two clauses were added to the section by the Commission. One, proposed by Mr. Van Buren, provided that at an extraordinary session of the legislature "no subject shall be acted upon, except such as the governor may recommend for consideration." In the preceding chapter I have given the history of a similar provision in the Convention of 1867, where, after much discussion, the limitation was confined to the enactment of laws relating to the objects stated in the proclamation, leaving the legislature free to act on appointments and other incidental matters. The

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Commission, in its report to the legislature, said concerning this clause that "in limiting the action of the legislature at extraordinary sessions the commissioners believed that on such occasions it was unwise to engage in general legislation, and therefore it is proposed to confine the legislature to the subjects recommended by the governor." The Commission apparently intended to limit legislative action at extraordinary sessions to subjects recommended by the governor in his proclamation, and perhaps supposed that the clause recommended would have the same restrictive effect as the similar clause proposed by the Convention of 1867, where the subjects of legislation were specifically limited to those mentioned in the proclamation. If this was the construction intended by the Commission it has not been followed in actual practice. In recent years it has not been the custom of the governor to state any specific subjects in the proclamation convening the legislature, but, by special message or messages, to recommend subjects for their consideration. The legislature is limited to the consideration of subjects so recommended, but the governor is not limited in the subjects which he may recommend, and it is familiar history that the governor has, at an extraordinary session, recommended several subjects for legislative consideration.

The other clause provided that the governor should "receive for his services an annual salary of $10,000, and there shall be provided for his use a suitable and furnished executive residence." Mr. Robinson proposed to fix the salary at $10,000, and Mr. Opdyke proposed to fix the salary at $8,000, with a furnished residence. In committee of the whole a clause was once adopted authorizing the legislature to establish the governor's salary; but later, on motion of Erastus Brooks, the clause substantially as it now stands was adopted, pro-

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viding for a fixed stated salary and an executive residence. On this subject the Commission said: "In fixing the salaries of the governor and lieutenant governor, and cutting off all perquisites and extra allowances, the commissioners believed that the present fixed compensations to those officers were too small, and, therefore, it was proper to increase them. And yet, though the proposition of the commissioners appears to be a considerable increase, it is not so in reality, for taking together the present fixed compensation, and the extra allowances and perquisites, for some time past received by these officers, they are greater in the aggregate than the salaries provided in the proposed amendment." The governor was then receiving an annual salary of $4,000.

While this section was under consideration in the Commission two important suggestions were made relative to communications by the governor to the legislature. Mr. Van Buren proposed that the governor should communicate by message to the legislature "at the close of each year," instead of "at every session." The Commission once agreed to this amendment, but afterwards rejected it. Mr. Silliman proposed that the governor should "communicate by message to the legislature, at every session, and at the close of his official term to the next legislature, the condition of the state, and recommend such matters to them as he shall judge expedient." This would require two messages at the first session following a governor's election,—one by the outgoing and one by the incoming governor. The suggestion that the outgoing governor make a report of the last year of his administration has much force. Under present conditions a governor sends only one regular message during his term, covering his own administration, and this relates to the first year. His second year remains unreported, except as to whatever information may be

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contained in his successor's first message. An incoming governor is required to communicate to the legislature the condition of the state during the period when he may have no part in public affairs, and is therefore obliged to obtain his information from his predecessor and among the various departments of government. The legislature meets on the first Wednesday of January. This is sometimes the first day of the month. The new governor must therefore prepare his message in advance of his inauguration, while the governor who goes out of office at midnight the day before is not required to give any account of the last year of his stewardship. It will be remembered that by the first Constitution the governor was required to "inform the legislature at every session of the condition of the state, so far as may respect his department," and "to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity." This crystallized in the Constitution a custom that had prevailed in the colony since the organization of the legislative system, at least since 1691, and which custom was in turn borrowed from English parliamentary practice. In a former chapter I have referred to this custom, and have pointed out that under the first Constitution, following the practice prevailing in the colonial period, the governor "informed" the legislature at the opening of its sessions of the condition of public affairs by delivering a speech in the presence of both houses; and that, by the second Constitution, this custom was changed and the governor was required to communicate to the legislature by message. The latter provision has been continued in subsequent Constitutions without change. It should be noted, however, that the first Constitution did not fix the beginning of the terms of the governor, lieutenant governor, and members of the legislature, nor

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the date of their election. By early statutes, the last Tuesday of April was fixed as a general election day, and the terms of the governor, lieutenant governor, and members of the legislature began on the following first Monday of July, which, as to the governor and lieutenant governor, was afterwards changed to the first day of July. The governor had power to convene the legislature by proclamation; but if it was not so convened the legislature was required by early statutes to meet on the first Tuesday of January, and later, on the last Tuesday of the same month. Sessions were sometimes held in November, but usually not until the beginning of the following year. The governor, therefore, ordinarily had been in office six months before the session, and had an opportunity to become familiar with public affairs. It is also worth while to remember that under the first Constitution, covering a period of forty-five years, only five different governors were elected. George Clinton held office twenty-one years, John Jay six years, Morgan Lewis three years, Daniel D. Tompkins ten years, and De Witt Clinton five and a half years.

Mr. Silliman's suggestion would not have been especially pertinent under the first Constitution for the practical reasons already suggested. The situation under the Federal Constitution is quite similar to that which existed under our first Constitution. The President assumes his office on the 4th of March, but Congress does not meet until the first Monday in December, nine months after the President's inauguration, and the last regular message is sent to Congress only three months before the expiration of his term. I think that the outgoing governor may very properly be required to communicate to the incoming legislature by message a report of the transactions of his administration, and of other state affairs within his jurisdiction for the last year of his

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term, with such recommendations as he may think expedient. The new governor should also communicate to the same legislature by message any recommendations which he thinks proper concerning state affairs, with such information as he may have obtained from other officers and departments. Mr. Silliman's proposition was rejected. The section was approved by the legislature.

Section 5, relating to pardons, and § 6, relating to cases where the powers and duties of the governor devolve on the lieutenant governor, were not changed by the Commission.

Section 7, relating to the duties of the president and temporary president of the senate, was amended by adding the following clause:

"The lieutenant governor shall receive for his services an annual salary of $4,000, and shall not receive or be entitled to any other compensation, fee, or perquisite, for any duty or service he may be required to perform by the Constitution or by law."

The lieutenant governor was then receiving an allowance of $6 per day and mileage. In the Convention of 1867 it was pointed out that the lieutenant governor received for constructive mileage and *per diem* allowances as a member of various boards a compensation exceeding that of the governor, and that one lieutenant governor received $10,000 in one year. That Convention left the subject of compensation to the legislature, but proposed to cut off all perquisites and allowances beyond the fixed salary. In the Commission it was at first proposed to authorize the legislature to fix the lieutenant governor's compensation substantially as proposed by the Convention of 1867. After some discussion the

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Commission concluded to fix the salary by the Constitution. There were propositions to fix the salary at $6,000, $5,000, $4,000, and $3,000. A salary of $4,000 was thought to be reasonable, and this amount was fixed by the proposed section. The legislature increased the salary to $5,000, and, as thus amended, the section was approved.

Sec. 8. Veto.—The existing section was modified in four particulars, by providing specifically that a bill could not be passed over the governor's veto, except on the affirmative vote of two thirds of all the members elected to each house; second, by adding to the ten day clause a provision that a bill should not become a law after adjournment of the legislature "without the approval of the governor;" third, the addition of a clause establishing a thirty-day period after adjournment for executive consideration of bills; and fourth, adding a clause extending the veto power to separate items in appropriation bills. The full text of the section will be found in the Introduction.

In the chapter on the Convention of 1867 I have given a sketch of the practice relative to signing bills after adjournment of the legislature, which led to a proposition to fix a definite term after adjournment for the executive consideration of bills. This subject was much discussed in the Convention of 1867, resulting in a proposed provision limiting the bill period to ten days after adjournment. In the Constitutional Commission the committee in charge of this subject reported a section which prohibited the governor from signing any bill after adjournment. On motion of Mr. Close the section was amended by adding the clause establishing a thirty-day period. On this clause the Commission in its report said it "believed it wise to put an end to the practice of approving of bills, by the governor, for many months

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after the final adjournment of the legislature, whereby for a long time important questions might be left in doubt and uncertainty, and be the occasion of much mischief."

I have already noted the attempt in the Convention of 1867 to include in the Constitution a provision allowing the governor to veto distinct and separate parts of a bill, afterwards limited to distinct items in tax and appropriation bills, but the Convention, after long discussion, concluded not to extend the existing veto power. The discussion in that Convention, combined with further legislative and executive experience, had strengthened the convictions so freely expressed in that debate, that the governor ought to have power to veto separate and unrelated items in appropriation bills, rather than be compelled to approve objectionable appropriations in order to secure necessary legislation on other subjects. Governor Hoffman, in his message of 1872, said that "the veto power needs to be made more effectual. Two thirds of all the members elected to either house should be required to overrule a veto, and where a bill contains several items of appropriation of money, the governor should be authorized to refuse his assent to one or more of the items, while approving of others." The seed sown in the late Convention was bearing fruit. The time was now manifestly ripe for this extension of the veto power. In the Constitutional Commission Mr. Tracy presented a plan, under which the governor might veto any part or parts of a bill appropriating state money. Under this plan the governor could veto any part of a bill carrying an appropriation, although the appropriation might be incidental to the main purpose of the bill. This power was almost as broad as that proposed to be conferred on the governor by the committee on executive in the late Conven-

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tion. Later Mr. Tracy modified his plan by limiting the proposed veto power to separate items in appropriation bills, and as thus modified the plan was accepted and recommended by the Commission. The Commission, in its report, expressed the opinion that "the governor should be allowed to approve of portions of appropriation bills," for the reason that appropriations relating to a great number of objects were included in the same bill "in order to get a cumulative favorable vote for the whole, while many of the items, if standing alone, could not probably receive the sanction of the legislature on their own merits, and that bills thus passed must, as a whole, be approved, or as a whole be rejected by the governor." The legislature approved this section without change.

ART. V. STATE OFFICERS.

§ 1. **Comptroller.**— *The comptroller shall be chosen at the same general election, and for the same term, as the governor, and shall receive a salary of six thousand dollars a year. The person holding the office at the time when this section shall take effect shall continue to hold the same until the first day of January next succeeding the first election of comptroller, pursuant to the provisions hereof, and shall receive the salary herein named for such time as he may hold the office beyond the term for which he shall have been elected.*

I have considered this provision in notes to the next section.

§ 2. **Governor to appoint certain state officers.**— *The secretary of state, attorney general, and state engineer and surveyor shall be appointed by the governor, with the consent of the senate, and hold their offices until the end of*

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the term of the governor by whom they shall be nominated, and until their successors are appointed. No person shall be *appointed* state engineer and surveyor who is not a practical engineer.

These two sections were intended to effect a radical change in respect to state officers in accordance with the policy recommended by Governor Hoffman in his message of 1872. I have already quoted his observations concerning the importance of vesting in the governor the power of appointment and removal of state officers, if he is to be charged with responsibility for the proper administration of public affairs. Applying his remarks to particular officers, the Governor said:

"The duties of the secretary of state are so directly connected with the details of executive action, especially in the matters of appointment to office and the issuing of pardons, that he ought to occupy the position of chief assistant and adviser of the governor, and ought to be selected by him. The attorney general is the legal adviser of the governor. The chief executive officer of the state should be allowed the privilege which all men exercise, of selecting for a legal adviser such person as is, in his judgment, the most competent. The attorney general ought to have supervision over and be responsible for the conduct of all that class of officers, throughout the state, which is charged with the duty of prosecuting for crime and other violations of state laws. Prosecuting officers for offenses against the laws of the state, now erroneously called district attorneys, should not be county officers, but be the deputies of the attorney general, appointed by him or by the governor on his recommendation. In this way responsibility for the due enforcement of the laws could be brought home, as it should be, directly to the governor, upon whom the duty is devolved to see that the laws are faithfully executed.

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"It appears to me proper that the secretary of state and the attorney general should be appointed by the governor without the intervention of the senate, and hold office during his pleasure, and that the comptroller, a superintendent of canals, and a superintendent of prisons, should, with or without the consent of the senate, be appointed by the governor, to hold office during his own term, but removable by him at any time for cause. These officers would form a valuable council to the governor. It might be well that the state treasurer, being the actual custodian of the public moneys, and perhaps the superintendent of public instruction, should be appointed by joint ballot of the two houses of the legislature; but all other administrative officers of the state, in addition to those heretofore named, should, in my judgment, be appointed by the governor, with or without the consent of the senate, so as to make his responsibility for the good management of public affairs complete."

The Commission did not adopt the Governor's suggestion concerning the comptroller, but provided for his election by the people. It proposed to vest in the governor the appointment of the secretary of state, attorney general, and state engineer and surveyor. Under the first Constitution all these officers, including the comptroller, had been appointed by the governor and Council of Appointment. By the second Constitution they had been chosen by the legislature on joint ballot, and by the third Constitution they were made elective by the people. In the preceding chapter I have given a sketch of the debate in the Convention of 1867 on the proposition to make some of these officers appointive, and the reasons there urged for thus changing the mode of their selection. Governor Hoffman and the Commission had evidently approved the arguments used in the Conven-

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tion in support of this plan, for the reasons assigned are much alike in both cases. The Commission, in its report referring to the provision in the existing Constitution for the election of the principal state officers at a time different from that of the governor, said:

"This separates them from all connection with the governor, and makes them in every way independent of him, and frequently of different political opinions. He has no responsibility for their selection, nor for the manner in which they may administer their respective departments of government. Nor can he rely upon them for confidential consultation and advice in the discharge of his own duties. The amendments proposed to the article are intended to remedy, and it is believed will remedy, these manifest evils;" that by the proposed method of selecting them the governor "will be directly responsible for the appointment of a majority of said officers. All of them will generally be of his own political faith, and he will be able to rely upon them as faithful counselors and assistants in administering the affairs of government. At the same time, the people will be able to hold him responsible for any misconduct on the part of the officers appointed by him. The government will thus have, as it should, an efficient and accountable executive head."

In the legislature of 1873 the senate approved the plan of the Commission for the election of the comptroller and the appointment of the other state officers, but modified the 1st section by omitting the provision fixing the compensation of the comptroller, and added to the 2d section a clause providing that "the officers named in this section may be removed from office by the governor upon his filing, in the office of the secretary of state, a statement of his reasons for such removal." This vested in the governor the power of removal without giving

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the officer an opportunity to be heard. It was a removal at pleasure. The assembly transferred the secretary of state from the 2d section to the 1st, thus making the office elective instead of appointive. It also struck out the clause added by the senate to § 2, vesting in the governor the power of removal. The senate accepted the assembly amendments, and in this form the two sections were passed and submitted to the next legislature. The amendments to article 5 were not approved by the legislature of 1874, and so could not be submitted to the people. This left unchanged the existing constitutional provisions relative to the method of choosing state officers. This subject does not appear again in our constitutional history, but before dismissing it from further consideration it may be profitable to review in a brief historical sketch the origin and development of the state departments, which at this time received the attention of the governor and the Commission.

The secretary of state was an inheritance from the colonial period, and it is worth noting that the office was continued, apparently, by general consent, and without any constitutional or statutory authority. I have not been able to find any statute creating the office. The obvious necessity for such an office, and the fact that it was for so many years an important element in colonial administration, were doubtless deemed a sufficient justification for the neglect by the Convention of 1777 and the first legislature to provide specifically for it, and prescribe the duties of the incumbent. A secretary of state was appointed by the Council of Appointment on March 13, 1778, but without any specific authority. The first secretary was John Morin Scott, who had been a prominent member of the first Constitutional Convention. Governor Hoffman's opinion that the secretary of state ought to be appointed by the governor had no

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practical historical support. In the colonial period the secretary of the colony was not appointed by the governor, but, like the governor himself, received his appointment from the Crown. Neither had the governor the power of removal; and instances are not wanting in which the governor often found himself at variance with the secretary, preferred complaints against him to the home government, and urged his removal and the appointment of another more agreeable to himself. During that period the secretary was charged with the performance of duties not directly connected with the governor's administration, but relating to other elements of colonial affairs. Under the first Constitution the secretary was appointed by the Council of Appointment, consisting of the governor and four senators, and on the abolition of that council by the Constitution of 1821, his appointment was transferred to the legislature on joint ballot. In 1846 the office was made elective by the people, and has so continued since that time. The enlargement of the duties of the office in recent years makes still more impracticable the suggestion that the secretary ought to be appointed by the governor, and that his office ought to be deemed a branch of the executive department. His duties as custodian of the state archives, his functions in relation to corporations and elections, which functions are often judicial, or semijudicial, his powers as a member of various state boards, make him one of the chief officers of the state, and the office one which, from almost every point of view, should be filled by popular election rather than by executive appointment.

The office of auditor general existed in the colony of New York for nearly a century before the Revolution. On the 24th of July, 1776, two weeks after the Provincial Convention had, by resolution, transformed the colony

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into a state, before the Constitution was framed, and more than a year before the state government was organized, the Convention, following, in this respect, its custom of adopting institutions with which the people were familiar, appointed Comfort Sands auditor general of the state. He held this office until October, 1781, when he resigned. His resignation gave the legislature occasion in 1782, by chapter 21, to establish the office of auditor general of the state, "to settle and adjust the public accounts of this state." He was appointed by the governor, subject to confirmation by the Council of Appointment. The office was continued until 1797, fifteen years, when it was abolished, and the office of comptroller created as a substitute for it. The comptroller was charged with the duties previously performed by the auditor. He was also required to draw warrants on the treasurer for all sums payable from the state treasury, and to "examine and liquidate claims against the state" when authorized by law. He was charged with other duties and vested with other powers which have been substantially continued in subsequent statutes, and he is now the chief financial officer of the state. His selection was transferred to the legislature by the second Constitution, and to the people by the Constitution of 1846.

Under the first Constitution the treasurer was chosen by the legislature, the appointment originating in the assembly. By the second Constitution this officer was still chosen by the legislature, but on joint ballot. By the third Constitution the office was made elective by the people.

For a few years after the English occupation of New York the governor appointed the attorney general, but, beginning about 1700, the appointment was made by the Crown, although the governor occasionally made temporary appointments to fill vacancies in case of death

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until regular appointments could be made by the home government. The first attorney general of the state, Egbert Benson, was appointed by the Constitutional Convention of 1777, together with other officers deemed necessary to establish the new state government. Afterwards, under the first Constitution, the attorney general was chosen by the Council of Appointment. In the Convention of 1821 the committee that had this subject in charge, of which Martin Van Buren was chairman, reported a plan for the appointment of state officers, by which the attorney general was to be appointed by the governor, subject to confirmation by the senate. The other state officers were to be chosen by the legislature on joint ballot. Mr. Van Buren, explaining the committee's report, said the selection of these officers was vested in the legislature because they were "officers intrusted with the public property, whose duties more immediately connected them with that body." While the plan was pending the attorney general was added to those to be chosen by the legislature, but not without some opposition. Among others, Chancellor Kent supported the original plan of the committee, saying that the attorney general was an executive officer, and his appointment should emanate from the executive department. Here was good authority for the opinion entertained by several prominent delegates in the Convention of 1867, and by Governor Hoffman in 1872, that the attorney general should be appointed by the governor; but a different policy has prevailed in colony and state almost without interruption for more than two centuries, and it is not probable now that the people will consent to relinquish the right to choose the attorney general. His powers, duties, and responsibilities have been materially enlarged, and his official obligations reach beyond the executive department. His functions are not all execu-

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tive, administrative, or ministerial. They are in many cases judicial. He is the legal adviser of numerous departments, and is the general law officer of the state. If Governor Hoffman's plan to concentrate in the governor all executive or administrative authority and responsibility were to be adopted there would be force in his suggestion that the attorney general should be exclusively subject to his appointment and removal. The administrative powers of our government, however, have not been so concentrated, but have been divided and distributed among several officers, of which the governor is the chief; and the fact that these executive powers are so distributed does not militate against a popular election. The attorney general has not been, and clearly should not be, a mere creature of the governor. In the preceding chapter I have quoted from the debate on both sides of this question in the Convention of 1867, and need not here repeat any of those arguments. While the governor in the colonial days occasionally experienced some annoyance from the fact that the attorney general was personally obnoxious to him, which experience has doubtless been sometimes repeated under the state government, the proper administration of public affairs has probably not been seriously impaired by this occasional condition. Besides, at least in recent years, the governor has availed himself of the opportunity afforded by law to employ counsel, and such counsel has acted as his confidential adviser; and so, whatever differences may have existed between the governor and attorney general, arising from lack of political harmony, the governor has been able to administer his office and obtain needed legal advice.

In 1796 the legislature created the office of assistant attorney general, and provided for the appointment of seven of these officers, who were assigned to districts es-

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tablished by the act. These assistants were charged with the duty of attending the criminal courts and conducting criminal prosecutions, except in the county of New York, where similar duties were to be performed by the attorney general. In 1801 the office of district attorney was created, and seven districts were established substantially on the plan of the act of 1796, creating the office of assistant attorney general. A district attorney was to be appointed for each district, which included several counties, and the duties imposed on this officer were the same as those imposed on the assistant attorney general by the former act. The attorney general was still required to attend to criminal matters in the county of New York. Other districts were created by later statutes, and in 1815 the county of New York was made a separate district. With this exception the state continued to be divided into districts composed of several counties, with a district attorney appointed in each district, until 1818, when a statute was passed providing for the appointment of a district attorney in each county. The district attorney was required to be a lawyer and was charged with the same duties which had been imposed on the assistant attorney general by the act of 1796. The territorial jurisdiction of the district attorney was reduced, but the official title was not changed, and each county was and still is deemed a district for this purpose. All of these officers—the attorney general, the assistant attorney general, and the district attorney—received their appointment from the same source; namely, the governor and Council of Appointment, until the Constitution of 1821, when the power of appointment of the district attorney was vested in the county court. This method of appointment continued until the Constitution of 1846, which provided that dis-

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trict attorneys should be chosen by the electors of the respective counties.

The supreme court in *Fellows* v. *New York,* 8 Hun, 484 (1876), held that the office of district attorney was a state office, and a part of the state judicial system. The public officers law (1892) defines a local officer as one "elected by the electors of a portion only of the state." This clearly includes the district attorney, but notwithstanding this definition he must still be deemed a part of the judicial system of the state, and therefore, in a general sense, a state officer. The definition in the public officers law should, doubtless, be limited to its apparent purpose of classifying certain officers as distinguished from others designated as state officers, and the definition need not be construed as an attempt to define the status of the district attorney in his relation to other parts of the judicial system. The evolution of the office from that of the attorney general, whose place he takes and whose functions he performs in the county, shows that, although the method of selection has been changed from state to local authority, the inherent quality of the office has not been changed, and it may still be classed among state officers, except with reference to the method of choosing an incumbent. The legislative intent on this subject is further manifest from the executive law (1892) which makes it the duty of the attorney general, whenever required by the governor, to attend any court of oyer and terminer, appear before the grand jury and take charge of a criminal prosecution then pending; and while so attending for this purpose he shall exercise all the powers conferred on the district attorney, and that officer becomes subordinate to the attorney general in such a case, and subject to his direction.

I have already quoted Governor Hoffman's suggestion

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that district attorneys ought to be deputies of the attorney general, and appointed by him or by the governor, and it appears from the foregoing sketch that, except for a short time, in the early history of the colony, neither the attorney general nor the district attorney has been appointed by the governor, but has been chosen by independent authority. Governor Hoffman's suggestion is less pertinent since the enactment of the executive law, under which the governor, in the exercise of his constitutional duty to "take care that the laws are faithfully executed," is expressly clothed with all the authority of the state, and may require its chief law officer to assume the management of any criminal proceeding in any county. Thus, although the attorney general and district attorney are chosen by the people, they are directly or indirectly subject to the direction of the governor, especially in the cases mentioned by Governor Hoffman.

The office of commissary general was created in 1815. In the Convention of 1821 the committee on the appointment of officers, to which I have already referred, included the commissary general in the list of officers to be chosen by the legislature. While the report of the committee was under consideration, Peter A. Jay moved to strike out "commissary general," on the ground that he was a military officer; but General Root opposed the motion, saying that "those who have the custody of public property and the disbursement of public moneys should be appointed by, and amenable to, the legislature." It will be observed that this was the reason already assigned by Mr. Van Buren for the proposed section relating to the method of choosing state officers. Mr. Jay's motion was lost. Under the third Constitution, 1846, the commissary general was appointed by the governor and senate, and since the adoption of the fourth Constitution (1894) he has been appointed by the governor.

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The office of surveyor general was, for obvious reasons, one of the most important in the colony. The occupation of new and unsettled portions of the colony required the accurate determination of boundaries, not only of individual holdings, but of towns, borroughs, counties, and other local divisions. The surveyor general was a busy officer, and as the colony spread the sphere of his service was correspondingly enlarged. The office existed almost from the beginning. We learn from the history of that period that Caldwalder Colden, appointed in 1720, was surveyor general forty years. The office was continued under the state government. The legislature, in 1781 (chapter 32, passed March 20), authorized and required the governor "by and with the advice and consent of the Council of Appointment" to appoint a surveyor general; and, on the 30th of March, Philip Schuyler was appointed to the office. By the Constitution of 1821 this office was included among those to be filled by the legislature. The Convention of 1846 changed the title of the office to that of state engineer and surveyor, and made it elective by the people.

§ 3. **Superintendent of state prisons.**—*A superintendent of state prisons shall be appointed by the governor, with the consent of the senate, and hold his office for five years, unless sooner removed; he shall give security in such amount, and with such sureties, as shall be required by law for the faithful discharge of his duties; he shall have the superintendence, management, and control of the state prisons, subject to such laws as now exist or may hereafter be enacted; he shall appoint the agents, wardens, physicians, and chaplains of the prisons. The agent and warden of each prison shall appoint all other officers of such prison, except the clerk, subject to the approval of the same by the superintendent. The comptroller shall appoint the clerks of the prisons. The superintendent shall have all the powers and perform all*

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the duties not inconsistent herewith which have heretofore been had and performed by the inspectors of state prisons; and from and after the time when such superintendent of state prisons shall have been appointed and qualified the office of inspector of state prisons shall be and is hereby abolished. The governor may remove the superintendent for cause at any time, giving to him a copy of the charges against him, and an opportunity to be heard in his defense.

In the chapters on the Conventions of 1846 and 1867 I have pointed out briefly the development of prison administration and several proposed reforms and have noted in the chapter on the last Convention that the standing committee recommended the creation of the office of superintendent of prisons, and that the Convention, deeming this too radical, adopted the Dwight plan of a board of prison managers. On this subject Governor Hoffman, in his message of 1872, said:

"The management of the prisons of the state needs great reform, which cannot be secured by a mere change of officers; the system is at fault. A constitutional amendment has been suggested putting these institutions under the charge of a board of citizens who are not to be paid for their services. While that would be an improvement on the present system, reflection upon the subject has convinced me that a better amendment would be to supersede the present commission of three inspectors (elected one every year by the people) by one inspector of state prisons, to be appointed by the governor and to be removable by him. An advisory or examining board of citizens might be valuable in addition; but, for the actual administration of prison affairs and the appointment of all subordinate officers, it would be better to have the responsibility concentrated upon one man, that one man being accountable to the governor, than to have this responsibility divided among the members of a board or a commission."

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The Constitutional Commission substantially adopted Governor Hoffman's recommendation, which had already been presented to the Convention of 1867. This subject was so fully considered in that Convention that it will not be profitable to recount here all that was done in the Commission; it would be a mere repetition, and would add little to the information already given concerning this important reform. It may be worth while to note, however, that Lucius Robinson, who was one of the leaders of the Commission, and who was the first governor chosen after the amendments were adopted, proposed the five year term for the superintendent of prisons, and also the clause providing that "the governor may remove the superintendent at any time for cause, giving to him a copy of the charges against him, and an opportunity to be heard in his defense." The Commission, assigning reasons for this amendment, said: "It is generally conceded that the management of the prisons by a board of inspectors has been a disastrous failure. Under the change proposed, the superintendent will be at all times directly responsible to the governor, and he to the people, for the proper and faithful discharge of the important duties pertaining to this branch of the public service." The legislature of 1873 approved this section without change, but it was omitted in 1874.

§ 4. **Treasurer.**— *The treasurer shall be chosen by the senate and assembly on joint ballot, and hold his office for three years, and until his successor shall be chosen and qualified. He shall, before entering upon the duties of his office, give such security as may be required by law.* He may be suspended from office by the governor during the recess of the legislature, and until thirty days after the commencement of the next session of the legislature, whenever it shall appear to him that such treasurer has, in any particu-

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lar, violated his duty. The governor shall appoint a competent person to discharge the duties of the office during such suspension of the treasurer.

This section was substantially in accordance with Governor Hoffman's suggestion. Erastus Brooks proposed to give the governor the power to appoint the treasurer, but the committee reported in favor of his selection by the legislature, and this plan was adopted by the Commission. The legislature of 1873 approved this section, but it was omitted in 1874.

§ 5. State officers, duties of in certain cases. — The comptroller, secretary of state, attorney general, treasurer, and state engineer and surveyor shall be the commissioners of the land office. *The office of commissioner of the canal fund is abolished, and all the powers and duties heretofore had or performed by the commissioners of the canal fund shall hereafter be had and performed by the comptroller. The canal board shall consist of the lieutenant governor, secretary of state, treasurer, attorney general, state engineer and surveyor, and superintendent of public works.*

This was a substitute for § 5 of article 5 of the Constitution of 1846, and materially modified the original section. The Convention of 1867 proposed some changes in this section, which I have noted in the preceding chapter. The legislature of 1873 approved this section, except that the lieutenant governor was added as one of the commissioners of the land office. This section was omitted by the legislature in 1874, but its consideration was resumed by the Convention of 1894, when, with some modifications, it was included in the revised constitution recommended by that Convention.

§ 6. Superintendent of public works.—*A superintendent*

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of public works shall be appointed by the governor, with the consent of the senate, and hold his office until the end of the term of the governor by whom he was nominated, and until his successor is appointed. He shall receive for his services a compensation to be fixed by law. He shall be required by law to give security for the faithful execution of his office before entering upon the duties thereof. He shall be charged with the execution of all laws relating to the repair and navigation of the canals; and also, of those relating to the construction and improvement of the canals, except so far as the execution of the laws relating to such construction or improvement shall be confided to the state engineer and surveyor; subject to the control of the legislature, he shall make the rules and regulations for the navigation or use of the canals. He may be suspended or removed from office by the governor whenever, in his judgment, the public interest shall so require; but, in case of the removal of such superintendent of public works from office, the governor shall file with the secretary of state a statement of the cause of such removal, and shall report such removal, and the causes thereof, to the legislature at its next session.

The creation of this office was suggested by Mr. Loomis in the Convention of 1846, and was recommended by the Convention of 1867. The subject was therefore not new to the Commission, and it was only necessary to agree on the details of a plan of canal administration under a single officer. The Convention of 1867 had proposed to fix the superintendent's term at five years. There was some difference of opinion concerning the tenure of office, but under the plan reported by the committee on canals the superintendent was to hold office only during the term of the governor by whom he was appointed. This tenure was adopted by the Commission and included in the section reported to the legislature. It will be observed that the governor was authorized to suspend or remove the superintend-

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ent, and in case of a removal he was required to file with the secretary of state a statement of the reasons therefor, and report the same to the legislature at its next session. Commenting on this provision the Commission, in its report to the legislature, said it was thought that this would "guard against the removal of a good officer capriciously or for merely political reasons, while, at the same time, the governor will be enabled promptly to depose an incompetent or corrupt officer without the details of a trial or the necessity of proving the malfeasance, of the existence of which there may be no real doubt, but which it may be nearly or quite impossible to establish by legal evidence." The section was approved by the legislature of 1873 without change, but was omitted in 1874.

§ 7. *The superintendent of public works shall appoint not more than three assistant superintendents, whose duties shall be prescribed by him, subject to modification by the legislature, and who shall receive for their services a compensation to be fixed by law. They shall hold their office for three years, subject to suspension or removal by the superintendent of public works whenever, in his judgment, the public interest shall so require. Any vacancy in the office of any such assistant superintendent shall be filled, for the remainder of the term for which he was appointed, by the superintendent of public works; but in case of the suspension or removal of any such assistant superintendent by him, he shall at once report to the governor, in writing, the cause of such removal. All other persons employed in the care and management of the canals, except collectors of tolls and those in the department of the state engineer and surveyor, shall be appointed by the superintendent of public works, and be subject to suspension or removal by him.*

This was a part of the plan embraced in the foregoing

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section, and was approved by the legislature of 1873, but was omitted in 1874.

§ 8. **Canal commissioners abolished.**—*The office of canal commissioner is abolished from and after the appointment and qualification of the superintendent of public works, until which time the canal commissioners shall continue to discharge their duties as now provided by law. The superintendent of public works shall perform all the duties of the canal commissioners and board of canal commissioners, as now declared by law, until otherwise provided by the legislature.*

The abolition of the office of canal commissioner was deemed an essential part of the plan of reducing canal administration to a single head. This section was also approved by the legislature of 1873, but was omitted in 1874.

§ 9. **Vacancies, how filled.**—*The governor, by and with the consent of the senate, shall have power to fill vacancies in the offices in this article named, except as therein otherwise provided; or, if the senate be not in session, he may grant commissions, which shall expire at the end of the next succeeding session of the senate.*

This section was approved by the legislature of 1873, but was omitted in 1874.

§ 10. *The secretary of state, attorney general, state engineer and surveyor, and treasurer, in office at the time this article shall take effect, shall hold their offices until their successors are appointed.*

The legislature of 1873 modified this section by omitting the secretary of state, who had been transferred to § 1. It was omitted in 1874.

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§ 11. The powers and duties of the respective boards and of the several officers in this article mentioned, shall, *except as herein otherwise provided,* be such as now are or hereafter may be prescribed by law.

This section was approved by the legislature of 1873, but was omitted in 1874.

Section 12, relating to offices for weighing, etc. (§ 8 of the existing Constitution), was continued without change.

In the legislature of 1874 the amendments to article 5 were once agreed to in each house, but they were afterwards rejected by the assembly, and so were not submitted to the people. This postponed action on the sections relating to the superintendent of public works and the superintendent of prisons, but they were considered again by the legislatures of 1875 and 1876.

ART. VI. JUDICIARY.

The Commission proposed the following addition to § 18:

"Judicial officers of courts, not of record, in the several cities of the state, having a population of not less than three hundred thousand, shall be appointed by the governor, with the consent of the senate, for a term of four years; and shall be subject to removal after due notice, and an opportunity of being heard, by such courts as may be prescribed by law for causes to be assigned in the order of removal."

This section in its original form applied to all cities. This amendment was agreed to by the legislature of 1873, but was rejected in 1874. This was the only amendment to article 6 recommended by the Commission. This article had been so recently revised that there was little occasion for its amendment. The Com-

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mission considered and rejected propositions for establishing justices' courts in towns on the basis of population, for district courts in each county, not exceeding one for each assembly district, providing that the "disqualifications resulting from judgment in cases of impeachment shall continue until removed by concurrent resolutions of the senate and assembly," providing for seventeen additional justices of the supreme court,—three in the first district and two in each of the others,—and for nine judicial districts, one to be composed of the counties of Kings, Queens, Suffolk, and Richmond, and also for reorganizing the general terms of the supreme court.

ART. VII. CANALS.

The Commission recommended the following addition to § 3, as amended in 1854:

"No extra compensation shall be made to any contractor; but if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel such contract."

In the article on the canals in the chapter on the Convention of 1867 I have given a sketch of the amendment proposed by Erastus Brooks and adopted by the Convention, providing that no bid should be rejected for informality, and that "no alteration of the plan or of any specification shall be made before or after the execution of any contract," except with the consent of certain canal officers, and have quoted from the remarks by Mr. Brooks showing that, under the existing canal contract provision, numerous frauds were perpetrated on the state, and by a process of manipulation described by him the

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contract was really let to the highest bidder. The Commission, instead of adopting this provision, concluded to recommend the foregoing addition to § 3, which was proposed by Mr. Richmond. The committee on canals presented the following reasons for the amendment:

"It is believed that this provision, while it is evidently just and equitable, will be of great value to the state. Many contracts have heretofore been taken at prices known to be unremunerative, in the belief that, upon subsequent application to the legislature, the prices would be raised. In this way the provisions of the present Constitution for letting contracts to the lowest bidders have been practically evaded, and by shrewd, not to say corrupt, management, great sums of money have been improperly obtained from the state."

This amendment was approved by the legislatures of 1873 and 1874, and adopted by the people.

§ 6. Canals not to be sold.—The legislature shall not sell, lease, or otherwise dispose of the *Erie canal, the Oswego canal, the Champlain canal, or the Cayuga and Seneca canal;* but they shall remain the property of the state, and under its management forever. *Hereafter the expenditures for collections, superintendence, ordinary and extraordinary repairs on the canals named in this section shall not exceed, in any year, their gross receipts for the previous year. All funds that may be derived from any lease, sale, or other disposition of any canal, shall be applied in payment of the debt for which the canal revenues are pledged.*

This permitted the legislature to dispose of any canal not named in the section. In the Convention of 1867 an attempt was made to modify the existing provision so as to leave the legislature at liberty to dispose of any canal which did not pay expenses; but the Convention concluded to adhere to the policy established by earlier

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Constitutions, and prohibit the disposition of any canal. The amendment recommended by the Commission originated in a proposition offered by Mr. Howland, prohibiting the sale of any canals except those mentioned in the section. Mr. Davis proposed an addition to the Howland amendment, directly authorizing the legislature to sell or dispose of any other canal or abandon it in whole or in part. Mr. Bradley proposed that no such abandonment or other disposition of a canal should take effect until approved by the people. Mr. Opdyke proposed a broad provision authorizing the disposition of any canal when sanctioned by a vote of the people. This proposition was afterwards renewed in another form by Mr. Robinson. The middle sentence relating to canal expenditures was proposed by Mr. Kernan, except that, on motion of Mr. Rogers, the words "gross receipts" were substituted for "joint revenues." Mr. Opdyke proposed the last sentence of the section as adopted. The Commission rejected Mr. Robinson's proposition that canal tolls be maintained at rates sufficient to pay all canal expenses, and that no tax should be levied upon the people of the state for these purposes.

In its report accompanying the section the canal committee expressed the opinion that "most of the lateral canals have outlasted their usefulness;" that they had been for many years and were likely to continue to be "financially a great burden to the state," which they said was especially true of the Chemung, Chenango, Black River, Crooked Lake, and Genesee Valley canals. The committee quoted from the canal auditor's report to the Convention of 1867, from which it appeared that the net cost of these canals at that time amounted to almost $33,000,000; further statistics furnished to the Commission by the canal auditors for the ten years ending 1872 showed that the debt against these canals for that period,

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after crediting them with their own tolls proper, and their contributions to the tolls of the Erie canal, and charging them with their own repairs only, was, for ordinary repairs, $3,116,763.80, and for all repairs $4,148,938.52, or an annual average of more than $400,000. In the chapter on the Convention of 1846 I have referred to the attempt to incorporate in the Constitution a provision authorizing the sale of the then unfinished Genesee Valley and Black River canals. It was believed that these canals would be a burden to the state, and that if they could then be sold private enterprise might be induced to complete them. They had then cost about $5,350,000, but the Convention, by a margin of ten votes, refused to authorize their abandonment. The other canals included in the plan of the Commission had been completed prior to the Convention of 1846. These water ways had been constructed in accordance with the policy of internal improvements which prevailed in the first half of the last century, and which was inaugurated before the era of railroads. While several of the lateral canals had not paid expenses, they had served the primary purpose of opening communication with some of the richest portions of the interior of the state, and the state had therefore derived an indirect benefit from their construction and operation. In addition to the argument for the abandonment of these canals, based on the large sums required for their maintenance, and the decline in receipts, the committee said that "the localities which, in the past, have been chiefly benefited by the lateral canals, are now well supplied with railroads, and are no longer dependent upon these canals for transportation and transit;" that the state had already been "sufficiently taxed to support these public works," and that it was "probable that the majority of the inhabitants along their respective lines will perceive the justice and propriety of

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relieving the state from their burden." The committee then referred to the "smaller laterals,"—The Baldwinsville, Oneida River Improvement, Seneca River Towing Path, and Cayuga Inlet,—but without stating any figures relating to them. The committee, after quoting statistics showing the net profits of the Champlain, Oswego, Cayuga and Seneca canals, said of the Erie canal, without stating revenues, that it had been "the source of large profits to the state," and expressed the opinion that public sentiment was almost unanimous against the transfer thereof by the state. But the committee believed "it to be time to relieve the canal system from the odium caused by the nonpaying laterals," and to accomplish that result recommended the adoption of the foregoing section. This section was approved and adopted without change.

By this amendment and subsequent action by the legislature and the canal department the abandoned lateral canals south of the Erie have practically passed out of our constitutional history, and this note may appropriately be closed with a brief sketch of the various steps taken by the legislature and canal authorities in disposing of them.

Governor Tilden, in his annual message of 1875, gives the following statistics concerning canals, which are especially interesting in view of the abolition of canal tolls seven years later, and the early abandonment of the lateral canals:

"During the last three years the income of the Erie canal, considered alone, has been $8,143,536.21, and its expenses $5,079,063.30, yielding a surplus of $3,064,472.91, or an average for each year of $1,021,490.97. The excess of expenditure over income of the three other canals (the Champlain, Oswego, and Cayuga and Seneca) which are to be retained by the state has been $1,820,002.14, or three fifths of the surplus produced by the Erie. Considering the four as a system collectively, the

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surplus has been $1,244,470.77, or an average for each year of $414,823.59.

"During the same three years the five other canals (Chenango, Chemung, Genesee Valley, Black River, and Crooked Lake) to which the constitutional amendment applies have given an income of $119,864.45, or for each year of $39,954.81, against an expenditure of $1,596,499.74, or for each year of $532,166.59. They have consumed all the net income of the paying canals, and have charged the state with a loss of $232,164.52, or, for each year, $77,388.17. In addition to this annual loss, the whole burden of the sinking fund to pay the canal debt is thrown upon the state."

In the same message the Governor called attention to the constitutional amendment which removed the prohibition against the sale of the lateral canals, observing that it was undoubtedly the intention by the amendment "to disencumber" the canal revenues, and "disembarrass the treasury" in respect to those canals. He thought it not feasible to dispose of them on conditions which would require the purchaser to maintain them, and that any other disposition meant their "practical abandonment;" that those portions which descend toward the Erie canal acted as feeders to that canal; "the supply cannot be diminished and might be judiciously increased. The improvement of the water way contemplated will call for more water," and great care ought to be used in determining the rights of the state as well as individual rights affected by the canals, and whether any, and how much, of the property of the state connected with the canals, should be sold. He therefore suggested a special commission of four persons to examine and report concerning the various matters involved in the disposition of these canals, and that, in the meantime, no more money be expended on them than was necessary.

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The legislature did not adopt the Governor's suggestion, but passed a statute requiring the canal commissioners and the state engineer and surveyor to examine the Crooked Lake, the Chemung, the Genesee Valley, the Chenango, and the Black River canals, and report to the canal board their conclusions relative to the lease, sale, or abandonment of such canals. Their report was presented to the legislature in 1876.

Adin Thayer, the commissioner who reported on the Black River canal, recommended its retention by the state for the reasons that it was needed as a feeder to the Erie canal, that if retained as a feeder it could be maintained as a water way at small additional expense, and that its abandonment would be followed by a marked decrease in the assessed valuation of property in its neighborhood, and consequently the amount of taxes collected there would be sufficiently diminished to "counterbalance any apparent gain to the state by such abandonment."

James Jackson, Jr., the commissioner who reported on the Genesee Valley canal, recommended a sale at a nominal price for canal purposes to a purchaser who would agree to maintain it and indemnify the state against any damages arising from its use; or, if such sale be not practicable, that the canal be leased on the same conditions, and that if it be not sold or leased the toll sheet of 1869 be restored and made applicable to it, and that the canal be run with a view to its abandonment in three or five years. Of the Chemung, Crooked Lake, and Chenango canals it was said that they were built before railroads were in vogue. "The opening of the Erie canal created a mania for canals which continued unabated until superseded by the age of steam." That in maintaining the "cross-cut canals," "it cost over $10 to obtain one," and that the commerce of the canals scarcely paid the cost of collection.

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The legislature did not act on this report; according to the journal the senate declined to print it, but it was printed as an assembly document, and is therefore accessible. The legislature of 1876 created a new commission, composed of Warner Miller, William Foster, E. W. Chamberlain, and Artemus B. Waldo, to examine the lateral canals, and report to the legislature their opinion and recommendations concerning the proper disposition thereof. The commission, in its report presented to the legislature of 1877, recommended the retention of the northern part of the Chenango canal as a feeder to the Erie and the abandonment of the remainder; that the Chemung and Genesee Valley canals be opened in 1877 long enough to permit the shipment of a large quantity of lumber dependent on these canals for cheap transportation, and that they be afterwards closed; that the Crooked Lake canal be closed, and that the Black River canal "with its feeders and reservoirs should be maintained as a useful and necessary portion of the canal system of the state." The commission then made a general recommendation that the superintendent of public works be authorized to sell at public auction the canal superstructures, real estate, water powers and privileges which may properly be sold, that cities and villages be given the prior right to purchase canal property within their limits or contiguous thereto; that elsewhere canal lands be conveyed to adjacent owners upon their relinquishing all claims against the state for damages. Concerning the title to canal lands, the commissioners expressed the opinion that it was "beyond dispute that the state holds the property so acquired in fee simple, and that no part thereof will revert to the original owners upon the simple act of abandonment by the state," and that the state could convey a fee simple title to such lands.

Governor Robinson, in his annual message of 1877,

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after showing that the gross receipts for the preceding year from the lateral canals south of the Erie, excepting the Cayuga and Seneca, were only $20,521.20, and that the deficiencies on the same canals amounted to $22,449.-91, said that it would be seen from these results of the year's business "that those canals are rapidly disposing of themselves, and have already become of little value even to the people living near them."

The legislature of 1877 passed chapter 404, providing for the abandonment of the lateral canals south of the Erie, as follows: That part of the Chenango canal south of the village of Hamilton on the first day of May, 1878; Chemung canal at the close of navigation in 1878; Genesee Valley canal on the 30th day of September, 1878, and the Crooked Lake canal from the passage of the act, June 4, 1877. Provision was also made for the use of the northern part of the Chenango canal and its appurtenances as a feeder to the Erie canal, for the sale of certain specified canal property, for the transfer to cities and villages of canal property therein on compliance with certain conditions, for the release of the canals which passed through farm lands to adjacent owners on their relinquishing all claims for damages arising from their abandonment, or for the maintenance of bridges or other canal structures, for the sale of the canals to individuals or corporations for railroad or canal purposes, and for the payment into the canal debt sinking fund of the net proceeds received from the sale of any canal property.

It will be observed that the Black River canal was not included in this statute. Both commissions had recommended its retention either as a feeder to the Erie canal or for general canal purposes, and we shall have occasion to note in the next chapter that the legislature acted on these recommendations, and submitted an amendment to the people, which was adopted in 1882, restoring the

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prohibition against the disposition of the Black River canal which was removed by the amendment of 1874.

Several statutes relating to these canals have been passed since the abandonment act of 1877, but they are easily accessible and need not be cited here. It will be remembered that, by the amendment of 1874 authorizing the sale of these canals, the proceeds were to be used in payment of the canal debt; but it has not been the policy of the state to attempt any substantial reimbursement for the expenses incurred in their construction, maintenance, and operation. The contributions to the canal debt sinking fund from this source have been very meager; according to figures furnished to me at the comptroller's office the entire net amount thus far received (1905) is a little less than $40,000. The state has released large portions of the lateral canal property to individuals, corporations, and municipalities, usually without direct pecuniary consideration, but still owns considerable property which was once a part of such canals or their appurtenances.

The Commission transferred the existing §§ 13 and 14 to article 3, and they became respectively §§ 20 and 21 of that article as amended in 1874.

§ 13. **Sinking funds.**— *The sinking funds provided for the payment of interest and extinguishment of the principal of the debts of the state shall be separately kept and safely invested, and neither of them shall be appropriated or used in any manner, other than for the specific purpose for which it shall have been provided.*

This section was proposed by Mr. Robinson. The Commission said it was intended to "maintain the inviolability of the sinking funds," and "that it was so obviously just that it needs only to be read in order to be approved." It was adopted in 1874.

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§ 14. Limitation of claims against state.—*Neither the legislature, canal board, canal appraisers, nor any person or persons acting in behalf of the state, shall audit, allow, or pay any claim which, as between citizens of the state, would be barred by lapse of time. The limitation of existing claims shall begin to run from the adoption of this section; but this provision shall not be construed to revive claims already barred by existing statutes, nor to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claims duly presented within the time allowed by law, and prosecuted with due diligence from the time of such presentment. But if the claimant shall be under legal disability the claim may be presented within two years after such disability is removed.*

This section was proposed by Mr. Leavenworth. The revised Constitution of 1867 contained two sections (6 and 8 of article 7) relating to this subject. Section 6 provided, among other things, that "no claim for damages growing out of the construction, maintenance, or repair of the canals, feeders, or structures connected therewith, shall be heard or allowed unless made within two years after it shall arise," and by § 8, "the laws of limitation, except as provided in the 6th section of this article, shall prevail in favor of the state as in favor of individuals." The Convention and the Commission proposed similar provisions relative to disabilities, the time when the limitation should begin to run, and the prohibition against the revival of claims by the new section. The foregoing section was adopted in 1874 without change. It also appears in a modified form as § 6 of article 7 of the Constitution of 1894.

Mr. Preston proposed a provision authorizing the sale of the salt springs when sanctioned by a vote of the people, but the Commission did not deem it desirable to take any action on this subject.

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ART. VIII. CORPORATIONS.

§ 4. Savings banks.— *The legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights, and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law and to such amendments as may be made thereto. And no such corporation shall have any capital stock, nor shall the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings.* The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.

The first sentence was proposed by Mr. Kernan; the prohibition against capital stock was proposed by Mr. Leavenworth, and the provision prohibiting a trustee or director from being interested in any loan by the bank was inserted at the suggestion of Mr. Brooks. The last sentence was continued from the existing Constitution. The Commission, in a statement of its reasons for the section, said that many special charters had been granted to savings banks "with capital stock, and stockholders interested pecuniarily in the conduct of the business of the institution, and in the profits derived therefrom, and without the proper and necessary limitations and safeguards as to the investment and security of the savings deposited with them, and allowing the business to be conducted very much in the manner of an ordinary banking business upon the savings deposited with them, with all the risks incident to that kind of business." Several of such institutions had failed, resulting in loss to the depositors. The Commission thought the failures were

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caused by a desire to make large dividends, which induced the managers to take risks "inconsistent with the safety and security of the deposits;" the Commission therefore recommended a general law for these institutions, and expressed confidence that the legislature, in framing such a law, would "provide all the necessary safeguards and limitations" concerning the investment and security of deposits. Referring to the provision that the banks should have no capital stock and that the trustee should have no pecuniary interest in the business, the Commission say that "the reason for this is to remove, if possible, all temptations to an improper use of their funds, and to prevent their engaging in and taking risks of an ordinary banking business." This section was approved by the legislature and adopted in 1874.

§ 10. **State aid prohibited.**—*Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held by the state for educational purposes.*

In former chapters a sketch has been given of the causes that led to the constitutional provision adopted in 1846 prohibiting the loan of the credit of the state "to, or in aid of, any individual, association, or corporation." This subject was considered in the Convention of 1867, and it was there proposed to extend the prohibition to the money and property of the state; but the Convention declined to adopt this proposition. An effort was also there made to check appropriations to sectarian institutions. This effort and the petitions presented against

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such appropriations led to an interesting discussion of the propriety and extent of state aid to private institutions, even for charitable purposes. On one side it was urged that such appropriations were used to promote sectarian instruction; on the other it was asserted that such appropriations were properly used, and were a real advantage to the state, for the reason that in this way indirect aid was afforded to persons who would otherwise have become public charges, and that while these were under the control of particular religious denominations they provided better facilities for the instruction of some classes of unfortunates than could be furnished under a state system. In the chapter on the Convention of 1846 I have given a history of the subject of state aid to corporations, from which it will appear that as early as 1790 the state contributed public funds for charitable purposes, and that within the next twenty-five years there were numerous instances of the same general character. Thus before 1820 large sums were appropriated for certain colleges, and in 1822 provision was made for the instruction of thirty-two indigent deaf mutes, four from each senate district, in the New York Institution for the Deaf and Dumb, which had been incorporated in 1817, and which, prior to 1822, had received state appropriations for the same purpose. The policy thus early established resulted in large appropriations to institutions erected on a charitable or educational foundation, and which appropriations, while nominally for the support of a specified class of persons, were often used for the general purpose of the institutions. The effort in the Convention of 1867 to prohibit, or, at least, restrict, such appropriations did not succeed. It was difficult by constitutional provision to draw a line between institutions which might properly receive state aid, and institutions which were designed primarily to propagate religious

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doctrines, and where the care of unfortunates was only incidental to their general purposes. The same difficulty was experienced in the Convention of 1894, and the controversy there over a proper state policy on this subject resulted in an unsatisfactory compromise. The opposition to sectarian appropriations was continued, and I have already in this chapter noticed the introduction of amendments on this subject after the Convention of 1867 and the passage by the senate of such an amendment in 1872. The agitation of this subject in the Commission was doubtless the real cause of the section now under consideration. Early in the session Mr. Dudley offered an amendment prohibiting the legislature from appropriating "the public moneys or property to any private or sectarian purpose whatever," and Mr. Leavenworth proposed that "neither the legislature nor any county, city, town, school district, or other public corporation shall ever make any appropriation or donation of money, land, or other property, or pay from any public fund whatever, anything in aid of any religious or charitable institution, which is under the exclusive control of any one religious denomination, or of any private association or corporation." These amendments were referred to a select committee on sectarian appropriations. It will be observed that the amendment of 1846, prohibiting the loan of the credit of the state in aid of a private enterprise, did not restrain the legislature from making appropriations of public money to private institutions. If this policy were to be changed it was necessary to extend the constitutional prohibition to appropriations of money or property, and this, as already noted, had been proposed in 1867. The committee did not deem it expedient to attempt to limit the prohibition to sectarian institutions only, but proposed the following amendment, intended to include all institutions:

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"Neither the credit nor the money nor property of the state, or of any county, city, village, or town, shall in any manner be given or loaned to or in aid of any association, corporation, or private enterprise."

But this was clearly too broad, for besides prohibiting objectionable appropriations, it also prohibited legitimate appropriations for charitable and educational purposes which were wholly free from any sectarian influence. The Commission was not satisfied with the proposed section, and after some discussion it was recommitted to the select committee for further consideration.

The select committee reported its proposed amendment again, but with an addition that "this provision shall not, however, prevent the legislature from making such arrangement for the education and support of the blind, the deaf and dumb, and the juvenile delinquents as to it may seem proper." This was a very important exception to the first part of the section, for it vested in the legislature ample authority in its discretion to provide for the education and support of the unfortunates specified, and it might employ private institutions as public agencies for this purpose. While the section was under discussion the Commission adopted an amendment proposed by Mr. Silliman, that the prohibition against state aid should not prevent the legislature "from making grants of water rights or of lands under water to riparian owners," but this was omitted in the section as finally prepared. The Commission evidently deemed the section as thus amended too broad, and concluded to limit it to state appropriations only. The local prohibition of the section was included in another amendment. Mr. Brooks proposed, and the Commission adopted, a substitute for the entire section in the following form: "Neither the credit nor the money of the state shall be

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given or loaned to or in aid of any association, corporation, or other private undertaking." The Commission rejected a proposition by Mr. Pringle to include property as well as money in the prohibition, and also a proposition by Mr. Dudley to limit the prohibition to sectarian institutions. The Commission then, on motion of Mr. Rogers, added the exception relating to the education and support of unfortunates, which had been included in the second report of the select committee. An additional clause proposed by Mr. Leavenworth was also adopted, excepting from the prohibition of the section any fund or property held by the state for educational purposes.

The Commission, in its report accompanying the section, said that "the manner in which moneys have been appropriated by the state for charitable purposes for many years past, excepting those appropriated for state institutions, has been a cause of very general complaint;" that such appropriations had been distributed unequally and disproportionately both as to population, locality, and the needs of different parts of the state; and that the "moneys are given to private corporations not owned or controlled by the state, which cannot superintend the expenditure of the money, or even control it, so far as to compel its use for the purposes for which it was appropriated." The Commission expressed the belief that the efficiency of the various charitable institutions would not be seriously impaired by the prohibition. "The boards of supervisors and the common councils have all the power they have heretofore had to pay to each class of said institutions the most liberal compensation for the care and support of the different classes of unfortunates for whom they were designed;" and that while the amendment "cuts off all gifts of money and of loaning of the credit of the state to all other associations, corporations, etc., they are all subject to the same objection,

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and appropriations to them of the money of the state are liable to the same abuses. They must all stand or fall together." The legislature approved this section, and it was included in the amendments adopted in 1874.

§ 11. **Local indebtedness.**— *No county, city, town, or village, shall, hereafter, give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, or become directly or indirectly the owner of stock in or bonds of any association or corporation, nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes. This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law.*

The substance of this provision was proposed in the Convention of 1867, and as I have pointed out in the previous chapter the amendment was suggested to prevent town bonding in aid of railroads by which several towns had assumed large and even ruinous liabilities. That Convention once agreed to an amendment prohibiting the legislature from enacting any law permitting a municipality to aid a private corporation or become the owner of its stock, but finally concluded not to recommend any provision on the subject. Governor Hoffman in 1872 recommended the immediate repeal of the general town bonding law, remarking that "aid has already been given to railroads, upon the credit of municipalities, to quite as great an extent as is wise, and in some instances to the oppression of taxpaying communities." The Commission may therefore be deemed to have resumed the consideration of this subject where it was left by the Convention. For the purpose of aiding its deliberations the Commission sought and obtained from various local officers a statement of the indebtedness of

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municipal corporations, from which statement a table was prepared showing in detail the indebtedness by classes of counties, cities, towns, and villages. The committee on local indebtedness presented this table in connection with its report on the subject, making a recapitulation of the statistics and deducing certain conclusions therefrom. Without burdening these pages with statistics, even on this important subject, it is worth while to consider a few of the results of the inquiry instituted by the Commission concerning municipal indebtedness. Thus it appears that in 1872 there had been issued "by towns, cities, and villages of the state, in aid of railroads, and remaining unpaid, $26,946,662.09.

For the purpose of erecting public buildings, such as courthouses, city and town halls, and school buildings, $10,416,864.84.

Of the debt growing out of the recent Civil War, which then remained unpaid, $26,934,696.19.

Bonds issued for roads, boulevards, streets, avenues, and bridges, $36,658,144.59.

For waterworks and fire apparatus, $29,335,383.79.

For parks, local improvements, and other purposes, $84,052,655.08.

Making the aggregate bonded indebtedness of counties, cities, towns, and villages of the state the enormous sum of $214,344,676.58, which amounted to a little more than 10 per cent of the assessed valuation of the property of the state.

Twenty-one counties had no bonded debt, thirty-nine, including New York, had a bonded debt amounting in the aggregate to $46,685,264.40; excluding New York, the county bonded debt was $15,030,159.94, which was about 2⅔ per cent of the valuation.

There were then twenty-four cities, all of which, except Lockport, had a bonded debt. The aggregate city

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indebtedness was $137,539,609.34, "exclusive of the county debt of New York, and a portion of the town debt of Yonkers, which are a debt upon those cities." The city indebtedness amounted to 9 $\frac{3}{16}$ per cent of the assessed valuation of the property.

517 towns had no bonded debt, 416 were bonded for $25,167,781.33, which was 7⅔ per cent of their valuation, some towns having been bonded for 20, 30, and even 50 per cent of their valuation.

Of the 256 villages then incorporated, 66 reported an aggregate indebtedness of $2,204,700.09.

It also appeared that a large amount of the town bonds were issued in 1872, showing that the practice of town bonding was still in progress. The results of the inquiry concerning municipal indebtedness convinced the committee that the time had arrived when it was "absolutely necessary to impose some restraint upon the power of municipalities to incur debt." The committee therefore recommended the following section:

"No city, town, or village shall hereafter give any money or property, loan its credit to or in aid of any individual, association, or corporation, or become, directly or indirectly, the owner of stock in any association or corporation, or contract any debt or liability for the construction of any roads, public parks, or buildings, or the purchase of land or materials for the same, to an amount which, with the amount of its existing indebtedness, shall exceed 10 per cent of the value of its taxable property, to be determined by the last assessment roll thereof."

The Commission, on motion of Mr. Morris, adopted the following substitute for this section:

"No county, city, town, or village shall hereafter give any money or property, or loan its credit to or in aid of any individual, association, or corporation, or become, directly or

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indirectly, the owner of stock in any association or corporation, nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, village, or municipal purposes."

The Commission rejected a proposition by Mr. Jackson to include in the section the 10 per cent limitation clause reported by the committee. On motion of Mr. Rogers the section was amended so as to prohibit local aid of money as well as credit, and also to prohibit a municipal corporation from acquiring bonds as well as stock in any association or corporation. The Commission evidently did not intend to impose any specific limitation on the amount of municipal indebtedness, for it not only rejected Mr. Jackson's proposition already noted, but afterwards rejected a similar proposition presented by Mr. Dudley. The Commission once, on motion of Mr. Kernan, struck out "individual" before "association or corporation," which would have permitted local aid to individuals, but this word was afterwards restored. Mr. Davis sought to exclude charitable corporations from the operation of the section, but his proposition was rejected. Up to this point the section as agreed to was as rigid as the first part of the preceding section; but on motion of Mr. Rogers the Commission adopted the concluding sentence authorizing local aid in support of the poor. The section was approved by the legislature and adopted in 1874. Mr. Brooks proposed a section regulating the election of directors in private corporations, but the Commission thought it inexpedient to include it in the Constitution. Mr. McIntosh offered a series of amendments relating to railroads, providing, among other things, that railroads should be deemed public highways, and free to all persons for the transportation of persons and property, subject to legislative regulation, and the

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legislature was required to fix the reasonable and maximum rates of charges; limiting the issue of railroad stocks and bonds; declaring the rolling stock and other movable property personalty, subject to execution, and prohibiting any exemption of such property by the legislature, prohibiting consolidation of railroad companies owning competing lines, and requiring sixty days' notice to the stockholders of any proposed consolidation, and requiring a majority of railroad directors to be citizens and residents of this state. The committee on corporations declined to recommend these amendments, but did recommend a provision which was also included in the proposed Constitution of 1867, prohibiting consolidation of railroad corporations owning parallel or competing lines of road; but this proposition was rejected by the Commission.

ART. IX. EDUCATION.

The Commission did not recommend any amendments to this article. Mr. Opdyke proposed an amendment providing for "compulsory attendance, at some school, of all children residents of this state, between the ages of seven and fourteen years, for at least three months in each year when their health will permit," and also for the free instruction in the common schools of this state of all residents of the state between seven and twenty years of age. The latter amendment was also proposed by Mr. Brooks together with an amendment to the existing school fund section, by including the amendment relative to the college land-scrip fund and the Cornell endowment fund, which had been recommended by the Convention of 1867. It will be remembered that Mr. Opdyke and Mr. Brooks were both members of that Convention, and were therefore familiar with its discussions on these subjects. The Commission did not deem

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it expedient to include any of these amendments in the Constitution.

ART. X. LOCAL OFFICERS.

§ 9. Compensation of officers.—*No officer whose salary is fixed by the Constitution shall receive any additional compensation. Each of the other state officers named in the Constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed, nor shall he receive to his use any fees or perquisites of office or other compensation.*

In its original form, as presented by the committee, the section applied to all officers, and required their compensation to be paid "at stated times;" the latter clause was stricken out by the Commission, and the section was made applicable only to state officers. This section was included in the amendments of 1874.

Mr. Brooks proposed to amend § 1 by providing that county treasurers should hold no other office and should be ineligible for the next three years after the end of their term. The committee reported the amendment adversely. I have already quoted Governor Hoffman's suggestion that district attorneys be appointed by the attorney general or the governor. The Commission made no recommendations on this subject, but Mr. Van Buren proposed an amendment providing that district attorneys be appointed by the court of oyer and terminer where it was held by more than one judge, and in counties where this court was held by only one judge the district attorney was to be appointed by a majority of the judges of the judicial district. A district attorney was to hold office four years, and be ineligible for a reappointment for the next term. Mr. Dudley proposed that the

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district attorney be appointed by the governor, subject to confirmation by the senate. Mr. Close proposed that district attorneys be appointed by the justices of the supreme court in each judicial district, and be ineligible to reappointment.

ART. XI. MILITIA.

The Commission did not recommend any changes in this article.

ART. XII. OFFICIAL OATH.

§ 1. Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the state of New York, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability;" *and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof: "And I do further solemnly swear (or affirm) that I have not, directly or indirectly, paid, offered, or promised to pay, contributed, offered, or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote," and no other oath, declaration, or test shall be required as a qualification for any office or public trust.*

The Convention of 1867 gave serious consideration to the subject of bribery, and as a part of its amendments

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on this subject proposed an addition to § 1 of article 12, relating to the use of corrupt or unlawful means by a candidate to promote his election, including a provision that a person should forfeit his office if convicted of taking a false official oath. Substantially the same section was proposed in the Commission, but after some discussion the committee concluded to divide the oath into two parts, for the reason, as stated in the report submitted to the legislature, that the "article prescribed the oath to be taken by officers chosen by appointment as well as those therein referred to who may be chosen by election. As the provision against bribery is intended to apply alike to the elector and the elected, it appeared to the Commission proper that the oath of office should be so framed that, while the oath now required shall be taken as before, there shall be added thereto, in the case of elected officers, the new clause provided by the amendment."

An amendment proposed by Mr. Dudley provided, after stating the form of the oath, "that any person who shall fail or refuse to take said oath or affirmation shall not be entitled to the office to which he shall have been elected or appointed; and any person who shall swear or affirm falsely in said oath or affirmation shall be removed from his office, and shall be incompetent to hold any office of honor or profit in this state during the term of office to which he was elected or appointed, nor until such disability shall be removed by the legislature."

The middle clause, providing for the removal of an officer who should take a false oath, is worth noting now in view of the removal of the sheriff of Kings county by the governor in March, 1902, for the reason that such sheriff had, in fact, taken a false oath of office. The sheriff contended that the governor had no power to remove him except for a cause arising after his induction

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into office; but the removal was sustained by the court of appeals on the ground that the power of removal was purely executive, and not subject to judicial review. (*Re Guden,* 171 N. Y. 529, 64 N. E. 451.) If this clause had been adopted the governor's power would have been clear. He asserted the principle of the clause by his removal of the sheriff under the conditions indicated.

ART. XIII. AMENDMENTS.

Sec. 1. The Commission proposed to amend the existing provision by providing that amendments agreed to by one legislature should be submitted to the legislature "at its next regular session," instead of to the legislature "to be chosen at the next general election of senators." This amendment was consistent with the plan of legislative organization proposed by the Commission in article 3, where provision had been made for thirty-two senators, to be chosen for four years from eight districts, one fourth to be chosen each year. This provided for a continuous senate, and restored the plan which had been superseded by the Constitution of 1846, which provided for electing all the senators at the same time from single districts. It has already been noted that the legislature rejected the Commission's plan of legislative organization. The new method of proposing constitutional amendments was therefore necessarily rejected, because, without the accompanying change in the senate, a proposed amendment would have been passed on both times by the same senate, which would have been contrary to the established policy of requiring a second consideration of a proposed amendment by a new legislature.

ART. XIV. TEMPORARY PROVISIONS, 1846.

The Commission did not recommend any change in this article.

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ART. XV. CITIES.

In the chapter on the Convention of 1867 I have noticed the amendments there proposed relative to cities, and the result. The rejection of the Constitution proposed by that Convention left unsettled the problems of city government to which the Convention had devoted so much time and serious consideration. Governor Hoffman referred to the subject in his message of 1872, speaking more particularly of the city of New York, and he recommended that the responsibility for good city administration be fixed upon the mayor, by giving him "full power of appointment and removal of all heads of departments, except the police, and making the mayor subject to removal by the governor for malfeasance in office or neglect of duty." The governor made several other suggestions which are not particularly pertinent here, but which have been considered in framing recent charters for the city of New York. Many of the amendments proposed in the Convention of 1867 were renewed in the Commission. In its report accompanying this article the Commission said it "felt compelled to make an effort to secure municipal reform in consequence of the late development of astounding frauds in the government of the city of New York, and from the known tendency to demoralization in the government of other cities of the state. All efforts of the legislature under the provisions of the present Constitution have failed to arrest this tendency. It was therefore deemed of vital importance to the good name and future welfare of the state, and especially of its cities, that some new safeguards should be obtained in the organic law."

The Commission recommended the following sections:

§ 1. Mayor,—election, powers, and duties.—*There shall be chosen, by the electors of every city in this state, a mayor*

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who shall be the chief executive officer thereof, and who shall see that the duties of the various subordinate executive departments are faithfully performed. He shall nominate, and with the consent of the board of aldermen, appoint the heads of such departments. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates under oath. He shall also have power to suspend or remove such heads of departments for misconduct in office or neglect of duty. Mayors of cities shall have the same veto power over acts of boards of aldermen that the governor possesses under this Constitution over acts of the legislature. And boards of aldermen shall have the same power of reconsideration and enactment, by a vote of two thirds of all the members elected, notwithstanding the mayor's objections, that is possessed by the legislature over bills returned to them by the governor without his approval.

§ 2. Heads of departments.—*Heads of departments shall be vested with power to appoint and remove their subordinate officers.*

§ 3. Boards of aldermen and audit.—*The local government of every incorporated city shall be vested in a mayor and a board of aldermen. Aldermen shall be chosen by districts or wards, not more than three from each district or ward; and the whole number of aldermen shall not be less than one to every fifty thousand of population. There shall also be a board of audit, of not less than five nor more than eleven members. They shall be electors of the city and shall be chosen by general ticket, by such electors thereof as shall have paid, individually, in the year previous to the election, a tax on property officially assessed for taxation at not less than two hundred and fifty dollars. The assent of such board of audit, by the vote of a majority of all the members elected thereto, shall be necessary to every resolution, ordinance, or other proceeding of the board of aldermen involving the auditing of claims and accounts, the expenditure of money, the contracting of debts, or the levying of taxes*

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and assessments; and the board of audit shall be clothed with no other power.

Mr. Silliman proposed for cities with a population exceeding 100,000 a common council consisting of a board of aldermen and a board of assistant aldermen. The board of aldermen was to be chosen by electors who were taxable freeholders, but all electors might vote for members of the board of assistant aldermen. He also proposed that no member of the common council should hold any other city office, and no city officer "shall hold a seat in the legislature." The committee on municipal reform reported Mr. Silliman's amendment substantially as proposed by him. But the Commission modified it by omitting the provision limiting the qualification of voters. The clause for a board of audit was proposed by Mr. Van Buren.

Amendments were rejected making the provision applicable only to cities which might approve it on a separate submission of the section, and limiting it to cities with a population exceeding 30,000.

The Commission expressed the belief that if the provision for a board of audit chosen by taxpayers and clothed with power to restrain excessive taxation "and the lavish or corrupt expenditure of money" should "become a part of the organic law of the state, it will prove a most salutary safeguard against the late and flagrant abuses in our municipal governments, and without the abridgment of the true political rights of any citizen. It is not an untried experiment, though novel in form." The Commission then referred to the provision in the village laws and in the charters of some cities giving taxpayers the right to control expenditures of public money in certain cases, and said that the "imperious necessity" of authorizing taxpayers to control the election of officers

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specifically charged with the financial operations of the city was demonstrated by recent events in New York.

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

This was the "home rule" section. The Commission submitted the following reasons for this provision:

"In view of the increased security, for purity and economy in the government of cities, which it is believed cannot fail to result from the concentration of executive power in the hands of the mayor, and the power of financial control vested in the board of audit, it was deemed judicious to confer on cities enlarged powers of local government. This was regarded as eminently proper for two reasons: First, because the citizens of every locality are best informed as to their own wants, and their direct personal interest affords the safest guide to the proper remedy; and, secondly, because it will relieve the legislature of a large share of the local bills with which it is now overburdened at every session. It was not deemed proper, however, to embrace in these exclusive powers of municipal government the absolute control of its police force, or of its commercial and sanitary interests. These are features of state polity on which experienced legislators differ, and it was therefore determined to leave them subject to the control and to the judgment of the legislature."

We shall hear of this subject again in the next chapter and when we study the work of the Convention of 1894.

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§ 5. General laws for cities.—*The legislature, at its first session after the adoption of this article, shall enact a general law for the government of cities, in harmony herewith.*

The foregoing sections in this article contained shall not take effect until the first day of July in the year next succeeding that in which this article is adopted, except that any of the officers therein mentioned may be chosen at any previous time provided by law.

The Conventions of 1846 and 1867 seriously considered the question of general laws for cities, and the latter Convention recommended a provision substantially like that adopted and reported by the Commission, providing for general city laws. In the Convention of 1846 Henry C. Murphy advocated an amendment requiring general city laws in a strong speech, which has been reviewed in a previous chapter. I have quoted Governor Hoffman's observation on this subject, and his opinion that it was impracticable "to frame a uniform charter for all our cities." In the same message (1872) he said that "city charters must, of necessity, according to population and circumstances, differ more or less in detail," and that "a general law aiming at entire uniformity in such charters is, in my judgment, not desirable." The Convention of 1867 considered such a provision practicable, and recommended one accordingly. The Commission entertained the same opinion, and evidently considered a general charter perfectly feasible. The Commission, in its note on this section, seems to have assumed that the legislature could prepare such a general law, for without making any argument it expressed the belief "that the provision will afford much relief to the legislature, by excluding the swarms of local bills now forced upon its attention at every session." It will thus be seen that this Commission, the Convention of 1867, and several of the most prominent members of the Convention of 1846 did

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not share the opinion on this subject entertained by Governor Hoffman, but recent experience confirms his judgment. Beginning with 1895 the legislature and commissions authorized by it have considered the subject of uniform city charters, with special reference to the three classes into which cities were divided by the Constitution of 1894; namely, cities of the third class, with a population of less than 50,000, of the second class, with a population of 50,000 and not exceeding 250,000, and cities of the first class, with a population of 250,000 or more. A uniform charter for cities of the third class has been deemed impracticable, although it has been considered feasible to incorporate certain general provisions in one law applicable to all cities, but the variety and contrariety of interests and conditions make absolute uniformity wholly impracticable. The legislature did enact in 1898 a so-called uniform charter for cities of the second class,—Albany, Rochester, Syracuse, and Troy,—but the numerous amendments by each subsequent legislature illustrate the difficulty of bringing even these four cities under one general and uniform system of local government; indeed, this has not been attempted except in a few particulars; special laws relating to each city are still in force, except as modified by the uniform charter. The number of cities has doubled since the Commission of 1872 considered this subject, and it is now hardly probable that any serious attempt will soon be made to enact a uniform charter for cities of the third class. In the legislature of 1873 this article was approved by the senate, but rejected by the assembly.

ART. XVI. BRIBERY.

This article is quite similar to the article on the same subject proposed by the Convention of 1867; in some respects the provisions are identical. I have given in the

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previous chapter the history of the discussion of this subject, and the reasons which induced the late Convention to propose the article; it seems unnecessary, therefore, to make any further comment now. The Commission said of the article that its "simple purpose" was "purity in office." "The leading reason for the amendment is the inability in the past to procure witnesses capable of giving evidence of guilt. The direct purpose is to overcome, in a practical way, a great public abuse."

The text of the article will be found in the Introduction. This article was approved by the legislature, and became article 15 of the Constitution.

ART. XVII. WHEN AMENDMENTS TO TAKE EFFECT.

§ 1. All amendments to the Constitution shall be in force from and including the first day of January succeeding the election at which the same were adopted, except when otherwise provided by such amendments.

The committee on revision proposed this section, intending by it to fix the time when "the amendments now proposed, or any future proposed amendments to the Constitution, shall take effect if adopted by the people." This section was approved by the legislature and became a part of the amendments of 1874. By virtue of its provisions all the amendments adopted at that time took effect from the first day of January, 1875. It is a continuing provision, applicable to all subsequent amendments, and incorporated in the Constitution the principle of the rule relating to statutes, established early in our history, that every law, unless a different time shall be prescribed therein, shall take effect on the twentieth day after its approval by the governor. By other provisions of the Constitution the political year and legislative term both

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begin on the 1st of January, and by this section constitutional changes take effect at the same time.

In notes to the foregoing articles and sections recommended by the Commission I have indicated the action thereon by the legislatures of 1873 and 1874. Several amendments agreed to in 1873 were rejected in 1874, the remaining amendments which had received the approval of two legislatures were submitted to the people, as required by the Constitution, on the 3d of November, 1874. The legislature provided for submitting, on one ballot, all the amendments which were grouped in eleven propositions, as follows: 1, article 2, suffrage and bribery; 2, article 3, part one, §§ 1 to 8, inclusive; 3, article three, part two, §§ 17 to 25, inclusive; 4, article 4, the governor and lieutenant governor, their powers and duties; 5, article 7, finance and canals; 6, article 8, part one, §§ 4 to 11, relating to corporations, local liabilities, and appropriations; 7, article 8, part 2, § 10, state appropriations; 8, article 10, § 9, relative to compensation of certain officers; 9, article 12, oath of office; 10, new article 15, relating to official corruption; 11, new article 16, time for amendments to take effect. A voter was permitted to cancel any proposition "with ink or pencil" and the inspectors were required to count the ballots for each proposition not so canceled.

The amendments were adopted by an average majority, in round numbers, of 200,000, ranging from 120,000 to 360,000. These figures are significant in view of the vote five years before, 1869, when the revised Constitution, except the judiciary article, was rejected by an adverse majority of 66,000. It will be remembered that many of the amendments submitted in 1874 were also included in the Constitution proposed by the Convention of 1867. The result shows that the people were not opposed to constitutional revision, but were opposed to many

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changes recommended by the late Convention. Thus, after much tribulation and many buffetings, these amendments found a home in the Constitution.

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CHAPTER X.

From 1874 to 1894.

I purpose in this chapter briefly to review constitutional development during the twenty years intervening between the amendments of 1874 to the Convention of 1894, reserving, however, for other chapters the Commission of 1890 and the preliminary history of the Convention of 1894, beginning with the affirmative vote of the people in 1886, on the question of holding a constitutional convention. The amendments of 1874 had disposed of a large number of subjects which for many years occupied the serious attention of statesmen, and, taken as a whole, the period now under review was not so prolific in constitutional amendment and suggestion as some other periods in our history; yet it will be observed that, especially during a part of this period, the canals and the judiciary were subjects of almost constant agitation. Numerous other subjects received legislative attention by way of suggested amendments, and while each branch of the legislature agreed to several amendments, only a few were approved by both branches, and some of these were not submitted to the people. Eleven amendments were adopted during this period; five related to the judiciary, four to canals, one to prisons, and one to local indebtedness. Of these, two (public works and prisons) were adopted in 1876; one (additional justice in second district) in 1879; two (judicial pensions, and three additional judges in New York common pleas) in 1880; four (one additional general term and twelve additional

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justices of the supreme court, free canals, taxation for canal debt, and restoring the Black River canal to prohibition against sale) in 1882; one (limiting local indebtedness) in 1884; and one (court of appeals, second division) in 1888. In addition to these eleven amendments, which became a part of the Constitution, the legislature in 1888 and 1890 passed a prohibition amendment, but it was not submitted to the people. Three other amendments, providing for additional justices of the supreme court, for the determination by the courts of legislative election contests, and authorizing the sale of the salt springs, were voted on by the people in 1892, and rejected; two amendments were also voted on in 1894, providing for an additional county judge in Kings county, and for additional justices of the supreme court in the first and second districts, but the revised Constitution of 1894 was adopted at the same time, and, by a provision on this subject, superseded the independent amendments. Several subjects suggested during this period were considered by the Commission of 1890 and the Convention of 1894, and were incorporated in the Constitution proposed by that Convention. These will be noticed here and will receive further consideration in subsequent chapters.

Amendments.

The possibility that a constitutional amendment might be adopted by a minority of the electors of the state led to a proposed increase in the vote required to make the amendment effectual. An amendment is now adopted if it receives the votes of a majority of the electors voting thereon. In 1883 it was proposed to require a majority of all the electors of the state to adopt an amendment; and in 1893 it was proposed that an amendment should not be deemed adopted unless the total vote for and

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against it should equal 70 per cent of the total vote cast for members of assembly at the last preceding election. In 1883, it was also proposed that a convention must be called by a vote of a majority of all the electors of the state, as appears by the last preceding state census. Neither of these proposed amendments was passed by the legislature.

EXECUTIVE.

No amendment to the executive article was adopted during this period, but several amendments were suggested, including, in 1885 and 1891, an extension of the term of the governor and lieutenant governor to four years; in 1888, creating a pardon commission, composed of three members, appointed by the governor and senate for three years, and transferring to such commission the pardoning power then vested in the governor; and in 1891, adding to the existing provisions relating to extraordinary sessions the requirement that the governor must convene the legislature in extraordinary session on the written request of a majority of the members elected to both houses, and that, when thus called, the legislature could consider only subjects specified in the request.

LEGISLATURE.

The constitutional suggestions concerning the legislature covered a wide field. None of these suggestions reached the form of actual amendment, although some of them were passed by one house and a few of them by both houses.

Organization.—The plan of senate organization recommended by the Commission of 1872 and rejected by the legislature—namely, a senate of 32 members, chosen for four years equally from eight districts, one fourth to be chosen each year—was

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presented again in 1875. In 1878 an amendment was proposed extending the term of members of assembly to two years; and in 1879 an amendment was offered extending the term of senators to four years and members of assembly to two years, which was passed by both houses. In 1888 it was proposed to extend the term of senators to three years and members of assembly to two; in 1891 an amendment was introduced providing for the election of senators for four years, and members of assembly for two years. Senators elected in 1893 were to hold office for three years; thereafter, beginning in 1896, senators were to be elected for four years. Members of assembly elected in 1894 were to hold office two years, and to be thereafter elected biennially. This would have brought the election of senators into the even-numbered years, which was accomplished by the Constitution of 1894. Another plan was proposed in 1891 by Senator Vedder, which was apparently intended permanently to preserve the senate districts as then established, and at the same time allow an increase in the number of senators, according to population. Under this plan the senate must have consisted of not less than 32 members, and an enumeration of inhabitants was to be taken in 1895 and every ten years thereafter. After each enumeration a district must have been given an additional senator if it had sufficient population, and the ratio for such increase was established at 250,000 inhabitants for each senator; that is, a district must have had 500,000 inhabitants before it could have had two senators, and if the enumeration showed a population authorizing this increase the district itself was to be subdivided into two or more districts, but without altering its original boundaries. According to the enumeration of 1892 the senate ratio was, in round numbers, 181,000; and in fact many districts had a much

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smaller number of inhabitants. This plan accentuated the disparity between districts, preserving the smaller and diminishing districts without the possibility of reorganization, and refusing the additional representation to which the larger districts might have been entitled by reason of their increased population, and would have required a district to continue to be represented by only one senator until it had 500,000 inhabitants, while a neighboring district, with a population less than the ratio might also continue to be represented by one senator. This was a departure from the established policy of dividing the state into senate districts on the basis of population, and it applied to the senate the principle which lies at the foundation of assembly representation: namely, that each fixed locality (in assembly representation the county, and in the senate the district) as then established should be the unit of representation, and each be entitled to one representative. A similar plan was proposed for assembly apportionments. The assembly was to consist of not less than 128 members, and each county was to be given the same representation assigned to it by the apportionment act of 1879, and also an additional representation on a ratio of 75,000 inhabitants to each member. According to the enumeration of 1892 the assembly ratio, in round numbers, was 45,000. Under existing constitutional provisions a county which before had two members, and which, by this enumeration, had a population of 135,000, would have been entitled to three members; but under the new plan could not have had three members until its population reached 225,000. I have already pointed out that assembly representation has a double aspect; that is, a fixed locality—the county—is given at least one representative, and additional representatives according to its population. This proposed plan of assembly representation accentuated the locality idea, and practically abro-

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gated the policy of increased representation based on population, for under it a county with a population just less than 225,000 could have had only two members, with a ratio for that county of 112,000, while a neighboring county with a population of 90,000 would have had two members, and other counties with a population less than 20,000 would each have had one member. Thus the inequalities of assembly representation, which must inevitably exist under the double theory above stated, would have become still more marked if this plan had been adopted.

Compensation.—The amendment of 1874 which fixed the legislative salary at $1,500 had apparently not given general satisfaction. In 1875, 1876, 1877, 1878, and 1879, amendments were introduced reducing the salary to $1,000. In 1878 an amendment was introduced reducing the salary to $750. This was offered again in 1879 and passed by both houses. A quite different view was presented by an amendment introduced in 1888, which proposed to increase the salary of senators to $5,000 and members of assembly to $3,000.

Biennial sessions.—I have noticed in previous chapters several attempts to provide for biennial sessions of the legislature. The agitation on this subject continued during and after the period now under consideration. Amendments for biennial sessions were introduced in 1878, 1879, 1880, 1882, 1883, 1884, 1885, and 1891. In 1882 Governor Alonzo B. Cornell called attention to the subject in his annual message, observing that the "experience of two years in the discharge of executive duties" had impressed him with the belief in the benefits to be derived from biennial sessions; that "provision for the support of all departments of the state government can be made two years in advance, quite as well as for a single year;" that extraor-

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dinary sessions would afford opportunity for relief in emergencies, and that the quality of legislation would probably be improved by less frequent sessions.

Contested elections.—In 1883 an amendment was introduced providing that contested cases should be tried and determined by the courts instead of by the legislature, and that "after January 1, 1886, no such contests shall be decided by either house." On the 5th of May, 1890, Governor David B. Hill sent a special message to the legislature, urging the adoption of a constitutional amendment providing for the determination of legislative election contests by the courts. The Governor pointed out that controversies relating to the election of executive, administrative, and judicial officers must be determined by the courts, but that elections to the legislative branch of the government were not subject to review by the ordinary judicial tribunals. He thought the power vested in each house to determine the election, returns, and qualifications of its members had frequently been abused, and that the only remedy was a transfer of jurisdiction in these cases from the legislature to the courts. The message contains an instructive sketch of the history of this branch of parliamentary prerogative and of the struggle which led to the final relinquishment of the right by the House of Commons in 1868. The governor said that "worthy of maintenance as this ancient privilege was regarded in times when the Crown assumed prerogatives which rightly belonged to the representatives of the people, there is no longer any excuse for its retention in legislative bodies, when a state or a nation has an elective, stable, and independent judiciary."

Governor Hill not only recommended an amendment to the state Constitution, but suggested action by the legislature which would bring the subject to the attention

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of Congress, with a view of a similar amendment to the Federal Constitution. In 1891 Governor Hill, in his annual message, renewed his recommendation, and said concerning the proposed amendment of the Federal Constitution, that "the distinguished speaker of the House of Representatives" (Thomas B. Reed) had given the plan his strong indorsement." The legislature at this session passed an amendment adding the following provision to § 10 of article 3:

"The election, returns, and qualifications of any member of either house of the legislature, when disputed or contested, shall be determined by the courts in such manner as the legislature shall prescribe, and such determination, when made, shall be conclusive upon the legislature. Either house of the legislature may expel any of its members for misconduct, but every person who receives a certificate of election as a member of either house, according to law, shall be entitled to a seat therein unless expelled for misconduct or ousted pursuant to a judgment of a court of competent jurisdiction."

In 1892 Governor Roswell P. Flower, in his annual message, called attention to the pending amendment, and urged its adoption; remarking that "since the last annual election, by the mutual consent of both parties to the contest, the highest court practically exercised that jurisdiction in several cases, and with excellent results;" and that "jurisdiction over the determination of such cases properly belongs to the courts." The legislature passed the amendment again in 1892, but it was rejected by the people at the November election by an adverse majority of 5,352.

Miscellaneous.—In 1875 an amendment was proposed, fixing the compensation of pages and other officers of the senate and assembly; also an amendment to § 17, adding

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a provision that the restriction should not prevent laws relating to corporations to provide for a rapid transit in any city by means other than surface railroads, nor laws to provide for terminal facilities at any port of entry. In 1877 the legislature passed an amendment to § 22, providing, in effect, that in the county of New York the power to make contracts, procure supplies, create, audit, or allow county charges, should be devolved on the board of finance instead of on the board of aldermen. This amendment was not passed again. In 1878 an amendment was proposed to § 25, article 3, exempting bills relating to municipal salaries from the restrictions contained in §§ 17 and 18. In 1879 an amendment was proposed to § 26, relating to the powers of boards of supervisors, by requiring such boards to fix the salaries of county judges and surrogates. In 1879 an amendment was passed changing the opening day of the legislature from the first Tuesday to the first Tuesday after the first Monday in January. This amendment was introduced again in 1880, but not passed. In 1883 an amendment was proposed to § 19, requiring claims against the state to be adjudicated by the supreme court or court of appeals before payment by the legislature. In 1885 it was proposed to require the legislature to adjourn on the 3d Friday of April, unless another day should be fixed by law.

STATE PRISONS.

This subject has been considered at length in previous chapters and the reader will there find a sketch of the discussion concerning certain proposed reforms of the prison system. The provision for a state superintendent of prisons, recommended by the Commission of 1872, was, with other amendments to article 5, rejected by the legislature of 1874. An amendment creating this office

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was introduced again in 1875 and passed. Governor Tilden, in his annual message of 1876, recommended that a "thorough inquiry be made with respect to the management of the state prisons, in such manner as the legislature may think best, to the end that such reforms, both in legislation and in administration, may be accomplished as are necessary to produce the desired result." He also recommended the adoption of the amendment passed in 1875, creating the office of superintendent of state prisons. An amendment was introduced at this session proposing a nonpartisan board of managers of prisons and of the Elmira Reformatory, to be appointed by the governor and senate, to hold office five years, with power to appoint and remove for cause a superintendent of each prison and reformatory. This was in substance the provision recommended by the Convention of 1867, and for which the plan of a superintendent of prisons had been substituted by the Commission of 1872. The legislature, at this session, thus had before it both plans. It concluded to adopt the plan for a prison department with a single head, and therefore passed again the amendment of 1875, creating the office of superintendent of prisons. The people approved this amendment at the November election by a majority of 449,868. Governor Lucius Robinson, in his annual message of 1877, commenting on the immense majority by which this amendment had been adopted, said a radical change had been made in the management of prisons, placing "all power and responsibility in the hands of one controlling executive officer. . . . Wearied with the frauds, the wasteful and extravagant expenditures which so often attend the management of irresponsible boards, the people have determined to make this great change, with the hope of better results."

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STATE OFFICERS.

In 1875 article 5, as proposed by the Commission of 1872, was again introduced. The provisions of this article were considered at length in the preceding chapter. In 1883 it was proposed to abolish the office of state engineer and surveyor as a constitutional office. Amendments were offered in 1885 and 1891, extending the terms of state officers to four years.

JUDICIARY.

Court of appeals.—An extended history of the movement for judicial reform, which culminated in the creation of the present court of appeals, has been given in previous chapters, including the provision adopted in 1869 for a commission to dispose of business pending in the former court of appeals, and the amendment continuing the commission adopted in 1872, and providing for the transfer to it of 500 causes by the court of appeals. The term of office of the commissioners expired on the 1st day of January, 1875, but the relief afforded by the commission was only temporary. Causes continued to accumulate in the court of appeals, and in 1887 a constitutional amendment was proposed suggesting a new expedient for the relief of the court, by which the governor was authorized, on conditions stated, to designate seven justices of the supreme court to compose a second division of the court of appeals, with power to hear and determine causes assigned to it by the original court. The amendment was passed. Governor Hill, in his annual message of 1888, recommended its adoption, observing that "the propriety of the adoption of this measure or some other appropriate plan for the relief of the court of appeals in the prompt disposition of its calendar seems to be very

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clear." The amendment was passed again at this session and approved by the people at the November election. The text of the amendment will be found in the Introduction. The second division was organized on the 24th of January, 1889, and held its first session on the 5th of March following. On the 22d of January, 1891, it completed the consideration of the causes assigned to it by the court of appeals, and adjourned. On the same day, pursuant to a certificate of the court of appeals and a new designation by the governor, the second division was reorganized and continued until the 1st day of October, 1892, when it closed its labors and finally adjourned. On the 24th of January, 1889, the court of appeals assigned 667 causes to the second division, and on the 28th of June, 1889, assigned to it all the causes then reserved on the existing calendar, amounting to 182. When the second division was reorganized on the 22d of January, 1891, 744 causes were assigned for its consideration. Thus, by three assignments, the second division received and disposed of 1,593 causes. The work performed by the second division fully justified its creation, and afforded substantial relief to the court of appeals. In 1890 an amendment was proposed for a court of appeals composed of a chief judge and fourteen associate judges. This was introduced again and passed in 1891.

Supreme court.—The amendments relating to this court consisted chiefly of propositions to increase the number of judges. In 1876 an amendment was proposed providing for two additional justices in the second district. The amendment was introduced again in 1877, and passed, but modified by providing for only one additional justice. The amendment was passed again in 1878, and submitted to the people in 1879, and adopted. In 1877 an amendment

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was proposed to article 6, § 7 (general term), adding a clause authorizing the legislature to provide for holding such courts "by persons other than the justices thereof, whenever the public exigency may require." In 1880 an amendment was proposed to § 6, article 6, providing for two additional justices in each district, except the first and second, and authorizing the legislature to provide for the election of not more than seven in the first district. In 1881 an amendment was proposed to article 6, adding a new section, 28, providing for five general terms, and for two additional justices of the supreme court in the first, fifth, seventh, and eighth districts, and one in the second, third, fourth, and sixth districts, making twelve in all. Governor Cornell, in his message of 1882, said of this amendment that "as to the increase in the number of justices of the supreme court, there may be some question about its necessity in the fourth and sixth districts; and also the addition of more than one justice in the seventh and eighth respectively;" but the legislature at this session passed the amendment again, and it was adopted by the people in November. In 1889 another increase of judges was proposed by a new section, 29, providing for two additional justices in the first and second districts and one in each of the other districts. The amendment was passed at this session and again in 1890. A bill providing for its submission to the people was also passed, but Governor Hill thought it was defective, and did not approve it. The Governor referred to this subject in his annual message of 1891, and, commenting on the fact that the amendment had not been submitted the previous year, for the reasons stated, said that it would be the "duty of the present legislature to provide, by suitable legislation, for its submission to the people. . . . If, for any reason, no matter what, a constitutional obligation has been omitted, or has not

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been fully performed by one legislature, it becomes the bounden duty of the next legislature to perform it at the first opportunity." He expressed doubt "whether the interests of the state really required this amendment at this time, and also whether it will be approved by the people;" but it was the duty of the legislature to submit it, "and permit the people to determine the matter for themselves." No bill was passed in 1891 for the submission of this amendment. It was submitted in 1892. Governor Flower permitted the submission bill to become a law without his approval, and filed a memorandum suggesting that the amendment was possibly faulty in form and ambiguous in construction. It was rejected by the people. In 1893 an amendment was introduced providing for two additional justices in the first district and two in the second; the other districts were not included in this amendment. This was passed in 1893 and again in 1894 and adopted by the people, but it was prevented from taking effect by the provision in the revised Constitution of 1894, adopted at the same election, by which independent amendments coincidently submitted were superseded by that instrument. The subject of the amendment was included in the new Constitution.

Surrogates' courts.— In 1883 an amendment was introduced providing for two additional surrogates in the county of New York; thereafter the surrogate's court in that county was to be composed of three surrogates, to possess concurrent jurisdiction with a general term of such court, from which appeals might be taken to the court of appeals. In a previous chapter I have quoted from the debate in the Convention of 1867 on the probate court plan recommended by the judiciary committee, and which Mr. Folger said was intended to provide three surrogates for

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New York, dividing the city into three divisions by geographical lines. The plan of the committee was not approved by the Convention. The foregoing amendment was an attempt to accomplish the relief needed in New York by the creation of a surrogate's court with three judges, and with a general term like that which had been provided for the court of common pleas and the superior court. The amendment was not introduced again. The legislature, without amending the Constitution, provided, in 1892, for two surrogates in New York, and this number was made permanent by the Constitution of 1894.

New York local courts.—In the chapter on the Convention of 1867 I have given a sketch of these courts and of the movement resulting in their inclusion in the Constitution. The new constitutional dignity thus given to these courts doubtless suggested the propriety of a further elevation and their absorption by the supreme court. A proposition intended to accomplish this result was presented by an amendment introduced in 1876 by which the superior court and court of common pleas were to be abolished and their judges, jurisdiction, and business transferred to the supreme court in the first department. After such abolition there were to be seventeen justices of the supreme court in the first department. Five of these were to be paid by the state, and twelve by the city. The amendment was introduced again in 1877, 1878, 1881, and 1889. An amendment somewhat similar was introduced in 1892, providing for twelve circuit judges in the first district, to be composed of the judges of the superior court and court of common pleas then in office, and their successors.

The plan to abolish these courts and merge them in the supreme court failed at this time, but it became apparent that the court of common pleas needed additional judges.

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An amendment increasing the judicial force of this court from three judges to six was introduced and passed in 1879, and passed again and adopted in 1880. We shall have occasion to note, in a subsequent chapter, that these courts were abolished and merged in the supreme court by the Constitution of 1894.

County court.—The amendments relating to this court applied only to Kings county. In 1885 an amendment of § 15 of article 6 was introduced, providing for an additional county judge in Kings county. In 1893 the subject was presented to the legislature again by an amendment proposing a new section, 32, which was passed that year and again in 1894, and adopted by the people, but was superseded by a provision on the same subject in the revised Constitution.

Brooklyn city court.—Three amendments relating to this court were proposed in 1893; one provided for one additional justice, one for two additional justices, and another, which was passed, provided for the abolition of the court, and the transfer of its judges, jurisdiction, and business to the supreme court, and for three additional justices of that court in the second district, but whose compensation was to be fixed by the board of supervisors of Kings county, and paid by that county.

Judicial pensions.—In 1879 this subject made its first appearance in the legislature by an amendment which proposed to add the following clause to § 13 of article 6:

"The compensation of every judge whose term of office shall be abridged pursuant to this provision shall be con-

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tinued during the remainder of the term for which he was elected."

This amendment would have continued the salary even if a judge had not served more than one year. The legislature modified it by limiting it to judges who had served ten years, and also by making it applicable only to judges of the court of appeals and justices of the supreme court. It was passed in this form, and in 1880 was passed again and adopted. This amendment evidently did not give universal satisfaction. In 1885 an amendment was proposed to § 13, which omitted the pension provision. In 1891 this subject was deemed of sufficient importance to justify its consideration by the Republican State Convention, which adopted a resolution recommending an amendment to the Constitution "expunging therefrom the provision made for the payment of the salary of any judicial officer after the expiration of his term of office." An amendment intended to accomplish this result was accordingly introduced in 1892, but another view of the subject was presented by an amendment in 1892, which proposed to amend § 13 by omitting the existing pension provision, and substituting for it the following: "The compensation of any justice or judge now holding office shall not be abridged by this provision." This would have permitted a judge, after passing the age limit, to receive his salary for the remainder of the term for which he had been chosen, but would have denied a pension to any judge elected after the amendment took effect. This plan was adopted in substance by the Convention of 1894.

Miscellaneous.—In 1878 an amendment was proposed to § 14, providing for the monthly or quarterly payment of judicial salaries, with no additional fees, percentages, or allowances. In 1882

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an amendment was offered to § 13, reducing the official term of the judges included therein from fourteen years to six years. Possibly this was intended to affect the pension amendment of 1880, which continued the salary after ten years' service.

SALT SPRINGS.

Amendments authorizing the sale of the salt springs were introduced in 1878, 1883, 1888, and 1889. In 1891 the legislature passed the following amendment:

"The legislature may provide by law for the sale and disposition of the salt springs and the lands adjacent thereto belonging to this state, making just compensation to all persons having any rights therein."

This amendment was passed again in 1892, but was rejected by the people at the November election by the narrow margin of 677 votes.

CANALS.

In 1879 the legislature passed amendments abrogating §§ 1 and 2 of article 7, making the existing § 6 a new § 1, and amending it by including the Black River canal among the canals which could not be sold, also by providing that the "rates of toll on persons and property transported on the canals shall not be reduced below those for the year 1852, except by the canal board, with the concurrence of the legislature," omitting the middle sentence relating to canal expenditures, and adding the last two sentences of the existing § 3, relating to contracts and extra compensation. The existing § 3 was stricken out, and the middle sentence of the existing § 6 was substituted in its place. A new § 4 was proposed, providing for

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a deficiency canal fund, to be composed of moneys derived from the disposition of the lateral canals, the net annual canal receipts, and of $400,000 already raised for canal improvement. The legislature might, in emergencies, draw on this fund for canal expenses, and might also, by a vote of two thirds of each house, appropriate $500,000 in any one year for the same purpose. These amendments abrogated § 4, relating to the claims against corporations, and § 5, relating to sinking funds. A new § 11 was proposed changing the "canal funded debt" to the "general fund debt," and providing for its payment by taxation. These amendments, which made a new article 7, will be found in the volume of the session laws of 1879; they were introduced again in 1880.

The legislature of 1880 passed several canal amendments. After reciting that the debts mentioned in the first and second sections of the article had been fully paid or provided for, "and no longer liens on the revenues of the canals," the net surplus revenues were to be credited to a "reserve fund" provided by § 6 and used as therein provided. Tolls established in 1880 could not be altered except by the canal board with the concurrence of the legislature. The provisions relating to extra compensation, and the letting and cancelation of contracts were continued. The Black River canal was included in the prohibition against the sale, providing for an annual tax for the payment of the canal debt, creating "a canal repair trust fund" composed of unexpended moneys remaining in the treasury applicable to extraordinary canal repairs, the enlargement of the Champlain canal, the reconstruction of the Oneida Lake canal, and the net annual surplus revenues of the canals, which trust fund was to be used "to make good any failure in the revenues to meet the appropriations for the ordinary expenditures, or for the permanent improvement of the canals."

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The canal amendments passed in 1880 were introduced again in 1881 with the following addition to the proposed § 3:

"The legislature may authorize the sale or lease to the government of the United States in perpetuity only, the Erie, the Oswego, the Champlain, the Cayuga and Seneca, and the Black River canals, or either of them, upon such conditions and for such consideration, either nominal or otherwise, as may be agreed upon; providing that the government of the United States shall enlarge such canal or canals by deepening, widening, and maintaining the same forever as free canals, of the same capacity as the Welland canal in Canada."

In 1884 an amendment was proposed to § 6 by adding the following:

"Nothing herein shall prohibit the legislature from selling or leasing all or any of the canals of this state to the government of the United States upon condition that said canal or canals so sold or leased shall be maintained by the United States government during its control of said canal or canals so leased or sold."

In 1885 an amendment was proposed to the same section by adding the following:

"The legislature may, however, in such manner as it deems expedient, authorize a contract to be made with the government of the United States of America, permitting such government to use and control such canals or either of them for the purpose of national defense in times of war, invasion, or insurrection, provided the national government shall furnish means suitably to increase the capacity of such canals."

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Superintendent of Public Works.

This subject has already been fully considered in previous chapters, and the history of the movement which led to the creation of this office need not be repeated here, except to say that the recommendation of the Commission of 1872 was approved by the legislature of 1873, but the whole of the proposed article 5, which included the office of superintendent of public works, was omitted by the legislature of 1874. An amendment creating this office was introduced and unanimously passed by the legislature in 1875. Governor Tilden, in his annual message of 1876, recommended the early consideration of the amendment by the legislature. Commenting on the importance and significance of the proposed reform, he said there should be "a radical change in the system of administration. The present machinery is chaotic, and, except with something of the unity which existed in practice in the canal board under the old Constitution, is incapable of acting with efficiency or economy. The abuses, perversions of law and morals, improvidence and waste which cling around it are the growth of years. When a man of average well-meaning and average ability comes singly into one of these administrative offices, the graft develops, not its own nature, but the nature of the parent stem. It is difficult to carry out reform by instruments that are incurably averse to reform, whose indolence, comfort, associations, habits, assistants, and advisers are all naturally opposed to what they are expected to do. Every step of progress is not only through an enemy's country, but beset by unexpected betrayals."

The amendment was passed again in 1876, and adopted by the people at the November election by a majority of 451,321. Governor Robinson, in his annual message of 1877, reminded the legislature that laws would be needed to carry the amendment into effect; observing that a

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radical change had been made in the management of the canals, with the hope of better results by avoiding "wasteful and extravagant expenditures" often incident to public business conducted by "irresponsible boards," and that "all power and responsibility are placed in the hands of one controlling executive officer."

The legislature did not pass the required act until March 30th; and the Governor, in his message of 1878, said this was too late "to permit a superintendent to adopt a new plan and perfect a new organization before the opening of navigation," and therefore the administration for that season was continued under the old system. The first superintendent was appointed January 30, 1878, and entered on the duties of his office on the 8th of February. Governor Robinson, in his annual message of 1879, referring to the change, said "the legislature will be gratified to learn that the new system of canal administration has fully met the most sanguine expectations of its friends. The efficiency, economy, and integrity of one responsible executive head have been amply illustrated in the first year of the experiment."

Free Canals.

We now come to a new stage in canal history. In former chapters we have studied the rise and development of the canal enterprise, from its beginning, far back in colonial history, to the act of 1816, by which the state formally committed itself to the construction of the great internal water ways, and have noted the progress of the work which was begun on the 4th of July, 1817, and which was carried forward with such persistent enthusiasm during the next eight years until the completion of the Erie canal in October, 1825, when the first boat passed from Buffalo to Albany, and thence down the Hudson to New York, where its advent was marked

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by an unparalleled popular demonstration. We have recounted the labors of three constitutional conventions, numerous legislatures, and the Commission of 1872 in dealing with the ever-present problem of canal construction, administration, and finance, and the effect of our canals and canal policy on the general growth of the state, our financial systems, and consequent constitutional changes. We must next consider some of the causes which led to the radical change of canal policy produced by the abolition of tolls in 1882.

Executive hopes and prophecies.—The early governors entertained high hopes of the advantages to be derived by the state from the completion and operation of the canals, and in their communications to the legislature often expressed their anticipations in glowing terms. They believed in almost boundless canal possibilities, and the first fifty years of our experience with the canals largely justified their anticipations. A few quotations from executive communications relating to this subject cannot fail to be of interest for the purpose of showing the development, progress, and success of the great enterprise in which the people of New York embarked more than a century ago. In an article on canals, in the chapter on the Convention of 1821, I have given a chronological sketch of this subject, with some extracts from executive communications, which need not be repeated here. It is interesting now to recount the expectations of the early governors and the consummation of their hopes before the beginning of the decline which resulted in the abolition of canal tolls.

In making these quotations we may very properly begin with one from Governor DeWitt Clinton, in 1818, in a communication to the legislature scarcely six months after the work of construction had begun. Governor Clinton said: "The enhancement of the profits of agri-

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culture, the excitement of manufacturing industry, the activity of internal trade, the benefits of lucrative traffic, the interchange of valuable commodities, the commerce of fertile, remote, and wide-spread regions, and the approximation of the most distant parts of the Union by the facility and rapidity of communication that will result from the completion of these stupendous works, will spread the blessings of plenty and opulence to an immeasurable extent. The resources of the state are fully adequate without extraneous aid; and when we consider that every portion of the nation will feel the animating spirit and vivifying influence of these great works,—that they will receive the benediction of posterity, and command the approbation of the civilized world,—we are required to persevere by every dictate of interest, by every sentiment of honor, by every injunction of patriotism, and by every consideration which ought to influence the councils and govern the conduct of a free, high-minded, enlightened, and magnanimous people."

The Governor further said, concerning the possible canal debt, that "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 also expressed the opinion that this subject might result in new arrangements in political economy encouraging home manufactures and "restraining the pernicious use of foreign commodities." Again, in 1819, Governor Clinton, speaking of the results of the canal enterprise, said that "a small transit duty will consequently produce an immense income applicable to the speedy extinguishment of the debt contracted for the canals, and to the prosecution of other important improvements. In these works, then, we behold the operation of a powerful engine

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of finance and of a prolific source of revenue." Discussing other internal improvements in New York and other states, and their probable effect on national life and affairs, he said the people ought to be "habituated to frequent intercourse and beneficial intercommunication, and the whole Republic ought to be bound together by the golden ties of commerce and the adamantine chains of interest. . . . Character is as important to states as to individuals, and the glory of a republic founded on the general good is the common property of all its citizens." In 1820, January 4, Governor Clinton said: "The successful progress of the important channels of communication now opening in the state will have a benign influence not only in producing facility and cheapness of transportation for the proceeds of labor, but also in creating markets for their consumption. Already do we perceive the establishment of villages on the borders of the great canal; and the raw materials of the husbandman, obtained with comparative ease and cheapness by the manufacturer, will be converted into articles of accommodation and comfort."

In 1825 Governor Clinton spoke of the facility which the canal "affords to emigration and change of habitation; its conveyance of bulky articles which are forbidden to land transportation; the cheapness, safety, and certainty of traveling, and its consequent increase. Hence, the promotion of rapid settlements and concentrated population. All these propitious circumstances go to establish the permanency and magnitude of the income to be derived from our canals, and to demonstrate the superior profit of judicious investments in them. . . . In producing extensive markets, in communicating the benefits of a dense to a sparse population, and in destroying the inconvenience of distance, canals may be emphatically designated as the great labor-saving machines of internal commerce."

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In the preliminary article on canals, in the chapter on the Convention of 1846, I have quoted at some length from Governor De Witt Clinton's message to the legislature of 1826, in which he reviewed the work of constructing the canals, and congratulated the legislature and the people on their completion. In the same message, referring to the debt incident to this great enterprise, he expressed the opinion that "it is obvious that the work will, in a few years, pay for itself; or, in other words, that the income will defray the expense of erection." In 1827 Governor Clinton, speaking of the canal debt, said the state had "derived great reputation from its enterprise in undertaking and its perseverance in executing a work of immense benefit, and it ought to set another example of the extinguishment of a great public debt. We must feel certain that this important object will be soon accomplished, and we can safely make prospective calculations accordingly."

He further remarked that revenue from public improvements "although desirable, is only a secondary inducement. . . . The expenditure of public money in works of utility enriches the country in which it is applied, increases its ability to defray public burdens, establishes profitable markets in all directions, enhances the value of land, augments the amount of capital, and rewards the exertions of industry and the exhibitions of ingenuity." Governor Clinton, in his last message, 1828, said: "Artificial navigation was established for public accommodation, for the conveyance of articles to and from market, and revenue is a subordinate object. It was never intended, as a primary consideration, to fill the coffers of the state, but to augment the general opulence, to animate all the springs of industry and exertion, and to bring home to every man's door an easy and economical means

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of access to the most advantageous places of sale and purchase."

In 1833 Governor Marcy said: "The canals are rapidly accumulating the means for the extinguishment of the debt for which their income is hypothecated. When this object is accomplished the tolls may, with fair claims of justice, be referred to for the means of replenishing the treasury, to an amount, at least, equal to the sums abstracted for the benefit of the canals from the general fund. On whatever principle this account shall be stated, the sum that will be found due will probably be sufficient not only to reimburse any loans which may be made for defraying the expenses of government, but to afford temporary aid to such works of internal improvement as the state may think it wise and prudent to undertake." The Governor further said that "there is no subject connected with our local affairs that we can contemplate with so much satisfaction as our works of internal improvement. The advantages resulting from them are felt in all parts of the state, in the diversified occupations of our citizens. Everywhere their beneficial effects are visible, bearing testimony of the wisdom which conceived the system, and to the enterprise which put it into practical operation." The Governor again referred to the subject in 1835, saying that "our own experience on the subject of internal improvements, as well as that of other states, forbids the hope that any public works hereafter to be constructed by the state will yield an income for a considerable time after they are completed, sufficient to keep them in repair and pay the interest on the debt created for their construction." Again, in 1836, he said: "The canals continue to increase in productiveness."

In 1839 Governor Seward said: "Internal improvement regards the highest possible cultivation of every part of the state, and the perfect evolution of its re-

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sources; the widest possible extension of the territory which can be made tributary to its markets, and the greatest possible diminution of the cost of transportation of persons and property, and consequent increase of population and labor and diminished cost of production."

In 1847 Governor Young said: "I think I hazard nothing in saying that the canals, left to themselves, would complete the canals and pay the public debt at no distant period." Referring to the large amount of tolls received in 1846, he thought that, with entire confidence, we may "rely upon the income of the canals to protect us against taxation on account of the present state debt, and for its ultimate extinction." It may be noted in this connection that there was no tax for canal purposes between 1847 and 1854. Governor Young said in 1848 that "in 1835, ten years after the completion of the Erie and Champlain canals, the debt which had been incurred for their construction had been virtually paid, and the state, free from direct taxation, was in full enjoyment of the revenues of these great channels of trade, and of the specific revenues which had been diverted from the general purposes of government, as well as of all its ordinary revenues;" but that the enlargement of the Erie had then become an imperative necessity. This enlargement was wisely ordered by the legislature. The Governor cited the report of an assembly committee in 1838 on canals, from which it appeared that if canal revenues should continue to increase, $40,000,000 might be spent on the enlargement, and the debt be paid by 1865. The Governor said the tolls had already exceeded the estimate of the assembly committee, and that if the policy adopted in 1838 had been vigorously pursued, the canals might soon have been completed, and paid for by 1857; and that with the Erie canal enlarged to a capacity of 7 feet by 70, the revenues, even with low tolls, would have aggregated

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$5,000,000 annually, which would have been available for general purposes.

In 1851 Governor Hunt said: "It is difficult to form an adequate estimate of the benefits so vast and varied as our people have derived from the original construction of the water communication connecting the Atlantic with the western lakes. The effect of this great work upon the wealth, prosperity, and advancement of the state surpassed the most ardent anticipations of its early advocates. It has doubled the trade and population of our great commercial emporium; and if we but emulate the statesmanship of its authors by adequately increasing its facilities it is destined to pour into our lap during all future time a stream of tribute rich and inexhaustible beyond any example in history, ancient or modern." The Governor said that "in less than ten years from its completion the Erie canal had paid the entire cost of its construction."

I have quoted at some length from Governor Hunt's message of this year, 1851, relative to canal debt and expenses, in the chapter on the period from 1847 to 1867, and have there given the result of his efforts to change the financial policy of the state concerning canals, including the amendment adopted in 1854. In a special message in June, 1851, Governor Hunt said:

"The importance of the trade and revenues of the Erie canal to the prosperity of the state is conceded by all. No public work of any age or country has contributed so largely to the welfare and happiness of a whole community. Every interest in the commonwealth has felt its vivifying influence. The towns and cities which it has created; the unparalleled prosperity of our principal emporium; the giant strides of Western New York in wealth and improvement; and, above all, the commercial supremacy of the state, may be pointed to with honest

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pride by all our citizens, as enduring memorials of the wisdom which conceived, and the energy which consummated, the noble design of opening a water communication to unite the Lakes with the Atlantic. It would not be difficult to demonstrate that the Erie canal has added more than three hundred millions in value to the property of our people. . . . If wise and liberal views shall guide our councils, we have the ability to command, during all future time, the commerce of a territory larger than Europe, embracing several of the most prosperous states of the Union, which, though yet in their infancy, are advancing beyond example in population and resources, and in the construction of internal communications which, in effect, are but an extension of our own."

After urging the early completion of the Erie enlargement, the expense of which he thought would soon be paid from increased revenues which would release the canal revenues and make them applicable to the ordinary expenditures of the state, so as to relieve the people from taxation for the support of government, he said that "then, free from debt, with a revenue from its public improvements without example in the history of governments, the state will have an inexhaustible fund for the support of education, the encouragement of art, and the relief of the unfortunate, without the intervention of assessors and taxgatherers." This was a very hopeful view, but the prospect was materially diminished by the enactment of a law at the same extraordinary session, repealing railroad tolls imposed for the benefit of canals.

The relation of New York city to the canals.—In the chapter on the Convention of 1821 I have quoted from one of Chancellor Kent's speeches the statement that the population of the city of New York had increased from 21,000 in 1773 to 123,000 in 1820, and

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that it was destined to become the future London of America. The advantages resulting to New York from the canals are often referred to in our early history, and clearly appear in the speeches by Dr. Hayes, hereafter noticed. Nowhere in the state was the value of the canal project more keenly appreciated than in the city of New York. This was clearly manifested by the interest taken in the canal enterprise by the people of that city, and also from the character of the celebration of the completion of the Erie canal by the city in the autumn of 1825. Governor De Witt Clinton, in his message of January, 1825, referring to the commercial advantages of the canal, said that "already have we witnessed the creative power of these communications in the flourishing villages which have sprung up or been extended; in the increase of our towns; and, above all, in the prosperity of the city of New York. If, as is said, upwards of three thousand houses have been built in that city during the last year, it is highly probable that in fifteen years its population will be doubled, and that in less than thirty years it will be the third city in point of numbers in the civilized world, and the second, if not the first, in commerce. Nor is there any danger of a reaction. After cities reach a certain elevation of opulence and prosperity, they appear to possess a self-multiplying, self-augmenting power. But independently of this consideration, the external as well as the internal causes of opulence and extent of New York will continue in full operation, and with additional power, and in proportion as its supplies increase, it will furnish augmented means of consumption at home, and of attraction to customers from abroad."

New York at once began to feel the effect of canal commerce in a rapidly expanding business; in 1840 Governor Seward mentioned the subject in his annual message, remarking "that it is not only the right, but the

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bounden duty of the legislature to adopt measures for overcoming physical obstructions to trade and commerce in this state, and for furnishing to each region, as far as reasonable, practicable facilities of access to the great commercial emporium of the Union, fortunately located within our own borders; that whatever contributes to increase the prosperity of the city of New York is beneficial to every part of the state; that it is of paramount importance to provide such channels and thoroughfares as will render tributary the trade of other states, and especially that of the territory bordering on the shores of the great western lakes. . . . By means of these improvements, the advantages of navigable communication with the city of New York have been distributed over a territory of 25,000 square miles, equal to one half of the surface of the state, and already sustaining more than one half of its population."

Governor Fenton, in 1866, discussed the relations of the canals to the prosperity of the state, and said: "In the East the finest harbor on the Atlantic seaboard invites to her chief city the trade and productions of the Eastern Continent. The termination of the grandest system of internal water communication in the world constrains, by irrevocable natural decree, the immense and constantly increasing productions of the West to her inland ports. New York is to-day first in wealth, population, and importance among the states, because enlightened statesmanship, developing and assisting these natural advantages, has given additional activity to all the people, and built up within her borders one of the greatest exchange marts of the world."

These are only a few of the quotations which might be made concerning the value of the canals in developing the commercial prosperity of New York. The supremacy of that city has been and is so dependent on western trade

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that its merchants and other business men, acting through the Chamber of Commerce and other associations, have watched with jealous interest every phase of the canal problem, every step in legislation, either enacted or proposed, which could affect canal business; every suggested constitutional change and every item in the development of rival routes to the seaboard through other states or Canada; in short, nothing, either favorable or adverse, which might increase or diminish the positive or even relative commercial greatness of New York, has escaped the attention of the men who have fashioned and controlled her destinies. It was not surprising, therefore, that New York should have been in favor of free canals, nor that even now, after more than twenty years of experience under the new policy, the city should be anxious to make the canals contribute still further to her prosperity.

While the use which has been made of the canals in recent years has fallen far short of their capacity, and while millions have been spent to keep them in repair, and for their enlargement, many citizens have believed that our canal policy was too narrow, and that broader views should be adopted and put into practical form by enlarging the canals to a capacity sufficient to accommodate 1,000-ton barges. The agitation for a broader canal policy culminated in 1903 in an act of the legislature submitting to the people the question whether the canals should be enlarged and partially rebuilt at a cost not to exceed $101,000,000. According to this plan the canals, as enlarged, are to have a bottom width of 75 feet, an average surface width of about 120 feet, and a depth of 12 feet. Rivers and lakes, when used for canal purposes, are to have a bottom width of 200 feet, a depth of 12 feet, with a minimum cross section of water of 2,400 square feet; but usually the surface width will be

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governed by natural conditions. The plan provides for a change of route in many places, and for the sale of abandoned canal lands. The act requires an annual tax of twelve one-thousandths of a mill, to be continued during the eighteen years limited by the Constitution, for the purpose of providing for the payment of the new canal debt. The act also authorizes the governor to appoint five expert civil engineers to act as an advisory board of consulting engineers, to advise the state engineer and superintendent of public works in relation to the construction of the new canals.

The submission bill became a law on the 7th of April, 1903, and it was to be voted upon by the people at the regular election on the 3d of November following. During the intervening time, nearly seven months, the subject of canal enlargement received serious attention throughout the state. It was discussed in all its bearings in newspapers, in magazines, and in public debate. The history of our canals was re-examined for the purpose of furnishing arguments for or against the new policy, and to aid electors in deciding the great question whether they should embark in a new canal enterprise at such great expense and with such far-reaching possibilities. It was a most significant illustration of the beneficence of a free government under which more than seven millions of people could calmly sit in judgment for more than half a year considering the question whether they should tax themselves so heavily to revive and reconstruct a canal system which many believed had long outlived its usefulness. The result was a most emphatic indorsement of the new policy,—1,100,708 electors voted upon the law; 673,010 in the affirmative, and 427,698 in the negative; showing a majority of 245,312 in favor of the new canal.

The interest manifested by the city of New York in

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the Erie canal as an important element of the city's prosperity has already been noticed. That interest was again shown by the vote on this law. Greater New York cast a very heavy vote in favor of the new canal. Comparatively few adverse votes were cast in that city, but in other parts of the state, especially in counties remote from the line of the canals, there was considerable opposition to the new policy, as appears by the figures already given. Here, also, as upon nearly every question submitted to the people, we cannot fail to notice the indifference—but less striking than in some other cases—concerning the result of a proposition which might naturally be expected to engage the attention of every intelligent citizen, and especially of every taxpayer, in view of the possibilities of the proposed policy. The only state office voted for at this election was judge of the court of appeals. Compared with the total vote for this office the figures show that 312,080 electors (22 per cent) did not vote on the canal question.

The people have thus committed themselves to a new policy. What the final result may be, and how soon it may be accomplished, cannot be foretold. The canal enlargement, which was begun in 1835, occupied twenty-seven years, and cost twice the original estimate. It has been estimated that the new canal can be built in eight years. It took eight years to build the original Erie canal, which, in many places, was less than 3 feet deep; but modern facilities for this kind of work are much superior to those available a century ago, and the advocates of the new canal confidently expect much more rapid progress than was possible under the conditions existing when the Erie canal was built, or when it was enlarged.

It is a coincidence which should not be overlooked that while the legislature of New York, in March, 1903, was considering and passing a barge canal bill, the Supreme

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Court of the United States listened to an argument in a case involving the legal status of the Erie canal in its relation to the jurisdiction of the courts of the country; namely, whether, under the New York lien law of 1897, a lien for repairs to a canal boat used on this canal and on the Hudson river could be enforced in a state court, or whether the Federal admiralty courts had exclusive jurisdiction in such a case. The courts decided the case on the 26th of October, 1903, eight days before the New York election on the proposition to enlarge and reconstruct the Erie canal. The court decided that the Erie canal is navigable water under the maritime law, and that the state court could not entertain an action to enforce a lien for repairs to a canal boat. By this decision the Erie canal, and, doubtless, by analogy, the other state canals, definitely passed under the maritime jurisdiction of the United States; and thus the Federal courts asserted authority over a great water way which the nation had originally been requested to construct and control, but had refused, leaving this magnificent public enterprise to be accomplished by New York alone.

This case (*The Robert W. Parsons,* 191 U. S. 20, *sub nom. Perry* v. *Haines,* 48 L. ed. 73, 24 Sup. Ct. Rep. 8, reversing the state courts) contains an interesting opinion, both from a legal and historical point of view. The whole subject of maritime jurisdiction of inland waters is carefully examined, and the court foreshadowed the possibilities of the new canal policy, by which the people of the state, coincidently with the decision of the court, determined to make the canal, more than it ever had been, and far beyond the dreams of its projectors, a great navigable public highway of commerce, and the principle of law declared by the court was distinctively accentuated by the vote of the people. The court gives an interesting sketch of navigation in its early days, and this article

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may be appropriately closed with an extract from the opinion of Mr. Justice Brown, who, among other things, says: "The Erie canal was built at an early day, and was adapted only for vessels of light draught and peculiar construction. The possibilities of the future were then scarcely foreseen, and even if they had been, the state was too poor to provide for anything beyond the immediate present. For those purposes the canal was amply sufficient, and for twenty years was the principal means of communication with the Northwest, and was not only the highway over which all the merchandise was carried between the Hudson river and the Great Lakes, but was largely used for the transportation of passengers in the great western immigration which immediately followed its construction. As late as 1850 large and handsomely equipped passenger vessels were run every day at stated hours, and the canal continued to be, even after the building of the railways, a favorite method of communication with the Great Lakes. While these boats were vessels of light draught, and were drawn by animal power, they were from 150 to 300 tons capacity,—larger than those out of which arose the maritime law of modern Europe, and much larger than those employed by Columbus and the earlier navigators in their discovery of the new world." The comparison between earlier and later navigation is continued by the remark quoted from a reviewer that "the first discoverers of America committed themselves to the unknown ocean in barks, one not above 15 tons; Frobisher, in two vessels of 20 or 25 tons; and Sir Humphrey Gilbert, in one of 10 tons only." The Judge says further that "the ships in which the Vikings of Scandinavia invaded England and ravaged the coasts of western Europe . . . were open boats, not exceeding 100 feet in length and 16 in breadth, and propelled partly by oars and partly by a single sail." The

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Judge discusses the question of jurisdiction from several points of view, including the fact that the boats are drawn by horses, and upon this aspect of the case says: "The present employment of horses is a mere accident, and likely to be changed at any time by an enlargement of the canal, now in contemplation, when steam or electricity will probably supplant the present methods of locomotion." The Judge evidently anticipated the affirmative vote of the people on the proposition for canal enlargement.

Railroad competition.—It should not be forgotten that the year 1825, which saw the completion of the Erie canal, witnessed also the successful inauguration of a steam railroad in England; and that the legislature of 1826, which received the congratulations of Governor De Witt Clinton on the "auspicious consummation" of the great canal enterprise which had so long engaged the attention of the state, passed an act on the 17th of April granting a charter to the Mohawk & Hudson Railroad Company, authorizing the construction of a railroad from Schenectady to Albany, to be "operated by the power and force of steam, of animals, or of any mechanical or other power." I think this was the first railroad charter in America. Thus, less than six months after the first canal boat passed from Buffalo to New York, the state invited into the field of transportation a rival which was destined to become its master; and then was initiated a competition to which the state was finally compelled to yield. For fifty-six years the struggle was continued with spasmodic efforts to preserve the canals as a means of producing revenue at least sufficient to pay for their construction; but it was a contest against the inevitable. I have recounted, in the preceding chapter, the movement for the disposition of the lateral canals after they had absorbed some thirty-five millions of the people's money, and had

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become a continuing and increasing burden on the taxpayers; and it was then observed that these lateral canals had become useless in large part by the competition resulting from the numerous railroads traversing the same sections of the state.

In the chapter on the Convention of 1846 I have called attention to the unceasing legislative activity concerning canals during the period between the second and third Constitutions, and have shown that during that period the legislature ordered surveys of forty canal routes. Besides these, it chartered thirty-one companies with power to construct canals, and authorized the construction of two others by private or municipal means. It actually authorized the construction of fifteen canals by the state in addition to the great canals which were already in full operation. It should be noted that the period of greatest activity was during the ten years beginning with 1823. In this period twenty-five canal corporations were chartered, a survey of thirty routes was ordered, and the construction of eight canals authorized. But railroad legislation was even more prolific; during the ten years beginning with 1826 the legislature granted 106 railroad charters, besides enacting several other laws relating to railroads. It was thus evident that the new motive power had entered on a sharp competition with the state. It did not take long to convince the statesmen of that period that stringent measures would be necessary to limit the extent of the new competition, and efforts were made from time to time, by means of the taxing power, to compel the railroad companies to contribute a portion of their earnings for the purpose of reimbursing the state for losses which the canal traffic must inevitably suffer by the new method of transportation. This new movement found its first expression in the charter granted in 1833 to the Buffalo & Black Rock Railroad Company, which

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required the company to pay to the commissioners of the canal fund the same tolls on goods carried by it, except personal baggage, as might be charged for the same goods transported by the Erie canal, and the tolls were not limited to the season of canal navigation. Two other charters granted in 1834 contained a similar provision. Two charters granted in 1836, one in 1837, one in 1838, and one in 1839, required the payment of tolls only during the season of canal navigation. In 1840 Governor Seward, in his annual message, questioned the wisdom of imposing these tolls on railroads, and suggested that if they were to be continued they should be collected only during the season of canal navigation. In 1844 the charter of the Utica & Schenectady Company was amended by including the peculiar provision that the company might carry goods "during the suspension of canal navigation in each year only," and was required to pay tolls to the state. Tolls were, by the same statute, required from several other railroad companies not previously subject to this tax, covering nearly the whole line from Albany to Buffalo. In 1845 the Troy & Greenbush Company, and in 1846 the Schenectady & Catskill Company, received charters which imposed canal tolls. In 1847 a statute was passed requiring the payment of tolls by all the companies along or near the line of the Erie and Oswego canals. Nearly all these companies were afterwards consolidated to form the New York Central Railroad Company. The first general railroad law (1848) provided that companies organized under it whose roads ran parallel or nearly parallel with any canal, and within 30 miles thereof, should pay tolls on property transported, except personal baggage, at the rates imposed on the canals; and companies incorporated under this statute, as well as under previous special laws, were required to render periodical statements of their re-

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ceipts. This provision was continued in the general railroad law of 1850. These two statutes established the general policy of the state to require tolls for canal purposes from all railroad companies in competition with the canals.

The two notable exceptions from this rule were the Erie and the Northern Railroad companies, which were not supposed to be in direct competition with the canal. But the omission of these two companies from the general plan was probably the primary cause of the sudden termination of the policy, which was accomplished by the act of 1851, abolishing railroad tolls.

In the legislature of 1851 bills were introduced abolishing these tolls, and another bill was introduced extending to the Erie and Northern roads the provisions of the statute requiring payment of railroad tolls. Numerous petitions were presented to the legislature for the abolition, and also for the equalization, of tolls. The "Board of Forwarders" of New York city presented resolutions protesting against the abolition of these tolls, and recommending the extension of the law to the Erie and Northern roads. This whole subject was referred in the senate to a select committee of three, all of whom made separate and different reports.

Stephen H. Johnson, chairman, said the roads affected by the tolls law necessarily diverted business from the canals, and to that extent deprived the state of revenue which it might otherwise receive. He thought the Erie and Northern roads should both be made subject to the tax; that both were surveyed at the expense of the state, and the Erie had received state aid to the extent of $3,000,000; that the exemption of either of them from the payment of tolls was an unjust discrimination in their favor, equivalent to a bounty of the difference of freight rates between those companies and companies subject to

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the state tax; that the Erie road, which could take freight from Buffalo to New York, would have an unfair advantage over the Central, which, also carrying freight from Buffalo, was subject to a heavy state tax, and traffic would thereby be seriously diverted from the canals. Mr. Johnson thought the tax ought to be continued on the former roads and extended to the Erie and Northern.

Charles A. Mann, another member of the committee, thought the provision of the existing law requiring the payment of tolls was obnoxious to the interstate commerce provision of the Federal Constitution; that the state could not lawfully impose a tax on commerce from other states; that taxes for general state purposes should be collected on all property, and not exacted from specified classes of business only, and quoted Michael Hoffman, a distinguished member of the Constitutional Convention of 1846, that money for state expenditures should not be charged on the "right of way, which the sovereign should hold, not as property for revenue, but in trust for the million, to promote travel, transportation, and commerce;" but that the taxation of transportation on roads or canals constructed by private capital was oppressive; that "general expenses should be paid from general revenues." Mr. Mann said that 1,284 miles of railroad had then been constructed and that 484 miles were in process of construction, and he remarked in this connection that the government might as properly "levy special contributions on all banks for general state purposes" as to tax the business of railroad corporations. The last remark is significant in view of recent legislation imposing a special tax on banks and trust companies. Mr. Mann was opposed to the extension of the tax to the Erie and Northern roads, and also thought the tax on the Central road should be discontinued.

Marius Schoonmaker cited decisions of the Federal

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Supreme Court to show that the state had a right to tax products brought from other states and transported over our canals or railroads, that Congress could not impose a tax on the canals constructed by a state or on products transported over them, and that even the general government could not use these canals without paying the tolls imposed by the state; and that the legislature was under obligation imposed by the Constitution to preserve canal revenues, and thus protect the creditors of the state without resorting to direct taxation. Mr. Schoonmaker thought that railroad tolls should be continued until the canal debt was paid; and concluded by recommending the continuance of tolls on the Central roads and extending the tax to the Northern road, but that no tax be imposed on the Erie.

The legislature did not dispose of the subject at the regular session. Owing to a partisan controversy twelve senators resigned and the legislature was consequently obliged to adjourn. The Governor convened an extraordinary session in June, at which a sufficient number of senators appeared to form a constitutional quorum. At this extra session the legislature again considered the subject of railroad tolls. The senate committee on railroads, to which was referred the bill extending the tax to the Erie and Northern roads, after quoting from the separate reports of the select committee already noted, recommended the abolition of all railroad tolls, and proposed a bill for that purpose. The committee, in discussing the question, observed that "as the owner of a thoroughfare, the state competes for the profits of carrying persons and property against individual companies, and one of the parties, having the powers of the sovereign to legislate, takes care of itself in its character as competitor." The committee thought there would be a diminution of railroad tolls, and that the larger part of

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the tolls collected would be received on "property produced or consumed between Albany and Buffalo;" by the completion of the "free railroads"—the Erie and the Northern—the railroad tolls actually collected would be a mere local tax, and that the canal revenues would not materially suffer by abolishing these tolls. The legislature concurred in this view and passed an act relieving the railroad companies from the payment of tolls after December 1, 1851. Thus ended the short-lived policy of taxing railroads for the benefit of the canals. That the policy would have been profitable to the state is evident from the results during its brief existence; according to the report of the canal commissioners the receipts from this source aggregated $661,682.58, and this scheme of indirect taxation had been in full operation less than five years. If the tax had been extended to the Erie road, which was completed and opened just before the tax was abolished, and also to the Northern road, the receipts from railroad tolls would doubtless have been a large and increasing source of revenue, which could have been used in paying the canal debt, and heavy taxation might thus have been avoided. The effect of the repeal is indicated by the fact that in 1847, when the tax was imposed on all the roads near the canals, only a small amount ($119,410.30) was raised by taxation for canal purposes, and that it was not necessary to resort to taxation again until 1854; two years after the last railroad tolls had been collected; that year it was necessary to raise $657,145.86 by taxation.

In 1858 the loss of revenue resulting from the abolition of railroad tolls was a subject of executive consideration, when Governor King, in his annual message, recommended that tolls be imposed on all railroads competing with the canals. This recommendation was prompted by the continued resort to taxation for canal purposes, by

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which, since the abolition of railroad tolls, the people had then contributed $1,239,645.86, the larger part of which, if not all, might have been saved if railroad tolls had not been abolished. The Governor observed that while railroads were "great public benefits," and that their owners were entitled to a "just return" on their investment, this should be "in subordination to the public good, and the rights of others." The Governor recommended that if the railroad companies were again required to pay tolls they should, as an equivalent, be permitted to increase passenger rates. Under this suggestion shippers might not have been required to pay any additional charges, but passengers would have been compelled to make up the loss sustained by the company in consequence of the payment of tolls for the support of canals. Governor King's anxiety was fully justified by the situation of canal affairs. The amount of canal tolls collected in 1858 was $1,656,627.66 less than the amount collected in 1851, when railroad tolls were abolished. We shall see hereafter that a part of this decrease was due to a reduction of the rate of canal tolls, but a large part of it was nevertheless due to a diversion of traffic from canals to railroads. The stress of the situation was further accentuated by the fact that it was necessary, in 1858, to raise $1,240,500 by taxation for canal purposes. In 1860 Governor Morgan renewed Governor King's recommendation that railroad tolls be reimposed for a limited time; at least, until the canal debt could be paid. The Governor pointed out the large and even alarming decrease in canal tolls and the consequent necessary resort to burdensome taxation in order to redeem the pledges imposed by the Constitution. He estimated that railroad tolls on the Central road in 1857 and 1858 would have produced $853,451.85, and that like tolls on the Erie in 1857 would have been about $350,000. This would

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have been a very substantial contribution to canal revenues, and of course would have become larger as railroad business increased. After remarking that "the constantly increasing amount of freight carried over the railroads has occasioned a corresponding diminution of our canal revenues, until the interest on the canal debt, formerly paid from these revenues, has now to be drawn by direct taxation from the people," the Governor said that railroad companies should be required to pay for a limited period, either a moderate toll during the season of canal navigation, or an annual equivalent in money.

In February, 1860, Governor Morgan sent a special message to the legislature, in which he set forth with considerable detail the financial condition of the state resulting from the diversion of canal revenues, and he protested against the continuance of a policy which permitted the railroads "to destroy the ability of the canals to meet the constitutional requirements upon them, without any equivalent on their part." The assembly at this session passed a bill repealing the act of 1851, but it failed in the senate, where the prevailing opinion was in favor of a law requiring railroad companies to pay a gross sum annually for a fixed period; adopting the second branch of the suggestion contained in Governor Morgan's annual message. In 1861 Governor Morgan again earnestly urged the legislature to reimpose temporarily tolls on railroads for canal purposes. He thought this action was required by the "large prospective demands upon the public treasury," and that it would relieve taxpayers from a portion of their "increasing burthens." The legislature declined to adopt the Governor's suggestion, and, so far as I can learn, this was the end of the discussion of this subject. Railroad competition continued and increased, with the result which will hereafter appear.

Railroad competition and its possible effect on the

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canals was the subject of frequent consideration by the governors in their communications to the legislature. Their observations on this subject are of special importance because, from their position at the head of affairs, their statements of fact must be deemed authoritative, and their opinions must be given the weight due to their high official source, and also because probably they usually reflected the prevailing public sentiment. They did not fail to perceive the ultimate influence of railroads on our canal policy, and long before the final movement for the abolition of canal tolls, the governors discussed the subject from the standpoint of present needs and future possibilities, often with anxious forebodings. The rise of this competition sufficiently appears from the foregoing sketch of railroad history; but its evolution and enlargement should not be overlooked in forming an opinion concerning the wisdom of the final abolition of canal tolls.

As early as 1830, four years after the first railroad charter, Governor Throop, discussing the canal debt, said that "the carrying might be diverted into other channels," and payment of the debt thereby retarded, along with other enumerated causes. In 1832 Governor Throop suggested a doubt whether "the Erie canal will remain the sole or even the favored channel for the trade of the West," and said that railroads were adapted to a "cheap, safe, and rapid transmission of persons and commodities," and that there was "reason to believe that, for great thoroughfares, they will not only supersede every other kind of road, but they will enter into a successful competition with canals also;" that in promoting the projected construction of roads which might become competing modes of transportation, "the legislature should be extremely careful to do nothing which may interfere with the canal revenues or retard the payment of the debt," and suggested that railroad companies might be char-

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tered on condition that they should pay "into the public treasury such rates of toll that no loss of revenue will result from their interference with the business of the canals." It has already been shown that this policy was adopted in 1833, and continued with some fluctuation until abrogated in 1851.

Governor Seward was quick to perceive the utility of steam as a motive power, and in his message of 1839 remarked that "railroads effect a saving of time and money; and will henceforth be among the common auxiliaries of enterprise. . . . They who are willing that New York should have no railroads must be ready to see all the streams of prosperity seek other channels;" and he urged the importance of the three great projected routes; namely, the Northern, the Central, and the Erie. In 1840 Governor Seward said: "It is no longer doubtful that railroads may be constructed by the state as suitably as canals, and that the public convenience requires that the former as well as the latter should, so far as practicable, be controlled by the state." Here was a clear affirmation of the principle that the state has the right to build and control railroads.

In his annual message of 1851, the year in which railroad tolls were abolished, Governor Hunt said: "Serious apprehensions are entertained that the trade of the Erie canal will be impaired by the competition of railroads and other rival avenues in and out of the state, unless the cost of canal transportation is materially reduced." Governor Hunt, in his message transmitted to the extra session of the legislature which met in June, 1851, discussed at some length the relations between the canals and railroads, taking a more hopeful view of the rivalry between these modes of transportation, as is manifest from his remark that there need be no "apprehension that the canal revenues will be diminished, after the completion of the enlargement, by the competition of railroads, it hav

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ing been demonstrated that those bulky commodities from which the largest amount of toll is derived can be conveyed at a less cost by the canal than by any other artificial mode of transportation," and that a "broad and liberal view of the subject must satisfy all unprejudiced minds that the supposed conflict of interest between our canals and railroads is more apparent than real."

It is evident, also, that Governor Seymour did not share the apprehension felt by many statesmen, that railroads would ultimately supersede, if not destroy, the canal as a means of transportation. In his message of 1853 he remarked that "the purpose of our canal system is to direct the vast commerce of the West into artificial channels traversing our state, and thus secure to us the profits arising from its transportation;" and that even if railroads should divert commerce from the canals they "would be of great value in controlling the rates of transportation," for "they are owned by the people of the state, who are always anxious to reduce to the lowest point the expense of conveying their productions to market. . . . While the canals are in good order and under judicious management, combinations cannot be successfully formed between corporations to the detriment of the public interests." The governor here seems to have been looking forward to the ultimate abolition of canal tolls, and the continuance of the canals as a restraint on railroad freight charges. The event shows that, so far as the actual effect of competition was concerned, the Governor was too sanguine in his opinion that the canals could sustain themselves against cheap and rapid railroad transportation.

I have already quoted Governor Morgan's urgent appeals to the legislature to restore railroad tolls for canal purposes, and the reasons which prompted him to advise this legislation. The hopeful view of railroad competition indulged in by Governor Hunt and Governor Sey-

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mour was not shared by Governor Morgan, who, in 1862, said that "the railroads have seriously diverted business from the canals," which was most marked in the "westward bound freight," which was almost exclusively carried by the railroads, and the Governor gave statistics to show the decrease of business since the abolition of railroad tolls, in 1851.

In 1865 Governor Fenton seemed to take the railroad view of the transportation problem, when he observed that the "great railroad lines find their capacities taxed to the utmost, with only occasional interference with the canals," and while the canal revenues for the current fiscal year had fallen off, the Governor thought it was due to a desire of the people to reach a market with their produce by the quickest method, even at some additional expense; "hence, large quantities of produce have been diverted from the canals to these speedy lines of communication, thus swelling their business."

It will not be profitable to repeat all that the governors have said on this question. The quotations already made show the general drift of executive opinion. Another aspect of railroad competition is presented in Governor Hoffman's annual message of 1871, in which he says that "the business of the canals suffered during the past summer from a great reduction of railroad rates of freight, temporarily made by rival companies in a struggle for the western trade." Governor Tilden, in his message of 1875, commended the policy of the state in providing different means of transit, because they were all for the benefit of the producer, and aided him in finding a quick and profitable market. He said the policy of the state had been, in the main, "large and liberal," for it treated "these great works as a trust for the million," and did not seek "to make revenue or profit for the sovereign out of the right of way;" and the act of 1851, repealing railroad tolls, was consonant with this policy. The state

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"had originally undertaken the construction and administration of the canal in order to create a cheap transportation demanded by the interest of the people, and not otherwise to be attained;" then, anticipating the "necessity afterward to arise by the construction of rival routes, it repealed all restraints on the carriage of property, and opened to free competition every mode of transit, even in rivalry to its own works."

In 1878 Governor Robinson said that the extraordinary competition of the railroads, which had prevailed in 1876, was "less ruinous" in 1877, and that the season had been profitable to boatmen. At this session, 1878, Dr. Hayes introduced in the assembly the proposed constitutional amendments providing for free canals, and a discussion was opened and carried on in the legislature and elsewhere which resulted in the passage of the amendments in 1881. The final test came in 1882; and it is worth while to remember that Governor Cornell, referring to the amendments in his annual message, said that "the competition of railways, the enlargement of the Canadian canals, and the development of the Mississippi river route," were "important considerations with reference to the future capacity of the canals to earn the necessary revenue for maintenance."

Railroad competition was undoubtedly the chief and most influential cause which resulted in the climax of 1882, when the state, almost in self-defense, was compelled to abolish all canal tolls, and open the canals as free water ways.

Reducing tolls.—It will not be profitable to state here in detail the tolls charged at different periods of our canal history. Tolls were established for the purpose of raising a revenue to meet the expenses of canal construction, maintenance, and operation. The rate of tolls necessarily changed with the fluctuations of business and they

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were often modified to meet conditions resulting from railroad competition. The reports of the canal commissioners and auditors afford ample opportunity for the study of this subject. A brief reference to some of these changes, the causes which produced them, and their effect on canal revenues and policies, will be sufficient for the purpose of explaining the development of a situation which resulted in the abandonment by the state of all efforts to maintain the canals by the exaction of tolls, and left to railroads the whole field of profitable transportation. It will be remembered that by the Constitution of 1821, article 7, § 10, tolls could not be reduced below the rate "agreed to by the canal commissioners and set forth in their report to the legislature of the 12th of March, 1821." In 1827 Governor De Witt Clinton said, in his annual message, that complaints had been made against high tolls, and he suggested that tolls on some commodities might profitably be reduced to the constitutional minimum, remarking that "the cheaper the conveyance the more commodities will be conveyed, and the profits of the canals may be thus augmented instead of being diminished by low duties." In 1834 Governor Marcy, in his annual message, informed the legislature that in 1833 tolls were reduced 28½ per cent on most of the products of the country, and 14¼ per cent on merchandise; but that, notwithstanding this reduction, the aggregate tolls collected that year were nearly $235,000 greater than in 1832. The Governor further said that the canal board contemplated making a reduction on merchandise of 25 per cent on the rates in force in 1834, which he said would bring the tolls down nearly to the constitutional limit. In 1835 Governor Marcy noted a further reduction of tolls, but said that business had increased nearly in the ratio of such reduction. Governor Hunt, in 1851, said that in 1850 "a considerable reduction of tolls had

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been made in several commodities, but it was believed that it would not materially diminish the revenue."

In 1853 Governor Seymour, observing that "the competition between the canal and other channels of commerce is now very active," said that an increase of tolls would "either drive business from the canal or compel forwarders and boatmen to reduce their charges, which are now low enough. If we would retain commerce upon our canals we must make them its cheapest avenues." In the chapter on the period between 1847 and 1867 I have given a sketch of the movement for a change of canal policy resulting in the amendment (article 7, § 3) passed in 1853, and ratified in 1854. That amendment provided that the "rates of toll on persons and property transported on the canals shall not be reduced below those for the year 1852, except by the canal board, with the concurrence of the legislature." This gave the legislature control of the rates of toll, and embodied the suggestion made by Governor Clinton, in 1827, that "the power of imposing transit duties or taxes, being a legislative power," ought not to be "delegated or transferred unless under extraordinary circumstances."

In 1851 tolls were reduced 33⅓ per cent on agricultural products and 50 per cent on merchandise. In 1859, tolls were reduced 50 per cent on merchandise and non-enumerated articles, and 33⅓ per cent on most agricultural products. Governor Morgan, in his annual message of 1860, said this reduction resulted in a loss of over a million of dollars in canal revenues, observing further that "the theory advanced by those who favor the reduction is that transit on the canals must be cheapened to retain the traffic and protect the treasury against railroad competition within the state;" but, as to railroad competition, he said the state had the power to apply an effectual remedy. He said the spirit of the Constitution undoubtedly required the imposition of such tolls "as

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will yield the largest amount of revenue," and pointed out, in this connection, that the deficiencies in the canal revenue for the years 1857 and 1858 were almost $3,750,000, which must be met by loans or taxes. Here was a very striking illustration of the struggle going on between the canals and railroads, and it needed no prophet to predict the result. Governor Morgan thought the conclusion was unavoidable that there had been a much greater reduction of tolls than was necessary to retain the traffic of the "lake countries;" that the reductions of 1858 and 1859 were inexpedient, and that tolls on most articles should be increased to their former rate. In 1861 he said the tolls had been increased substantially as suggested, and that the receipts had thereby been greatly enhanced. In 1862 he said "experience conclusively shows that reductions in toll, although made avowedly to retain to the canals the business which might fall to other modes of transit, result in loss of revenue. It is clear that our true policy lies not in the direction of striving for employment at unremunerative prices, but in protecting the canals in their legitimate business, and demanding proper tariff for their use."

In 1864 Governor Seymour presented another view of the canal problem, and was apparently looking forward to a time when all tolls might be abolished; but, without going so far as to make the direct suggestion, he said the state would be untrue to itself if it failed to retain the commerce of the western states. "Rather than suffer its diversion into other channels we should strike off all tolls upon western produce." This would have produced a very material reduction in canal revenues. The full significance of this suggestion should not be overlooked, not only because of its source, but also because of the time in which it was made. This message to the legislature at the opening of the session of 1864 was written soon after the close of the canal season of

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1863, when tolls reached the highest point in our history, the receipts that year exceeding five millions. The Governor's reasons for his suggestion are indicated in his remark that "New York should exhibit that degree of interest in all measures designed to benefit the West which will show our purpose to keep up the most intimate commercial relationships with that portion of our Union; and the rates of toll charged upon transportation should be governed by the interests of this commerce, and not by the amounts which may be paid directly into the treasury of our state. The increase of our wealth from the growth and value of this commerce can be made to add far more to the income of the state than the entire receipts from all our canals. The tolls they pay are of little importance compared with the wealth and prosperity which the domestic and foreign commerce of our country diffuse among all classes of our citizens." We shall have occasion to notice hereafter the further development of this subject by Governor Seymour when he reached the conclusion that not only tolls on western products, but all tolls, should be abolished, and the canals be made free public highways.

Governor Hoffman, in his message of 1869, said the canal tolls for the fiscal year ending September 30, 1868, were $4,417,559.50. He congratulated the legislature and the people on the fact that the "surplus revenues of the canals for the past fiscal year have been sufficient to pay the balance of the canal debt of 1846, satisfy the other requirements of the Constitution, and contribute over a hundred thousand dollars 'to defray the necessary expenses of government.'"

The period from 1846 to 1870 was known as the period of high tolls, which had been rigidly maintained while the constitutional pledge remained unredeemed, but with the payment of the old canal debt a reduction of canal tolls became practicable. The legislature, by the loan

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law submitted to the people in 1870, had authorized a reduction of tolls by the canal board, and at the same session a concurrent resolution was adopted consenting to a reduction to a possible 50 per cent below the tolls established in 1852. The subject of tolls and their effect on commerce was carefully considered by Governor Hoffman in his annual message of 1870. Discussing the importance of retaining the commerce of the grain producing states, he said that "in affording water transportation at low rates through the length of our state, we are contributing at once to our own prosperity and that of others; and every barrier to a full and free interchange of the products of their industry and ours should, if possible, be removed. Our canals were not constructed with the narrow view of levying a tax upon commerce, that the state might thereby make money; they were built for the purpose of affording facilities to the internal trade of the country. The tolls should therefore be put at low rates, and the canals be made free as far and as fast as is practicable." In 1871 Governor Hoffman informed the legislature that a reduced scale of tolls had been adopted, which, as anticipated, had resulted in a diminution of revenues, but that the reduction of receipts was not all due to low tolls; the traffic had been diminished from purely commercial causes. "The business of the canals, moreover, suffered during the past summer from a great reduction of railroad rates of freight, temporarily made by rival companies in a struggle for the western trade." This shows how animated was the competition between railroads and canals, and that the advantage was almost inevitably on the side of the railroads. The state, in dealing with canal tolls, necessarily acted slowly, for the canal board could not reduce tolls on short notice to meet railroad competition, but must wait for the concurrence of the legislature; hence the traffic for a single season might be largely monopolized by the railroads,

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and the state would be without remedy, owing to the constitutional requirement that the legislature must concur in a reduction of tolls. The Governor, in this message, said that "we should adhere as far as possible to low tolls. . . . It is obvious that cheap transportation from the grain producing states is essential to our comfort and prosperity. Our people gain much more by lowering the rates of transportation on the supplies they must procure from other states, than they lose in reduced revenue from low tolls. We ought not to levy a greater toll upon the commerce of the canals than is absolutely necessary for their maintenance and the gradual payment of that portion of our debt to which their revenues are pledged. . . . Except in the canals our people have no efficient check upon the rates of freight which the railroads may impose. It is vitally important to us that the great connections of the lakes with the Hudson should be maintained with the least possible tax upon the traffic which they were established to promote."

The policy of reducing canal tolls with a view of their possible ultimate abolition, and, at the same time, protecting the state against taxation to pay the canal debt, found tangible expression in an amendment introduced in 1871 by Loran L. Lewis, in the senate, and by the committee on canals, in the assembly, providing, among other things, that "in order that the tolls on the canals of the state may be reduced so as to meet the requirements of commerce, and prevent the diversion thereof from this state," the commissioners of the canal fund should borrow a sum sufficient to pay the canal and general fund debts, and issue obligations payable in forty years, with interest at 5 per cent; and canal tolls were to be established at rates sufficient only to provide a sinking fund for the payment of these obligations, and for the expense of keeping the canals in repair. This amendment was prepared by the New York Chamber of Com-

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merce, and was based on the action of the people at the November election in 1870 refusing to approve a law authorizing the commissioners of the canal fund to borrow, on an eighteen year loan, a sum sufficient to pay the canal and general fund debt, for which canal tolls had been pledged by the Constitution. This vote showed that the people evidently intended to adhere to the policy established by the Constitution of 1846 and the amendment of 1854, under which these debts were to be paid from the canal revenues. The wisdom of this policy is abundantly confirmed by the results. The Chamber of Commerce, in its memorial accompanying the amendment, also said that the canals should be administered in the interest of commerce, and not for the purpose of obtaining a revenue beyond the necessities incident to their maintenance and the payment of the canal debt; that no other tax should be imposed on "what has been justly styled 'the right of way for the million'" and which should be made, "without undue delay, free commercial channels, for the common use of all the people of the United States." At the same session of the legislature William M. Tweed presented, in the senate, a petition from citizens of New York for a free canal. The Chamber of Commerce amendment was laid on the table in the senate, but was considered and rejected by the assembly. It was never adopted, and I do not find that it was presented to the legislature again, but it was part of a movement which culminated, in 1882, in the adoption of an amendment abolishing canal tolls. In 1872 Governor Hoffman again briefly referred to the subject, with the comment that "the policy of low tolls, which, when first recommended, met with strong opposition, is now, by general consent, admitted to be wise."

In 1875 Governor Tilden, in his annual message, noting the reduction of tolls in 1870, which amounted to about 38 per cent, said that "one per cent per bushel taken

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off the present tolls (on wheat and corn) and the same proportion on other articles would annihilate nearly all the net income of the Erie canal, considered alone, and would make a deficiency in respect to the four canals retained of half a million of dollars a year. . . . . In the present condition of things, to embark hastily and unadvisedly upon a general reduction of tolls might well be considered as improvident, even in respect to the canals themselves." In a special message of March 19, 1875, Governor Tilden said he had received a petition from forwarders, boatmen, and others engaged in the transportation of the canals of this state, representing that the "depressed state of their business calls for legislation and necessitates a reduction of tolls." Governor Tilden said the petitioners were "proprietors of about 6,000 boats, which are said to give employment directly to about 30,000 persons and indirectly to 20,000 others." The Governor suggested that these men were partners of the state, "owning and managing the equipment, while the state owns and manages the body of the canals."

In 1877, Governor Robinson, in his annual message, said that canal revenues for 1876 were $438,662.74 less than the revenues for 1875; that the year had been one of unprecedented disaster to all persons doing business on the canals, resulting not only from business depression, but from extraordinary railroad competition. He thought there could be no difference of opinion on the question of high or low tolls, that forwarders must pay such tolls as are required to keep the canals in running order, "and no one can reasonably ask them to pay any more, when they are making losses instead of profits on every cargo which they carry;" and, expressing the hope that the canal business would soon revive, the Governor said that, "with the usual amount of freight, at fair prices, the present rates of toll will doubtless be sufficient for all purposes; and with continued economy in expenses

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they may probably be still further reduced." In 1877 the canal board, with the concurrence of the legislature, made a substantial reduction in tolls, even to the extent of abolishing tolls on twenty-five kinds or classes of articles, and also on boats, which, before that time, were subject to tolls at the rate of $.02 per mile, which amounted to a tax of $13.50 on each boat for a round trip from Buffalo to tide water and return. This was a practical answer to the petition of the boatmen referred to by Governor Tilden, and afforded partial relief from the conditions resulting from business depression and railroad competition. The free list also indicated significant possibilities, for if some articles might be carried free, others might also be relieved from the burden of tolls, and by the joint action of the canal board and the legislature tolls might be substantially abolished without amending the Constitution. The toll sheet of 1877 showed a manifest purpose to retain canal business even if it produced no revenue; and was the entering wedge of a policy which rapidly culminated in free canals.

In 1878 Governor Robinson said that "in view of the depression and losses of 1876, and not anticipating the revival which has taken place in 1877, the tolls were reduced to an extremely low rate for the last year;" and he summed up the results of the last season in the statement that canal revenues showed a net surplus of only the "trifling sum of $3,031.33," remarking that the amount of receipts for 1877 was smaller than had been known within the last forty-five years.

The movement for free canals was given a new impetus by the report of Auditor Schuyler, dated January 1, 1878, in which, under the question "Shall we take a new departure?" he discussed the whole subject, and recommended the abolition of all tolls, and the payment of the remainder of the canal debt by taxation. He referred to the efforts annually made to procure concessions

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in the rates of toll, which in 1877 "resulted in a total abrogation of tolls on boats and certain articles which had almost ceased to be transported on the canals, and a reduction of 50 per cent in the various classes which had theretofore composed the bulk of the canal tonnage." He said the commercial men appeared to be "laboring, without any concealment of their objective point, to secure a free canal, upon the assumption that it is absolutely essential to the state's prosperity;" asserting that the Erie canal "owes the state nothing, but rather that the state owes to it by far the largest part of its prosperity." Mr. Schuyler said the canals had cost $35,000,000 in excess of revenues, which was a "large sum," but "when it is confronted with the immense benefits which have resulted from the outlay, which nowhere appear in the financial accounts of the canals, then it dwindles into insignificance." The people of the state own the great water way "connecting the western lakes with the tide water of the Hudson" and "so long as it remains our property it can never become a monopoly or be controlled by combinations." Referring to the fact that "the largest portion of the millions realized has been derived from western products," he said it was not surprising that the business men of our own state as well as of the West were so persistent "in their demands for a free canal." Mr. Schuyler further observed that it seemed evident from the action of the legislature and canal board that canal revenues were not expected to yield more than enough to meet current expenses, leaving the principal and interest of the debt to be paid by taxation. After giving statistics of canal business and its results on the prosperity of the state, and especially of the city of New York, he suggested that we could afford to remit all tolls, and that such a policy would not only be more appropriate to a great state, but would make the people of the western states more inclined to use our thoroughfare.

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Referring to the amendment of 1874, which provided that "the expenditures for collection, superintendence, ordinary and extraordinary repairs, shall not exceed in any year the gross receipts for the previous year," Mr. Schuyler said that rates of toll must be imposed "sufficient, at least, to keep the canals in good repair," with a margin for extraordinary contingencies. The Constitution contained at least an implied obligation to maintain tolls at a rate sufficient to produce revenue adequate for ordinary canal purposes, and that the recent policy of reducing tolls and creating a free list could not be carried much farther without a constitutional amendment abrogating the provision which required the running expenses to be paid from canal revenues, for if there were no revenues there could be no expenditures for this purpose. An attempt was made in 1877 to remove this incongruity by an amendment of § 6 of article 7, omitting the provision limiting expenditures to receipts from revenues, but it was not passed.

In 1878 the issue of free canals was presented to the legislature by three amendments, offered in the assembly by Dr. Isaac I. Hayes, chairman of the canal committee. It is a curious circumstance in our constitutional history that when the movement for low tolls was approaching a climax destined to result in free canals, the most conspicuous champion of the new movement in the legislature should have been a man who was almost an outsider, who was born and educated in Pennsylvania, and who had spent many years in studies and experiences wholly foreign to those which might naturally have fitted him to become the exponent of New York's canal policy. He had already won distinction for himself and credit for the nation by his travels, explorations, and writings, had made several voyages to the Arctic regions, and had received the highest honors from numerous geographical societies, including those of London and Paris, for his

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services in the field of geographical discovery. In 1876, at the age of forty-four, he turned aside from the fields of literature and science to the domain of statesmanship, and was elected to the assembly from the city of New York. He at once addressed himself to the great problem then confronting the people of New York with the same intelligence, patience, and persistence that marked his labors as an explorer. He mastered the subject, and presented views of the canal problem and its possibilities which had not been suggested by our most experienced statesmen. He served five terms in the assembly, and his legislative career was especially marked by his advocacy of free canals. The results of his studies are embodied in two speeches made by him in the assembly of 1878, the year in which his amendments were first introduced. There were three amendments relating to this subject: First, § 3, which, among other things, provided that "no tolls shall hereafter be imposed on persons and property transported on the state canals;" that canal expenses should be paid from taxation; that the canal debt, which, on the 30th of September, 1877, was declared to be $9,014,200, should be paid from taxes to be raised under a new § 5; second, § 5, which required taxation for the payment of the canal debt; and § 6 was also to be amended by omitting the provision limiting canal expenses to receipts from revenues.

Dr. Hayes began his discussion of the subject on the 27th of February, 1878, and I am indebted to the New York Tribune of February 28th for a copy of his speech. He began by remarking that the amendments were very radical changes in the Constitution, were "utterly at variance with the meaning and intent of the original framers of that instrument," and included "provisions never contemplated by those public-spirited men whose genius conceived and whose energy perfected the canal system of the state." Those men intended that the canals

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should, from their business, "pay all the expenses of their maintenance, and from time to time accumulate sufficient revenues to liquidate the debt incurred by their construction." "The fathers of the canals" never dreamed that the canals would or could become a "tax upon the property and revenues of the state, nor that the rivalries of railroads would change their relation to the course of trade. Railroads were then unknown." Dr. Hayes said that New York state had "less natural ground for being the home of a prosperous people than any equal amount of territory within the Federal union. The products of her soil are not more than sufficient to sustain her population; and yet she has within her borders one of the three great cities of the world," meaning "those centers of traffic, of money, and of power which money makes." A little more than a century ago the city of New York was a mere hamlet, inferior to Newport, R. I., in population, wealth, and commercial importance. Dr. Hayes thought that no great city was so "unfortunately situated" as New York; that while she has a magnificent harbor—"there is none finer"—and "stands upon an island with navigable waters upon every side," and has running by her a magnificent river, "a magnificent river and navigable waters and a fine harbor do not make a city. . . . The harbor would accommodate all the ships of all the world, but the river which pours into it its vast volume of water is the most worthless river of any magnitude on the face of the earth. . . . Great cities are built because they drain to them by water certain products of the earth which men require," but the Hudson river "drains to the sea and to the commerce of the world absolutely nothing." The two natural outlets of the North American continent to the sea are the Mississippi river and the St. Lawrence; "man has made the third," the Erie canal, which, by its connection with the Great Lakes, has given

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the Hudson river "the greatest drainage of the world." "Blot out the Erie canal, and the Hudson river is but a magnificent stream, and the cities by its sides would cease to be; and notwithstanding its matchless harbor, New York city would take its place in history with Babylon and Carthage, and other commercial marts of past ages." Answering the question whether railroads could not save New York and come to her assistance, Dr. Hayes said that they would not and could not; that there was not a "line of railroad transportation that is profitable anywhere in the world which does not follow more or less directly on the line of navigable waters," and that there was not a dividend-paying railroad "that does not connect one point on navigable water with another point on navigable water; and these points within 200 miles of each other. . . . The New York Central Railroad was built because the Erie canal was there." The Erie canal made the cities along its line, and by giving a diversion of trade by the Hudson, allowed cities to grow up beside its waters, and made New York city possible. Dr. Hayes said that the greatness of the city and state of New York was due to the fact that the state "occupies the territory embraced by the only break that occurs in the great mountain chain which stretches parallel with the sea, north and east from the Gulf of Mexico to the St. Lawrence," and that De Witt Clinton "realized the fact, embraced the opportunity, and seized the occasion."

"Water channels are the highways of commerce." Dr. Hayes thought that the city of New York owed her greatness to the Erie canal, and that she could well afford to pay all that the canal has cost, and all the expenses of its maintenance. Railroads are nothing. "There is not on the face of the whole earth a city that a railroad alone ever built. . . . Cities are the accidents of commerce; and commerce is the accident of water. . . .

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Cheapness is the essential element of commerce. Steam is always costly. The great products of the earth that make up traffic are never in a hurry. . . . Commerce means water, and land transportation is a simple incident, and has a very moderate limit, while water is endless, and furnishes the natural course and direction of trade and commerce." Dr. Hayes said that his course of reasoning had led him to the conclusion that, whatever the cost of the canals, "the state can abundantly afford to pay it. Aye, even a hundredfold," and that the annual cost was "a paltry little million of dollars."

Discussing the means of transportation from the Northwest by railroads Dr. Hayes said that commerce had no sentiment; that it would get to the seaboard by the cheapest route, and that the simple question was whether we could make it cheaper to come by our way. The people are sovereign, and hold the canals in trust for their own benefit; they "do not demand revenues from the canals," but they do insist that the state shall not "lose the prestige" it has acquired by means of the canals. They have seen and experienced enough of the selfishness of railway monopolies and combinations. They hold in their hands the right of way from the Atlantic ocean to the Great Lakes; the key to the commerce of the great West; and will not yield it to any power on earth, "but will keep that which their ancestors acquired through their energy and foresight as a sacred trust, and a power forever. . . . They will make the Erie canal a highway of their own, as free as the trackless ocean, open to all the world; and they will say to the West, 'Through this channel you may pour your vast products of the soil;' and to the East, 'Hither may you pass untrammeled with the fruits of toil gathered from every quarter of the earth.'" Concluding his remarks, Dr. Hayes said the canals should be and continue forever free, and should forever remain the property of the state. "Free because

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they have made her powerful; free because they have made her prosperous; free because they made her great."

On the 10th of April following Dr. Hayes closed the debate on the amendments. This speech is printed nearly in full in the New York Times of April 11th. Comparing the progress made by New York and Virginia he said that New York, "with her canal and no natural wealth whatever, rapidly increased her population and rushed forward into opulence and power with giant strides;" but that she was in danger "of losing her supremacy. . . . The notable events in the history of our state have been, first, the construction of her canals; second, their enlargement; and the third assuredly will be liberating them from the incubus of tolls." While we had "virtually a monopoly of the carrying trade, we should have made our canals yield a revenue sufficient to have paid off all the loans contracted in aid of their construction and enlargement within the stipulated period of eighteen years, and thus have been prepared, without taxing the people, for a competition which the enterprise and energy of sister states was certain to force upon us." Comparing New York and Pennsylvania Dr. Hayes said: "The census returns show that for the decade ending with 1860 the population of the states of New York and Pennsylvania has increased in exactly the same ratio; but for the decade ending in 1870 the percentage of increase for Pennsylvania was over 21 per cent and New York less than 13; or, taking the period from 1840 to 1870, it appears that Pennsylvania has gained 104 per cent and New York only 80. At this rate Pennsylvania, eighteen years hence, will outrank New York in population." This condition was due, he said, to competition and also to a loss of trade in western products. The total exports of grain from the United States ports to all foreign countries between 1871 and 1876 increased

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nearly 125 per cent. Dr. Hayes thought this increase ought to have had a beneficial influence in the state of New York, but, on the contrary, it appeared that the "total movement in vegetable food by trunk roads and canals, connecting the West with the city of New York, was, in 1871, 3,965,471 tons; and in 1876, 3,867,000 tons,—an actual loss of 98,471 tons; and notwithstanding there was a total gain in exports equal to 125 per cent, the trade of our own state actually fell off 7 per cent. Dr. Hayes thought that these and other facts cited by him conclusively proved that "the constitutional restrictions in regard to our public works are insidiously working in the interest of our rivals, and are actually retarding the growth of the state, and repelling trade which naturally should flow to us." Referring to the expectation that the canals would pay for themselves, and to the fact that some $35,000,000 had been raised by taxation for canal purposes, and that the canal debt was still $9,000,000, Dr. Hayes said that "if the canals have not directly paid for their full cost, they have, in an indirect manner, more than redeemed every pledge made for them." He furnished numerous statistics bearing on the question, intended to show the importance of the canals in the development and prosperity of the state, and the loss which would result from a policy which would have the effect of diverting commerce from New York, and closed his speech with an earnest appeal for the passage of the amendments.

The debates, except the first speech by Dr. Hayes, parts of his second, and fragments of speeches by others, have not been published, and I am therefore unable to give even a summary of the discussion; but according to newspaper accounts of the movement for free canals the opposition to the Hayes amendments came largely from counties remote from the canals, and was based on the

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argument that those counties derived no practical benefit from the canals, and therefore ought not to be taxed for their maintenance. Against this it was urged that the increase in business and valuation of property anywhere in the state produced advantages which were felt in all parts of the state, and was an indirect benefit to remote counties by augmenting taxable property, and thereby reducing the rate of taxation. At the close of the debate the committee of the whole reported in favor of the passage of the resolutions, "which report was agreed to and the same ordered engrossed for a third reading;" but, on motion of Mr. Alvord, the resolutions were recommitted to the committee on canals, and no further action was had on them at that session.

Governor Robinson evidently did not join the movement for free canals, although he approved the reduction of tolls. In his message of 1879 he said "the tolls have been reduced to a point lower than ever before known, and a great many articles have been placed upon the free list. Although, in my opinion, the requirements of the Constitution render it probably dangerous to attempt further reduction of tolls, it is a matter for congratulation that they have been brought to so low a point that all the advantages of free canals are substantially attained without the injustice of taxing the people for their maintenance." Dr. Hayes introduced the amendments again in 1879, but they were not passed. Their presentation again, however, kept the subject before the legislature and the people, but it was evidently too early to hope for their acceptance.

The amendments were strongly indorsed this year by the New York Chamber of Commerce, which, in a series of preambles and resolutions, pointed out that the "extraordinary increase of business that has followed the reduction of tolls on the canals of this state has fully

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demonstrated, not only the wisdom of the low toll policy, but also the necessity of the further improvement and continued maintenance of the canals as a means of cheap transportation and protection from the exactions and discriminations of the railroads;" called attention to the fact that the Dominion of Canada, "for the purpose of diverting from our state and city the vast and increasing commerce of the Great Lakes," had expended $54,000,000 in the enlargement of the Welland and other canals "tributary to the navigation of the St. Lawrence river, enabling the passage of vessels of 2,000 tons burden, and which were to be free of tolls, or comparatively so," and expressed the opinion that "it has become a matter of imperative necessity, if we would retain our commerce, that all restrictions should be removed that interfere with the free navigation of our canals." The legislature, at this session, did pass important amendments to the canal article, which have been noted in another part of this chapter, but it did not go to the extent of abolishing tolls. The gradual abolition of tolls was further marked this year by the addition of several articles to the free list.

In April, 1880, the legislature concurred in modifications of the toll sheet recommended by the canal board, making a few additions to the free list, and imposing tolls on some articles which were theretofore free. In May following the legislature passed several important amendments to the canal article, which have been noticed in another part of this chapter, but they are so intimately connected with the movement for free canals that they should receive further attention here. I have already referred to the amendment of 1877, omitting from § 6 the provision limiting canal expenditures to canal revenues. This limitation was abrogated by the proposed amendments of 1880; and while the revenues were to be

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applied first to the cost of collection, superintendence, and ordinary repairs, the legislature was not limited in expenditures for these purposes. The amendment also prohibited the increase or reduction of tolls without the concurrence of the canal board and the legislature, following, as to the reduction, the rule established in 1821 and in 1854. The legislature did not manifest any intention to abolish all tolls, although its action in relation to the toll sheets, beginning with 1877, indicated a purpose gradually to enlarge the free list and reduce the tolls actually retained. The legislature approved this year, in substance, the proposition submitted by Dr. Hayes in 1878, authorizing taxation for the purpose of paying the canal debt. The Hayes amendments were not introduced at this session, and Dr. Hayes at this time closed his legislative career.

The discussion of the Hayes amendments and other cognate canal questions, with the positive action of the legislature of 1880, was clearly bearing fruit, and the year 1881 saw the beginning of the end of canal tolls. It has already been seen that the free list inaugurated in 1877 had been gradually enlarged until in 1880 it included more than thirty kinds or classes of articles. Auditor Schuyler, in his report dated December 10, 1880, and presented to the legislature of 1881, objected to the free list as unconstitutional, arguing that while the Constitution permitted the legislature and the canal board to reduce tolls, this did not mean that tolls could be wholly abolished. As a practical question the distinction would mean little, because if the tolls could be reduced at all they could be reduced to a merely nominal amount, which would produce no revenue, and if they could be reduced to a mere nominal, nonproducing minimum it is difficult to see why they could not be reduced to zero. Notwithstanding Mr. Schuyler's objections the legislature, in

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March, approved a radical change of tolls proposed by the canal board. The new toll sheet included seventy-five kinds or classes of commodities, besides boats, and all of these were made free "from tide" and twenty-nine were made free "toward tide." By this action the legislature made the canals free on all west or north bound traffic, and made them free on east and south bound traffic on 40 per cent of the schedule. The canals were thus made wholly free one way, and largely free the other way. Dr. Hayes had left the legislature, but the cause which he so earnestly advocated in 1878 was not lost.

Before the approval of the toll sheet in 1881, George H. Forster had introduced the Hayes amendments in the senate, and they were afterwards introduced in the assembly by Francis B. Spinola. Having approved the toll sheet which made the canals almost free it was easy for the legislature to take the next step and pass the amendments. They were passed in the senate on the 21st of July by a vote of 18 to 12,—one more than a majority,—and the assembly passed them the next day by a vote of 65 to 30,—a bare majority of the members voting for them, and 33 members were either absent or did not vote. But the legislature had committed itself to the new policy and the amendments were therefore submitted to the consideration of the people for such action as they might think proper in the coming election of senators and members of assembly. The two great political parties formally approved the new movement in the platforms adopted by their state conventions in 1881. The Republican convention said: "That as the Republican party has always been identified with whatever was deemed essential to the maintenance of the commercial supremacy of the state, we are in favor of submitting to the people the question of making our canals free." And the Democratic platform contained this declaration: "We approve

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of the unanimous action of the Democratic members of the last legislature in providing for the early submission to the people of an amendment to the Constitution in favor of free canals." The effect of the reduction of tolls and of the free list, which was shown by the small amounts received in 1878 and 1879, was still more marked in 1881, when only $810,532.05 were received from canal tolls, and this was the smallest amount which had been received since 1831.

We should not forget at this stage of our canal history that Dr. Hayes, in December, 1881, at the age of forty-nine, closed a career full of labor and hardship, but brilliant in achievements; and while he did not live to see the final consummation of the project for free canals, he lived long enough to see it adopted by one legislature and approved by a growing public sentiment which was expressed by the two leading political parties in their platforms, and with this auspicious prospect he must have felt assured of the ultimate result. A new legislature was elected in 1881 and the amendments were again introduced in 1882. Governor Cornell referred to them in his annual message, and suggested their consideration by the legislature, but without expressing any opinion on their merits. A most valuable contribution to the discussion of the subject was a letter written by former Governor Seymour to the chairman of the assembly committee on canals, and bearing date February 27, 1882. I have already cited Governor Seymour's suggestion in his message of 1864 that, rather than suffer a diversion of commerce, it would be better to abolish all tolls on western products. Eighteen years had passed since that message, and they were years marked by agitation and even alarm concerning the future of the canals. Governor Seymour in this letter strongly urged the adoption of the amendments for free canals. He had

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been chairman of the canal committee in the assembly of 1842, and then and afterwards had given the subject of canals a most careful study; he was therefore able to speak as an expert, and his opinions consequently had great weight. He advocated a liberal policy towards railroads and canals. Admitting "the immense loss of revenue by the state from this policy with regard to the railroads," he said it had "gained wealth and prosperity by taking off taxes upon commerce." He characterized tolls as the most hurtful "kind of taxation, falling oppressively upon labor, industry, and commerce." Referring to the idea which prevailed in the early part of our canal history, and which had been recently revived, namely, that sections of the state remote from the canals could receive little if any benefit from them, he said: "The wise way to lighten taxation is to add to the wealth and prosperity of the community;" and cited the state engineer's last report to show that in the counties of St. Lawrence and Delaware the assessments were lower than in 1818, before the Erie canal was built. He repeated the suggestion already made by many others, that the canal was necessary to restrain railroad charges, and said that if the "canals do not carry a pound of freight it would be wise to keep them in order so that they would be ready for use to defeat unjust and hurtful charges against the business of New York."

The amendments were passed again by a vote of 22 to 10 in the senate and 74 to 44 in the assembly. The legislature at this session passed an act, chapter 229, submitting the proposed § 3 of article 7 to the people, but did not submit §§ 5 and 6. Sections 3, 5, and 6 were considered by the legislature as forming together a complete plan for free canals, including the abolition of tolls, the repeal of the provision limiting canal expenditure to canal revenues, and a new provision authorizing

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general taxation for canal purposes. They were passed in each house at the same time, and by one vote, and were all embraced in one general resolution. It seems singular now that the legislature by the submission act should have included only § 3, and that it should have prescribed a form of ballot for § 3 only, omitting all reference to the other two sections. The records in the office of the secretary of state show that 486,105 votes were cast in favor of the amended § 3 and 163,151 against it. The records also show that four counties—namely, Monroe, Orange, Putnam, and St. Lawrence—used a ballot including §§ 3, 5, and 6, and on this ballot the aggregate vote for the three sections was 9,609, and the aggregate vote against them was 20,061; so that on the face of the figures §§ 5 and 6 were not adopted, but the State Board of Canvassers in its certificate declares that §§ 3, 5, and 6 were adopted. It is further to be noted that in three counties —Monroe, Orange, and Putnam—there was no separate vote on § 3, but all the votes were on the combined ballot, including the three sections, while in St. Lawrence county both ballots were used. But even if §§ 5 and 6 were not included in the submission, and, by strict construction, were not adopted, the provisions of these sections were necessarily put into practical operation, because, by the abolition of tolls, taxation became the only source of revenue for the maintenance and operation of the canals.

The substance of these amendments was included in the Constitution of 1894, and, at least, from the 1st of January, 1895, they must unquestionably be deemed a part of the Constitution.

The state should keep the canals.—In a sketch of the history of the canals in the chapter on the Convention of 1821 I have referred to the act of 1811, appointing commissioners with authority, among other things, to apply to the Federal government for aid in constructing the

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Erie canal, and have noted the report of Gouverneur Morris and De Witt Clinton, specially deputed to visit Washington and present the subject to the national government, and their failure to induce the President and Congress to embark in the enterprise. The canal was offered to the national government, but not accepted, and the commissioners thought the only course left for the state was to construct the Erie canal on its own account. This was accordingly done and the state thus became the proprietor of all the canals.

The Convention of 1846 deemed it important to hedge the canals about with a constitutional restriction, and accordingly proposed a section prohibiting the sale, lease, or other disposition of the canals. In the chapter on that Convention I have noticed the fact that the proposition in its original form permitted the sale of the unfinished canals. This was expressly declared to include the unfinished laterals; but this exception was subsequently omitted and the state was thereby pledged to complete all the canals. I have also quoted from speeches in that Convention showing that some delegates were in favor of selling all the canals; but the wisdom of the Convention was opposed to this view, and it was decided to preserve the canals, and thoroughly intrench them in the Constitution. A sale of the canals at that time would probably have resulted in their ownership by private corporations, perhaps railroad companies, and under such ownership they would scarcely have afforded the people any protection against freight charges imposed by corporations, unless the state had continued the policy, abandoned in 1851, of imposing tolls on railroad traffic, and this would have needed constitutional protection to avoid legislative fluctuation and changes in public opinion.

In 1857 Governor King, referring to the fact that the

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whole length of our canals and public works was 892 miles, and that, when completed, they would cost about $50,000,000, urged the legislature to take active measures for continuing the work of enlargement which had been going on more than twenty years, and said that "any purpose of selling the canals should not be, for a moment, entertained. They are state works in their origin and progress. They should so continue to completion and forever remain the property and under the control of the state."

Governor Morgan, in 1860, also considered the long delay in completing canal improvements, and noticed the mistakes in estimates and consequent heavy burdens imposed by the enlargement enterprise, but said that the "canals are to remain the property of the state. Their sale, inexpedient at any time, even if permitted by the Constitution, would be doubly so at a period when, by unwise legislation and uncontrolled competition, their revenues have been reduced to the lowest point."

Governor Hoffman, in his messages of 1869, 1870, and 1871, expressed very positive convictions concerning the disposition of the canals, especially against any transfer of them to the Federal government. Thus, in 1869, after remarking that the Erie canal has "an important relation to the commerce and business not only of our own state, but of the populous and rapidly growing communities of the great Northwest," that it was still of great power and value notwithstanding improved land transportation, and that "this work is a trust for the people of this state, whose enterprise and capital have created it, but it is to be administered in a spirit of liberality toward those great populations whose growth has been fostered by it and whose welfare it continues to affect," said "I desire to enter my earnest protest against the proposition, which in some quarters has met with favor, that it is the duty

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of the general government to interest itself in our canals, and ultimately to acquire control of them. Our state has a just pride in its public works, and is quite competent to take care of them. To foster and protect them, to adapt them fully to the public interest, and to the growing demands of the internal commerce of the country should be the duty of the legislative and executive departments." In 1870, again referring to the canals, he said it was "the duty, as it is the manifest interest, of the state, to foster and protect them; more so now even than before the construction of the lines of railway which connect the western and northwestern states with the seaboard;" and that "properly managed they will not only serve the original purpose of their construction, but will act as a check upon exorbitant charges of railroad corporations, and thus keep down the price of transportation for the various articles moving eastward and westward, to the mutual benefit of producer and consumer." In 1871, observing that "our internal commerce is far beyond that of our foreign trade," he said that "our canals are a necessary means of facilitating this great domestic traffic, and their maintenance in good navigable condition is essential to the general welfare of the people of this state," and that the "suggestion to surrender them to the control in any degree of the Federal government, deserves no consideration."

Governor Tilden, in 1875, expressed substantially the same views, but less positively, remarking in his annual message that "the Erie canal remains an important and valuable instrument of transport, not only by its direct services, but also by its regulating powers in competition with other methods of transportation. The state, so far as we can now foresee, ought to preserve it, and not contemplate its abandonment."

It is evident, however, that these executive suggestions

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did not meet with universal favor, for we find that in 1881, 1884, and 1885 amendments were introduced proposing to lease or sell the canals to the United States. Those amendments, which were considered in connection with other canal subjects, will be found at length in a previous part of this chapter; and we shall have occasion to observe in a subsequent chapter that the project of Federal ownership of the canals still has its advocates in this state.

Profit or loss.—Canal Auditor George W. Schuyler, in his report of 1879, said that "those canals which the Constitution declares shall not be sold or otherwise disposed of have earned in excess of all cost for construction, land damages, and operation, over $30,000,000." This included only the Erie, Champlain, Oswego, and Cayuga and Seneca canals, and excludes the lateral canals which, by the amendment of 1874, were released from the prohibition against their sale. I have already shown that these lateral canals cost some $35,000,000, and had become a heavy and continuing drain on the treasury. I have noted the amendment of 1882 which again included the Black River canal among the canals which could not be disposed of. I think that a statement concerning the profit or loss resulting from canal construction and management should include all the canals, for they were all constructed under one system and nearly at the same time. Money received from taxation, loans, or tolls was necessarily used for all of them without discrimination. Since the abolition of tolls, in 1882, the canals included in the prohibitory clause of the Constitution have been maintained and operated at state expense as free public highways. That date, 1882, when our canal policy was radically changed and when revenues from the use of the canals practically ceased, seems the most appropriate time for making a computation and comparison of the total

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canal receipts and expenditures. At that time, according to the comptroller's report, the aggregate canal tolls received were $134,837,814.26. Other sources of revenue include interest on deposits, $6,068,951.13; various duties, $3,592,039.05; salt duty, $2,055,458.06; sales of land, $320,518.15; rent of surplus water, $138,823.73; steamboat tax, $73,509.99; and miscellaneous, $2,939,442.48; making a total of $150,026,556.85.

The expenditures for construction, repairs, maintenance, and operation, and all other purposes, amount to $130,896,524.28, leaving an apparent net surplus of $19,130,032.57. But it should be borne in mind that, in addition to the foregoing receipts, the people contributed $39,012,454.43 by taxation for canal purposes during the same period. The same report shows that during the period of canal tolls the state borrowed for canal purposes $71,920,503.28 to meet canal expenditures in anticipation of tolls, taxes, and other sources of revenue; that in this field of financial operation payments were made as follows: On principal, $55,752,191.81; premiums on purchase and investment of stock, $743,611.02; temporary loans, $3,406,467; interest on loans, $47,246,868.19; general fund, $5,015,774.60; general fund debt, $13,834,637.34; making a total of $125,999,549.96. Add to this the foregoing expenditures for construction, etc., $130,896,524.28, and we find that the total expense side of the canal account was $256,896,074.24, but which includes some items which were mere matters of bookkeeping, and balance one another in the comptroller's statements. This method of stating the account necessarily includes some duplication because the money borrowed was paid out for construction, repairs, etc., and had to be repaid from any revenues available. If we add to the amount received from tolls, etc. ($150,026,556.85), the sum borrowed ($71,920,503.28), we have a

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total of $221,947,060.13, besides the sum received from taxation. Deducting this amount from the total expenditures, $256,896,074.24, it appears that the state paid out for canal purposes $34,949,014.11 more than had been received from canal sources, and, except for taxation, the state would have owed this amount; but this result was avoided by the payment of taxes amounting to $39,012,454.43, so that, as a result of all the canal financial operations ending in 1882 there was an apparent surplus of $4,063,440.32, and the state still owed $8,983,360 on the canal debt. Looking at the whole field it can hardly be said that the canals had yielded any surplus revenue at the time when canal tolls were abolished. The expectations of the founders and promoters of the canal enterprise were not realized in direct financial results, at least, so far as it was hoped that the canals would be a source of revenue sufficient to relieve the people from taxation. What the result might have been if railroad tolls had not been abolished we cannot even conjecture; but judging from the amount received from such tolls while they were required to be paid, and the great railroad traffic of recent years, it is reasonable to believe that a moderate toll on this traffic would have produced a very substantial contribution to our public revenues.

CORPORATIONS.

The amendments affecting article 8 related to some aspect of municipal affairs. Thus, in 1891 and 1893, it was proposed to amend § 1 by omitting municipal corporations from the exception permitting special laws, which would have required general laws for this class of corporations. This amendment was suggested by the senate committee on cities, in its report concerning city affairs, dated April 15, 1891. It was introduced in connection with one relating to the incorporation of cities,

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and seems to have been a part of a plan for the organization and government of cities under general laws. The other amendment appears in the article on cities.

I have referred, in a previous chapter, to the attempt in the Commission of 1872 to include in § 11 of article 8 a provision limiting local indebtedness to 10 per cent of the assessed valuation, and the failure of the Commission to include that provision in the section as finally recommended. The consideration of this subject was resumed in 1876 by an amendment which was then passed by the legislature, proposing to fix the limitation at 5 per cent. It should be observed that the Tilden commission on cities, appointed in November, 1875, considered the subject of local indebtedness, and, in its report, submitted in February, 1877, objected to this amendment on the ground "that this expedient is not a remedial measure, and that its incorporation in the Constitution would be an error. The apparent prohibition, both as to taxation and the percentage of debt, could be readily evaded by raising the assessed values to which the ratio of taxation and of debt would apply. Such restrictions do not attempt to prevent wastefulness or embezzlement of the public funds in any other way than by limiting the amount of the funds subject to depredation. The effect of such measures would simply be to leave the public necessities without adequate provision."

Governor Robinson, in his annual message of 1879, considered at some length the subject of local indebtedness. It will be remembered that the Governor had been an active member of the Commission of 1872, and was familiar with its deliberations and purposes. In the chapter on that Commission I have given facts collated by the Commission relative to local indebtedness, indicating very serious burdens then being borne by many municipalities. In this message Governor Robinson said

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that "whilst the state has paid all its debts, except about $8,000,000, and is rapidly reducing its expenses and taxes within reasonable bounds, most of the cities, counties, and towns in the state are struggling under a load of debt, large expenses, and heavy taxation." He attributed this condition "to a false financial system which seemed to deprive men of their reason, and of all capacity to foresee the evil which they were bringing upon themselves and children." The melancholy condition following this period of extravagance is thus forcibly depicted by the Governor: "They played with debt, and courted taxation as if for pastime. Many towns almost buried themselves with bonds, issued for railroads which have never been built, and covered their farms with mortgages for which they have received no consideration. Now that the illusion is gone, they are deploring the misfortunes in which it has involved them." The Governor vigorously denied the possibility of repudiation, declared that these municipal contracts, however improvident, must be fulfilled in good faith, and that the state could not assume any part of such obligations. He said the first step toward relief was to stop the increase of indebtedness; that municipalities should next make a radical reduction in local expenses; that sinking funds should be established to meet existing obligations, and that while in case of heavy indebtedness complete relief could only be reached by a "long and rugged path," if this were faithfully pursued the people would receive ample compensation "in learning to reduce their own personal expenses, and in having it impressed upon them, in a manner never to be forgotten, that debts, both public and private, are an unmitigated evil, and should never be contracted except under the pressure of unavoidable necessity." Governor Cornell, in 1880, also referred to this subject, and said: "Serious embarrassment exists in different sec-

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tions of the state on account of the large amount of town indebtedness, incurred, for the most part, in aid of railroad enterprises. In some instances towns are being depopulated in consequence of the high rate of taxation rendered necessary to pay the interest on their bonds The value of property is also depreciating; and looking forward to the maturity of the debt, the prospect becomes still more discouraging. The only remedy seems to be in refunding the indebtedness, so as to reduce the rate of interest. This, however, requires an improved credit: and it is very desirable that some measure be devised, if possible, to enable the towns to accomplish this object."

In 1881 an amendment was introduced, but not passed, imposing a 10 per cent limitation on local indebtedness. In 1882 Governor Cornell said, in his annual message, that "the proposed amendment for further restricting the authority of counties, towns, and villages to contract local indebtedness must, in view of past experience, commend itself to the approval of the people." The amendment was passed at this session. It was introduced again in 1883, and passed the second time in 1884, and was adopted by the people in November.

Governor Hill, in his annual message of 1885, called attention to the amendment, remarking that it was of "vital significance, and a failure to observe its provisions becomes most disastrous in its consequences;" that it rendered void all bonds issued in violation of its terms: that it must affect the value of all securities, "as every purchaser is put upon inquiry as to the existence of the facts upon which their validity depends, and he purchases at his peril." He suggested legislative caution in passing bills providing for local taxation, so that indebtedness might not be authorized in excess of the constitutional limit, and observed that "the theory of the amendment seems to be that it is wise that there should be some

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constitutional check upon the absolute and unrestricted power of taxation which has heretofore existed" and which experience has shown has led to serious abuses, and that the indebtedness and taxation permitted by the amendment were "a sufficient and reasonable exercise of sovereign authority," if wisely and economically administered.

In January, 1886, Governor Hill sent a special message to the legislature concerning the indebtedness of the city of New York, suggesting that the city had already exceeded the constitutional limit when the amendment took effect, and recommending a reorganization of its sinking funds with a view of providing moneys for the erection of needed public buildings, and relieving the city from immediate financial pressure. He remarked again concerning the amendment, that "the evil sought to be guarded against by it was the imposition upon future generations of taxpayers of the payment for the expenditures of to-day."

SUFFRAGE.

The reader will recall the reference in a former chapter to the recommendation of the suffrage committee in the Convention of 1867 that the provision requiring a residence of four months in a county be abrogated, for the reason, among others, that hundreds of clergymen who change their residence in the summer, were, by this limitation, deprived of the right to vote. The subject was revived in 1876 by a proposed amendment which added to the soldier clause the provision that "no minister of any religious denomination shall be deprived of his vote by reason of any change in residence, made in the regular discharge of his ministerial duties."

The legislature of 1877 passed an amendment to § 1, article 2, recommended by the Tilden commission on

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cities, providing that "elections for members of city boards shall be so regulated as to give to minorities a proportionate share of representation therein." It was introduced again in 1878, but not passed.

Woman suffrage amendments were introduced in 1878, 1880, 1882, 1883, and 1885.

In 1888 it was proposed to amend the suffrage section by providing that a soldier should not be deprived of his vote by reason of his absence while an inmate of a soldiers' or sailors' home. In 1890 an amendment was proposed to § 5, relating to the form and distribution of ballots, and method of voting, but I have not had access to the text of the amendment.

EDUCATION.

The amendments on this subject related chiefly to the establishment and maintenance of a common school system and the prevention of sectarian instruction. I have recounted in former chapters the efforts made in the Conventions of 1846 and 1867 and in the Commission of 1872 to incorporate in the Constitution a provision establishing and perpetuating a common school system, and have given the text of an amendment contained in the revised Constitution submitted to the people in 1869. The subject was revived in 1876 by amendments intended to add to article 9 provisions requiring an annual school tax of one and one-fourth mills, that "the common schools of the state shall be free to all persons over five and under twenty-one years of age, residing in the state;" and that neither the money nor the credit of the state nor of any municipal corporation, town, or county shall be applied to the support of sectarian schools. At the same session Mr. Webb offered in the assembly a resolution "instructing the judiciary committee to prepare and report

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a proposed amendment to the Constitution, securing forever a free common school system, and providing against the introduction in the common schools of any peculiar religious doctrine or belief, or the appropriation of money to any denominational school, or the granting of any peculiar privilege in the common schools to any religious denomination whatever;" and Mr. Smith introduced amendments to article 9, which, after some modifications and additions, were passed in the following form:

"2. Free common schools shall be maintained throughout the state forever. The legislature shall provide for the instruction in the branches of elementary education in such schools of all persons in the state between the ages of five and twenty-one years, for the period of at least twenty-eight weeks in each year.

"3. Neither the money, property, or credit of the state, nor of any county, city, town, or school district, shall be given, loaned, or leased, or be otherwise applied to the support or in aid of any school or instruction under the control or in charge of any church, sect, denomination, or religious society; nor to or in aid of any school in which instruction is given peculiar to any church, creed, sect, or denomination, or to or in aid of any such instruction; nor to or in aid of any school or instruction not wholly under the control and supervision and in charge of the public school authorities."

These amendments were introduced again in 1877 and 1878, but not passed.

On the 25th of February, 1885, the comptroller, Alfred C. Chapin, sent a special communication to the legislature, recommending an amendment providing for the conversion of the common school fund into cash, to be used for general state purposes. With this communication the comptroller transmitted the following proposed

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substitute for § 1 of article 9, which was introduced the next day by Senator J. Sloat Fassett:

"The capital of the literature fund and the capital of the United States deposit fund shall be respectively preserved inviolate. The revenues of the said literature fund shall be applied to the support of academies, so soon after January 1, in the year 1887, as good judgment may dictate; the comptroller shall convert the capital of the common school fund into cash, which shall be paid into the treasury and be applied in reduction of direct taxation."

In this communication the comptroller gave a sketch of the history of the common school fund, with tables showing its capital from year to year, from its creation, in 1805, the income derived therefrom, the increase by additions from the income of the United States deposit fund, and from other sources, and also the annual appropriations for common school purposes. The comptroller deduced from these tables the conclusion that "this fund, for the accomplishment of present purposes, is, and for years has been, a mistake." According to Mr. Chapin's statement the capital of the common school fund on the 30th of September, 1884, was $3,852,901.54. The net income from it that year, after deducting transfers, was $162,564.49, and that the appropriations for common schools the same year amounted to $3,274,959.47. He estimated that by the time a constitutional amendment could take effect, 1887, the cash value of the fund would amount to $4,250,000, and he thought this amount should be turned into the treasury and made available for general purposes. He said an "objection to maintaining such a trust fund arises from its unfitness to fulfil the duties of a productive instrument at the present day. . . . A fund earns revenue only by investment," and this, with the diminishing rate of interest, will necessarily

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produce a small income. He thought the conversion of the fund into cash would set free "for purposes of reduction of taxation" not only the capital of the fund, but the $25,000 annually added to it from the United States deposit fund. He said the school fund survives, "but only as a relic. At most it can but feebly and needlessly supplement the direct school tax. . . . At the present day true financial wisdom will find special means for raising revenue as the progressiveness of the people takes on special forms or discloses new sources of wealth." He again referred to the corporation tax law as a source of revenue, and predicted large results from it.

The Fassett amendment was considered once in committee of the whole, but was not reported. Governor Hill, in his annual message of 1886, called attention to the comptroller's communication, and recommended the adoption of the proposed amendment, but it was not introduced again.

In view of the recent and probably permanent increase in revenues derived from indirect taxation, it is at least an open question whether it is worth while to maintain the common school fund, which produces only about 4 per cent of the total state appropriations for common schools. The amount which could be realized from the present capital of the fund would probably not exceed $5,000,000. In the absence of direct taxation, this would be added to the fund in the treasury accumulated from various indirect sources of revenue. The capital of the common school fund on the 30th of September, 1904, was $4,648,140.77, and the income that year was $169,889.06. The state appropriation for common schools the same year was $4,095,000, and the entire expense for the common schools, including local taxation for the same period, was about $42,000,000.

The growth of indirect taxation has passed far beyond

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even Mr. Chapin's expectations; for the year ending September 30, 1904, the indirect revenues amounted to $23,473,046.23; including liquor tax, $9,039,877.18, corporation tax, $7,033,196.99, transfer tax, $5,428,052.48, pool tax, $211,416.64, organization of corporations, $199,680.16, and $1,560,822.78 from other sources. No direct tax for ordinary state purposes has been imposed since 1901; but under § 4 of article 7 of the Constitution, direct taxes are necessary to provide sinking funds for the payment of extraordinary debts, which at present (1905) include the canal improvement acts of 1895 and 1903. It is expected, however, that even this item of direct taxation may soon be avoided or modified in consequence of constitutional amendments intended to authorize the payment of the canal debts from indirect taxation, and extending the time of payment, which now cannot exceed eighteen years. The reader will recall the fact that direct taxation was suspended in 1827, and it was then hoped that revenues derived from canal tolls and other indirect sources would be sufficient to pay the canal debt and also ordinary state expenses, but that this hope was not realized, and direct taxation was resumed in 1842. The indirect revenues are not yet sufficient to pay all state expenses; according to figures furnished at the comptroller's office, $26,735,457.70 will probably be needed during the fiscal year ending September 30, 1905.

LOCAL OFFICERS.

In 1885 an amendment was proposed to § 4 of article 10 prohibiting the election of city, town, or village officers on any day on which a member of assembly was elected. This amendment was introduced again in 1891, with an additional provision that, beginning with 1897, such local officers should be elected on the regular election day, and hold office for two years beginning with

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the first day of the following January. At the same session an amendment was offered to § 5, requiring, in effect, that appointments of judges of courts of record to fill vacancies should be for the remainder of the unexpired term.

INTOXICATING LIQUORS.

The period between 1874 and 1894 was marked by a most earnest discussion of questions relating to a prohibition or restriction of the manufacture, sale, and use of intoxicating liquors. Numerous amendments were introduced, and the legislature gave the subject frequent attention. Party platforms expressed approval or disapproval of specific propositions, and the legislature went so far as to pass one amendment twice, but did not submit it to the people. The sale of intoxicating liquors was regulated principally by the excise acts of 1857 (chap. 628) and of 1870 (chap. 175) and the civil damage act of 1873 (chap. 646), until 1892, when a new excise law was passed. Several statutes were passed during this period, relating to the election, appointment, and qualification of excise commissioners, the disposition of excise moneys, and the details of excise administration. A prohibitory amendment was introduced in 1875. In 1879 a like amendment was offered to § 10 of article 1 and another amendment proposed a new article to be included in the Constitution, relating solely to this subject. A new article was also proposed in 1882. Later in the year the Republican State Convention declared "that while there are varying opinions on the sale of liquors, we subscribe to the principle that propositions on that subject, like all other propositions for change in the fundamental law, ought to be submitted to the popular vote." A like amendment was introduced in 1883, and the same year the Republican State Convention said:

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"We believe in the wisdom of the people in deciding all questions pertaining to the public welfare, and would accede to a desire of a large body of our citizens to submit to the voters a constitutional amendment in regard to the manufacture and sale of intoxicating liquors." Like amendments were introduced in 1884, 1885, 1886, and 1887. In 1888 the legislature passed a new article (17) in the following form:

"No person shall manufacture for sale or sell or keep for sale as a beverage, any intoxicating liquors, whether brewed, fermented, or distilled. The legislature shall, by law, prescribe regulations for the enforcement of this article, and shall provide suitable penalties for its violation."

At the same session the legislature created a commission to revise the excise laws. Under the Constitution this amendment could not have been passed again until 1890. It was not introduced in 1889. That year, however, the state convention of the Democratic party considered the subject, and made the following declaration in its platform: "We do not favor the unrestricted sale of intoxicating liquors, on the one hand, nor prohibition, on the other. We believe that the liquor traffic should be restrained and regulated by just and equitable excise laws, rigidly enforced, which laws in their operation should be substantially uniform throughout the state. We oppose the passage of the prohibition amendment upon which the next legislature is required to act."

In 1890 Governor Hill referred to this amendment in his annual message, and said he did not "believe that the people of the state favor the adoption of this amendment. Their sentiments upon this question have been tested and expressed too frequently to leave much doubt as to their position. They are opposed to prohibition, but believe in the regulation of the liquor traffic by just and equitable

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excise laws, rigidly enforced. Observation and experience have demonstrated to them, unless I am mistaken, that constitutional prohibition is not the best means of preventing or mitigating the evils of intemperance."

The legislature passed the amendment again at this session, together with a resolution that it be submitted to the people on the second Tuesday of April, 1891, but no law was passed providing for its submission. In 1891 Governor Hill again called attention to the amendment, and to the fact that no law had been passed providing for its submission. He said that "whether the last legislature could legally call a special election by a joint resolution and not by a statute, and whether such an election can legally be held, in the absence of further legislation, are serious questions which ought not to surround so important a matter." He thought the people did not wish the amendment submitted at a special election, not only because the date suggested (the second Tuesday of April) was inconvenient, but also because of the additional expense, which had been estimated by the secretary of state at $629,000. He recommended the enactment of a law for the submission of the amendment at the next annual election; but no law was passed for this purpose, and the amendment was not submitted.

CITIES.

The provisions relating to cities, included in the Constitution recommended by the Convention of 1867, were rejected by the people, along with other recommendations proposed by that Convention, except the judiciary article, and the article on cities, recommended by the Commission of 1872, and quoted in the preceding chapter, failed to receive the approval of the legislature; but, while all efforts toward constitutional municipal reform had so far

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come to naught, the subject was not abandoned, but it received serious executive and legislative consideration during the period covered by this chapter.

Governor Tilden, in his annual message of 1875, said: "The problem of municipal government is agitating the intellect of all civilized peoples. In our own state it is the more interesting and important because it involves the half of all our population which lives in cities or large villages. The framework of the system which we should adopt must be intrenched in the fundamental law, and protected by constitutional restrictions from arbitrary and capricious changes by legislation. This problem failed of any solution in the recent amendments to the Constitution. It is worthy of long-continued thought and debate. Time and discussion will at last mature a safe and wise result."

In May, 1875, Governor Tilden sent to the legislature a special message on municipal reform, in which he said that the "essential conditions of local self-government, or home rule, in respect to those powers of administration which are intrusted to the locality, are" a convenient and effective local organism, subject to popular control, freedom from disturbing conditions, especially the separation of municipal from state and Federal elections, protection of the popular will "from the effects of undue concentration of power, patronage, and the means of corrupt influence," and accountability of local officers to the people, through judicial tribunals, and to the state "through regular methods," thus obviating frequent legislative interference. "Arbitrary or irresponsible power finds no place in our popular system of government. The public officers are the trustees of the people. The majority are trustees for the whole,—for the minority, and for each individual." Governor Tilden closed this special message by recommending the appointment of a commission to report to the next legislature appropriate laws

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and constitutional amendments to effectuate reform in municipal affairs. On the 22d of May the legislature adopted a concurrent resolution providing for such a commission of not more than twelve persons "to devise a plan for the government of cities." A commission was accordingly appointed by Governor Tilden on the 29th of November, composed of the following distinguished citizens: William M. Evarts, Samuel Hand, Edwin L. Godkin, Edward Cooper, Martin B. Anderson, John A. Lott, Oswald Ottendorfer, William Allen Butler, Simon Sterne, Joshua M. Van Cott, Henry F. Dimock, and James C. Carter. All accepted the appointment except President Anderson, of Rochester University.

Governor Tilden, in his annual message of 1876, said the commission was still engaged in the work committed to it, and suggested that the "restrictions necessary to arrest the creation of municipal debts, which has become a grave evil, affecting one half of the people of this state, and calling urgently for redress, may well command the attention of the commission and the legislature, independently of the complicated questions involved in the structural organization of municipal government and the distribution of its powers." This restriction on local indebtedness, imposed by the amendment of 1884, has been noted in another article.

Governor Robinson, in his annual message of 1877, continued the discussion of this subject, observing that "in some respects the government of the city of New York is in almost a chaotic condition;" that of the city indebtedness "$85,000,000 has been created by direct action of the state legislature, without being asked for or approved by the common council of the city, or the board of supervisors of the county, or by its taxpayers or its people;" and that there were twenty-one of "these objectionable laws" then in force. The Governor vigorously

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condemned the "evil practice of commanding the creation of debt for local purposes by local governments," which he said was not confined to New York, but had been applied to many localities by statutes which commanded extraordinary taxation and indebtedness for local purposes. Commenting on § 9 of article 8, relating to the organization and government of municipal corporations, the Governor said:

"Whenever the legislature undertakes to impose on a neighborhood local taxes or local indebtedness for local purposes, it assumes to have a knowledge of the case which none can have except those who live in the neighborhood affected. It undertakes to discharge the functions of village trustees, town officers, city aldermen, or supervisors of counties; for which functions the men selected especially for these places are better fitted. Whatever evils may occasionally appear in local government should be remedied by the people at home, upon whom the responsibility should rest."

The commission appointed by Governor Tilden presented its report to the legislature on the 24th of February, 1877. The report considered at length the subject of municipal affairs,—organization, government, administration, and indebtedness,—and closed with proposed constitutional amendments intended to cure some existing evils, and prevent others in the future. The aggregate city indebtedness was stated at "upwards of $170,000,000," the interest on which exceeded the entire state appropriation for current expenses in 1875. The indebtedness of New York city alone exceeded $140,000,000. The waste or ill-advised use of the moneys represented by this great debt had necessarily produced a remarkable "poverty of the results exhibited as the return for so prodigious an adventure. It was abundantly sufficient for the construction of all the public works of a great metropolis

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for a century to come, and to have adorned it besides with the splendors of architecture and art." The commission urged the separation of municipal from state and Federal elections, and the adoption of a policy which would result in the selection of city officers on business principles, regardless of politics, remarking that "there is no more just reason why the control of the public works of a great city should be lodged in the hands of a Democrat or a Republican, than there is why an adherent of one or the other of the great parties should be made the superintendent of a business corporation. . . . The system of government by municipalities is inherent in our free institutions. In separate communities, existing as integral parts of the commonwealth, but having local interests which immediately concern themselves rather than the state at large, the instinct of self-government has always asserted itself in some way as the basis of their organic life." The commission then quotes De Tocqueville's observation, referring to the New England town system of government, that "assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science,—they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty." The commission thought that these and other arguments, which need not be quoted, led to the conclusion that the choice and supervision of local officers, and the determination of municipal expenditures, "should rest not with the central legislature, but with the people of the locality." The commission reiterated the suggestion which has been often repeated in previous pages of this work, that the time of the legislature should not be so much occupied with the consideration of local legislation, to the detri-

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ment of subjects in which all the people have a direct vital interest; remarking that "legislative interposition in the affairs of cities is an evil of the first magnitude," which was illustrated in a peculiarly objectionable manner by mandatory laws covering a variety of subjects. Thus: "Cities were compelled by legislation to buy lands for parks and places because the owners wished to sell them; compelled to grade, pave, and sewer streets without inhabitants, and for no other purpose than to award corrupt contracts for the work. Cities were compelled to purchase, at the public expense and at extravagant prices, the property necessary for streets and avenues, useless for any other purpose than to make a market for the adjoining property thus improved. Laws were enacted abolishing one office and creating another with the same duties, in order to transfer official emoluments from one man to another; and laws to change the functions of officers with a view only to a new distribution of patronage, and to lengthen the terms of office, for no other purpose than to retain in place officers who could not otherwise be elected or appointed." The commission thought it inadmissible "wholly to deprive the legislature of the power of intervention," because "the cities of our state would be left entirely unprotected against those evils which have seemed, in many instances, to make a resort to the central authority absolutely necessary." The commission urged the restriction of suffrage in electing members of the board of finance, citing numerous statutes which indicated a legislative policy to limit to taxpayers only the right to vote on propositions involving taxation or the expenditure of public funds. The commission specified certain subjects which were deemed properly within the exclusive jurisdiction of the municipality, but excepted "the business of providing for the support of the poor, maintaining a sufficient police, enforcing the

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local administration of justice, and supporting schools," and said that while the expense incident to these objects should be borne by the localities, they "are not purely local, and the people of the whole state have an interest in them; and it is the function of the central authority to secure their just accomplishment. The supervisory function of the state is therefore preserved, and it may itself, in case of need, assume the control of these branches of administration, and charge the expense on the localities."

The commission concluded by recommending the adoption of a new article of the Constitution, to be numbered 17, consisting of eleven sections. This article was passed by the legislature at the same session, and will be found in the volume of the session laws of 1877. It provided, in substance, that the powers conferred by article 8, § 9 (organization of cities and villages), should be exercised subject to the limitations contained in the new article; that city elections should be held "separately from the state and national elections and in March or April; that the legislative power in a city was to be vested in a board of aldermen," which should be the common council, but which board could not exercise any power conferred on the board of finance; and that the board of aldermen might, by a two-thirds vote, overrule the mayor's veto. The executive power was vested in a mayor, to be elected by the people, and who might be removed by the governor for cause. Each city was to have a board of finance, composed of not less than six nor more than fifteen members, elected by the people; but in cities of over 100,000 inhabitants such board must be chosen by electors owning property assessed at $500, or who had paid $250 rent during the preceding year; in cities with a population not exceeding 100,000, members of the board were to be chosen by electors who had paid taxes for the preceding two years, or who had, during the same period, paid an annual rent

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of $100. In cities of 25,000 population the board was to be composed of six members; in cities between 25,000 and 50,000, of nine members; in cities between 50,000 and 100,000, of twelve members; and in other cities the board was to be composed of fifteen members; in each case one third were to be chosen annually. The article prescribed in detail the duties of the board of finance; prohibited any indebtedness beyond available appropriations; prohibited the legislature from enacting any law providing for the "opening, making, paving, lighting, or otherwise improving or maintaining streets, avenues, parks or places, docks or wharves, or for any other local work or improvement in or for a city, but all authority necessary for such purposes shall be by law conferred on the city government; nor shall the legislature impose any charge on any city or civil division of the state containing a city, except by a vote of two thirds of all the members elected to each house." The article imposed specific limitations on the power of the city to borrow money, including the assent of the legislature to the proposed debt by a law passed by a two-thirds vote of each house. The article closed with the following section:

"Except as prescribed by the first section of this article, no change in the organization of, or in the distribution of powers in, a city government, or in the terms or tenure of office therein, shall be made by the legislature, unless by an act passed upon the application of the city, made by a resolution both of the board of aldermen and of the board of finance respectively, approved by the mayor, or by an act which shall have received the sanction of two successive legislatures."

The commission also recommended an amendment to § 22 of article 3, relative to the powers of the board of finance, and an amendment to § 1 of article 2, providing

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for minority representation in the election of city boards. At the same session an amendment was introduced limiting the bonded indebtedness of the city and county of New York to $150,000,000. Governor Robinson, in his annual message of 1878, referred to these amendments without expressing any definite opinion on their merits, remarking, however, that if they were not approved at that session "it will remain a grave question for the legislature to determine what should be done."

In 1879 amendments were proposed to article 8, providing that the local government of every city should be vested in a mayor and common council, which might consist of one or two boards; that such local government should "have exclusive power to levy taxes and to regulate expenditures for local purposes," including the compensation of city officers and employees; that the mayor should appoint all heads of departments, subject to confirmation; that the mayor might veto acts of the common council, and that, as to debts and compensation of city officers and employees, levying taxes or appropriating money, his veto should be final; that no city should incur indebtedness beyond 10 per cent of its assessed valuation, and the issuing or authorizing such excess of debt should be a felony; that the aggregate annual tax for local purposes should not exceed more than 1½ per cent of the assessed valuation, except by special permission of the legislature, which could be granted only in time of war, pestilence, or other great public calamity. These proposed amendments relating to city government were stated with much detail, but the foregoing summary is sufficient to show their scope and general character. They are significant as an expression in tangible form of the current discussion concerning home rule for cities, and which was continued until and even beyond the Convention of 1894, which proposed important constitutional

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changes on this subject. These amendments were introduced again in 1880.

An important amendment relating to city organization and government was introduced in 1881 and passed in 1882. The full text of the amendment will be found in the volume of the session laws of the latter year. The amendment included provisions for incorporating cities by general laws only, guaranteeing a republican form of government in every city, requiring offices to be filled by election or by appointment with or without confirmation, except subordinates, who might be appointed by the heads of departments, vesting in the people of a city the right to "organize their own local and municipal government, and to administer the same for local or municipal purposes, subject only to such general laws as the legislature may enact; provided such local government shall be republican in form," requiring notice of proposed increase of taxation or indebtedness to be published three months and submitted to the people for approval. The amendments were introduced again in 1884 and 1885, but were not passed.

An amendment introduced in 1885 and 1886 added the following to § 9 of article 8:

"No law shall be passed by the legislature requiring the execution of any public works or local improvements at the expense of any city, but authority to execute public works or local improvements for municipal purposes, in the discretion of the local authorities, shall be conferred by the legislature upon cities on such conditions and under such restrictions as the legislature may prescribe, subject, however, to the approval of the mayor in cities containing over 100,000 inhabitants."

The expense of such improvements was to be provided for by local authorities, subject to the restrictions contained in § 11.

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The work of the commission appointed in 1875, and known as the Tilden commission, did not immediately bear fruit, except to accentuate the need of municipal reform, enlarge the scope of discussion, and furnish additional reasons for constitutional provisions regulating the organization and administration of cities. The amendments recommended by the commission were adopted by one legislature, but they were deemed either too comprehensive or too minute in detail to satisfy many persons who had given the subject careful study and who thought that the Constitution should include only general provisions, leaving matters of detail to the legislature. Other amendments of a different character introduced during the ten years immediately following the examination of this subject by that commission show that there was no diminution of interest nor any disposition to abandon projected reforms. But no amendment received the necessary constitutional sanction of two legislatures, and therefore no amendment reached the people. Governor Tilden, in opening a discussion of this subject, in 1875, said in his message that "the problem of municipal government is agitating the intellect of all civilized peoples," and even then the subject was old and familiar; the Governor doubtless recalled the discussion of it in the Convention of 1846, when one of his most distinguished colleagues, Henry C. Murphy, delivered an elaborate and instructive speech on the subject of cities and city government. From the beginning of organized society, municipal government has been a fruitful source of agitation, discussion, controversy, and accomplished or projected reforms in government.

The state senate appreciated the importance of this subject, when in January, 1890, in a preamble to resolutions directing its committee on cities to institute an inquiry into city affairs, with a view to recommending

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needed reforms, it declared that "the administration of cities is now universally recognized as among the most difficult problems of government." This committee made its report on the 15th of April, 1891. I have already noticed various attempts to incorporate in the Constitution provisions either prohibiting the legislature from enacting special city laws, or requiring previous local notice of such intended laws, or their previous approval by the people or by specified municipal authorities. The difficulties attending the enactment of special legislation are noted by this committee in the suggestion that "special laws can be passed without proper appreciation by the legislature of their effect or meaning;" that it is almost impossible for the legislature to determine the exact relation of a proposed law to other existing city laws. This suggestion is especially pertinent in view of the amendment adopted in 1894, requiring the submission of a special law to the city affected by it, prior to its presentation to the governor. Governor Robinson's objections to mandatory municipal legislation, expressed in his annual message of 1877, have already been quoted. This committee, continuing the discussion, called attention to the "large number of mandatory laws which have been passed by the legislature during the past twenty years, making it obligatory upon the administrative officers of our municipalities to perform particular acts." The committee strongly condemned this class of legislation "as one of the chief causes of the miscarriages of local administration. It is the worst form which special legislation assumes." But the committee thought "the system, rather than the legislature," was to blame. The committee also expressed the opinion that under existing conditions "stability in city government" was impossible; that "municipal government is a mystery even to the experienced;" that "our cities have no real local autonomy;" that "local

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self-government is a misnomer," and that in almost every city "it has fallen into the hands of professional politicians." The committee thought these evils could largely be cured by "the abstention, on the part of the legislature, from special legislation, and the enactment of general laws springing out of a general uniform, logical, and coherent plan for the government of cities."

In this connection it is worth while to note that the committee expressed the opinion that "more than two thirds of the time of the legislature is taken up with the consideration of special bills exclusively applicable to particular localities, concerning matters which, as a rule, should be left to the localities themselves." Concluding its discussion of this subject, the committee urged the immediate adoption of a constitutional amendment "which shall prevent special legislation affecting the government of cities," remarking that the Tilden commission was understood to have been unanimous in advocacy of this principle. The senate committee said that one of the chief causes of the failure of the work of the Tilden commission was the recognition by one of its proposed amendments "of the principle of a limitation upon the suffrage so far as it affected the election of certain financial officers" (the board of finance), which the committee thought was "opposed to the spirit and essence of the Constitution." The committee did not approve the commission's amendments as a whole, chiefly for the reason that they embodied the outline of a city charter, which was not deemed desirable, because of the limitations imposed on the legislature. "Within proper limitations the legislature should be permitted to exercise wide powers." The committee doubtless appreciated the difficulty of framing a general charter applicable alike to all cities, great and small, and suggested the necessity of classify-

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ing cities according to population, placing New York in a class by itself.

This report, signed by Francis Hendricks, James W. Birkett, Lispenard Stewart, Gilbert Deane, and J. S. Fassett, recommended two constitutional amendments, one omitting the clause "except for municipal purposes" from § 1 of article 8, the corporation section, and the other proposing to add the following § 26 to article 3:

"The legislature shall enact a general law for the government of all cities in this state, and no municipal corporation shall be hereafter created by special act, nor shall the legislature pass any act relative to the government of any city in this state, except by way of amendment to such general law."

The legislature did not pass these amendments. In 1891 a new § 26 was proposed to article 3, as follows:

"The legislature shall, at its next session, enact a general law for the government of all cities in this state, and no municipal corporation shall be hereafter created by special act, nor shall the legislature pass any special act relative to the government of any city in this state, except by way of amendment to such general law."

In 1893 Senator Joseph Mullin proposed the following amendment to § 9 of article 8, which put into practical form the suggestion of the senate committee in 1891, relating to the classification of cities and the enactment of general city laws:

"It shall be the duty of the legislature to classify the several cities of this state into three classes. Such classification shall be made according to the last preceding state census, so that the first class shall consist of cities having a population exceeding 1,000,000 of inhabitants. The second class

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shall consist of cities having a population of not less than 250,000 and not more than 1,000,000 inhabitants. The third class shall consist of cities having a population under 250,000 inhabitants. It shall be the duty of the legislature by general law to conform the charters of each class of cities so classified to a uniformity of powers, rights, and liabilities, and all charters of cities hereafter granted shall conform to such general laws, and to such amendments as shall be made thereto. Whenever any city, after the passage of such general laws, shall have the requisite number of inhabitants to entitle it to be classified with the cities of the higher class, such city shall be subject to the laws of such higher class. It shall be the duty of the legislature, by such general law, to provide for the organization of cities and incorporated villages, and to restrict their powers of taxation and assessments, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations."

When this amendment was introduced provision had already been made for a convention to revise the Constitution. That convention met the following year and considered at great length the subject of municipal reform and appropriate amendments relative to city organization and administration. It classified cities, but not according to the plan suggested by the Mullin amendment.

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CHAPTER XI.

The Judiciary Commission of 1890.

The Constitutional Commission of 1890 doubtless had its origin in the failure of the legislature and the Governor to agree on a bill for a constitutional convention. In 1886 the people had, by a very decisive vote, answered in the affirmative the question "Shall there be a convention to revise the Constitution and amend the same?" and the legislature of 1887 had passed a convention bill which had been vetoed by the Governor. The legislature afterwards considered several convention bills, and the Governor repeatedly urged the enactment of a law to effectuate the manifest intention of the people, but no agreement was reached until 1892. The details of the controversy on this subject between the legislative and executive branches of the government may more appropriately be given in connection with the history of the Convention of 1894, which will be found in the next chapter. It became apparent, on the Governor's veto of the convention bill of 1887, that the differences of opinion concerning representation in the Convention would continue to be irreconcilable. The Governor's novel plan of a convention chosen by congressional districts was not favorably received by the legislature, which was unwilling to depart from the unbroken historical precedents including five conventions, all of which had been chosen on the basis of assembly or senate representation.

The complete or partial reorganization of our judicial system was apparently deemed the most important subject

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then demanding attention. In the previous chapter I have referred to several judiciary amendments which had been recently proposed in the legislature, and it seemed clear to many of the best judges and lawyers that the judiciary article of the Constitution ought to be rewritten, or at least modified by eliminating provisions which had become obsolete, and by adding provisions deemed necessary to meet conditions presented by an increase of business in the courts. Neither party to the controversy between the Governor and the legislature seemed willing to yield, and after the deadlock had continued four years, from 1887 to 1890 inclusive, the legislature decided to try to accomplish at least a limited constitutional revision in another way. It therefore resorted to the commission plan which had worked so successfully in 1872. This plan did not answer the mandate of the people, who had voted for a convention in which they would be directly represented by delegates of their own choice. It was at most an uncertain makeshift, but it provided a tribunal with power to consider and recommend constitutional reforms.

On the 28th of February, 1890, Charles T. Saxton, then senator from the 28th district (afterwards lieutenant governor and judge of the court of claims), introduced a bill "to provide for a commission to propose amendments to the Constitution." The commission was to consist of thirty-eight members, four from each judicial district, with four additional members from the first district, and two from the second. George W. Greene, of Orange county, on the 7th of March also introduced in the assembly a bill for a commission to consist of thirty-six members. This bill, amended to conform to the Saxton bill, was passed and became chapter 189 of the Laws of 1890. Under this law a commission was to be appointed by the Governor, with the consent of the senate, to be

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composed of thirty-eight members. The jurisdiction of the commission was limited to proposing amendments to the 6th article of the Constitution. The act provided that not more than one half of the commissioners from any district should be members of the same political party. It is a curious commentary on representative government that it should have been deemed necessary to have a bi-partisan commission to revise such a cold, nonpartisan feature of our Constitution as the judiciary article; as if thirty-eight republican lawyers or thirty-eight democratic lawyers, or an unequal number from each party, could not have been trusted alone to construct fair and reasonable machinery for the administration of justice among the people, but must have been divided into two equal hostile camps to watch each other lest one or the other should try to subvert or undermine our institutions. It should not be forgotten that the commission could do nothing directly to affect the Constitution; for its work was subject to review and amendment by the legislature, and could not possibly reach the people until it had been approved by two legislatures, whose action on constitutional amendments would have been independent of the Governor.

The Governor appointed a commission composed of the following members:

First judicial district.—Joseph H. Choate, James C. Carter, Daniel G. Rollins, Elliott F. Shepard, William B. Hornblower, W. Bourke Cochran, Frederic R. Coudert, and Franklin Bartlett, appointed in place of George Hoadly, who declined to serve.

Second judicial district.—George R. Reynolds, Odle Close, Lewis E. Carr, Thomas E. Pearsall, Calvin Frost, Homer A. Nelson.

Third judicial district.—Francis H. Woods, Timothy F. Bush, Martin I. Townsend, J. Newton Fiero.

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Fourth judicial district.—S. Alonzo Kellogg, Artemas B. Waldo, Leslie W. Russell, James M. Whitman.

Fifth judicial district.—Charles D. Adams, Daniel G. Griffin, Maurice L. Wright, and Louis Marshall, appointed in place of Warner Miller, who declined to serve.

Sixth judicial district.—Francis R. Gilbert, Albert C. Tennant, Douglass Boardman, Gabriel L. Smith.

Seventh judicial district.—George F. Danforth, James C. Smith, Thomas Raines, Michael A. Leary.

Eighth judicial district.—Hamilton Ward, George Barker, Wilson S. Bissell, William C. Greene.

The foregoing suggestion concerning the bi-partisan feature of the commission law applies only to the seeming necessities incident to administering a government by party, and does not relate to the *personnel* of the Commission. It would have been difficult for Governor Hill to find thirty-eight citizens of New York more distinguished as jurists and lawyers than the men selected by him as members of this Commission. Most of these men are still living, and it would seem invidious for me to mention any of them by name in an attempt to describe their individual qualifications and achievements; but a mere perusal of the list of commissioners must convince any intelligent reader that here was a body of representative men who had already won high fame in their profession, and who, since their service in the Commission, have increased an already enviable reputation by their successes in the field of statesmanship or of diplomacy, in the forum, or on the bench.

The Commission met at Albany on the 3d of June, 1890, and organized by electing George F. Danforth, a former chief judge of the court of appeals, chairman, and Walter H. Bunn, clerk. Committees were appointed on the court of appeals, supreme court, superior city courts, county judges and surrogates, and miscellaneous provisions. The Commission was in session as such

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seventeen days, but its committees were in session and consultation on many other days. The Commission met and organized on the 3d of June, and on the 4th adjourned to August 5th. Regular sessions were then held until August 16, when an adjournment was taken until the 2d of December, and the Commission continued in session until the 5th, when it adjourned to January 23, 1891; on this day twenty-two commissioners attended, the final report of the committee on revision was accepted, and a resolution was adopted requesting the chairman to report to the legislature the action of the Commission. The Commission then adjourned without day. The report was submitted to the senate on the 4th of March, and appears as document No. 51.

The whole of article 6 was considered, and numerous propositions were submitted intended to revise the article, harmonize its provisions, and provide a more elastic and efficient judicial system. The Commission agreed on five general propositions, some of which were amendments and included additions to existing constitutional provisions, and some of the propositions were simply intended to eliminate from the Constitution provisions which were originally of a temporary character, but which had served their purpose and had become obsolete. The following review is by topics, as indicated by the reports of the committees relating to the several courts, or to distinct portions of the judiciary article.

Court of Appeals.

"No appeal shall be taken to the court of appeals in a civil action or proceeding from any determination of a general term which affirms, without dissent, a determination reviewed, except where the determination so reviewed decides a controversy concerning:—

"(1) The construction or effect of a provision of the Constitution or a statute of this state or of the United States; or,

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"(2) The validity or interpretation of a written instrument, other than a promissory note, bill of exchange, or other order for the payment of money, and the claim or the defense is based wholly or in part upon such instrument; or,

"(3) The validity, execution, probate, or interpretation of a will; or,

"(4) The title to real property or an interest therein; or,

"(5) A trust, express or implied, or a power; or,

"(6) Legitimacy or the fact or validity of a marriage; or except,

"(7) Where the determination decides a material question of law which stands otherwise determined by a general term of the supreme court.

"The right of appeal is further restricted in the case of orders to such determinations as affect a substantial right, and do not rest in discretion, and which

"(1) In effect determine the action or proceeding and prevent a final judgment or final order; or,

"(2) Grant or refuse a new trial; or,

"(3) Sustain or overrule a demurrer; or,

"(4) Are final orders in special proceedings, or in proceedings subsequent to and based upon the final judgment in an action.

"But an appeal from any determination of a general term may be allowed by such general term, or, in case of its refusal, by any judge of the court of appeals.

"The legislature may further restrict the right of appeal to the court of appeals."

The committee in charge of this subject, in its report to the Commission, said it had seemed possible to the committee "to so arrange the jurisdiction of inferior courts and the appellate jurisdiction of the supreme court as to greatly diminish the number of appeals to the court of appeals;" that a majority of the committee were of the opinion that a "court of appeals composed of seven judges only should be continued, and that an industrious effort should be made to preserve that system; and it

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entertains the hope and belief that the inferior jurisdictions may be so arranged as to make its preservation practicable." In view of its avowed attitude toward the court the committee decided not to submit any amendments, at least not until it should become known what could be done in relation to the supreme court and other inferior tribunals. The discussion of this subject by the Commission, and the amendments offered, show a wide diversity of opinion. Mr. Ward proposed to enlarge the court so that it could "properly and expeditiously dispose of its business without further limitation of the character of an appeal or the amount involved in it." He submitted a plan for a court of appeals to be composed of a chief judge and thirteen associate judges, seven of whom were to be elected by the people and seven appointed by the governor and senate, but not more than three could be appointed from one political party. Nine judges should constitute a quorum, and eight must concur in a decision, but the court might resolve itself into two divisions of seven members each, with equal authority. Six members of a division were necessary to constitute a quorum, and five must concur in a decision. Two dissents would require the cause to be reargued before the entire court, and a cause must also have been so reargued on a conflict of decision between the two divisions. Mr. Fiero proposed a court to be composed of a chief judge and fourteen associate judges. I have already noted in the previous chapter that a similar amendment was introduced in the legislature of 1890, and that it was introduced again and passed in 1891. Mr. Fiero's plan provided for two or more quorums of the court, which might sit at the same time, each quorum to consist of not less than five, and the concurrence of four was necessary to a decision; appeals from orders involving questions of practice only might be heard by three judges, two of

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whom might render a decision. Mr. Gilbert proposed to give the governor power, on the application of the court, to designate seven justices of the supreme court to act with the court for one year whenever the accumulation of business required this aid; and the justices so designated and the judges of the court were to compose two divisions, one to include four supreme court justices and three court of appeals judges, and the other four court of appeals judges and three supreme court justices. Mr. Adams proposed a court of fifteen members from which two divisions might be created by the court itself, to be designated respectively the "common law division," and the "equity division," but an appeal might, by order, be heard before the entire court. Mr. Reynolds proposed a court of nine members, and Mr. Bush a court of eleven members. Mr. Cochran proposed to allow appeals to this court from inferior or local courts on the certificate or order of the general term of the supreme court that the case presented a question of law which ought to be reviewed by the court of appeals; "in a case where the decision of the general term is not unanimous, except that where a decision of affirmance is made with the concurrence of all the judges, no appeal shall be allowed." The judges of the court of appeals might also allow an appeal where there appeared to be probable error in the record of the general term. Mr. Raines proposed a court of "ten or more judges," which might sit as a whole or in parts.

Several questions relating to the reorganization of the court of appeals were presented by Mr. Tennant, and, without considering specific propositions, the Commission, on his motion, disposed of most of them by votes intended to determine the policy of the Commission without reference to details. He submitted four propositions which were disposed of as follows: First, by a vote of

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22 to 11, the Commission decided not to recommend an increase in the court of appeals; when the proposition was presented again the Commission adhered to its position by a vote of 19 to 13. Second, by a vote of 24 to 8, the Commission decided that there should not be "any limitation of the right of appeal to the court of appeals" where the amount in controversy exceeded $500. Third, by a vote of 25 to 7, the Commission decided that there should not be "any limitation of the right of appeal to the court of appeals in actions for negligence;" and fourth, by a vote of 27 to 6, the Commission decided to recommend that no appeal to the court of appeals be allowed from orders without the consent of the general term, "except where such order is the final one in a special proceeding, or where it prevents a judgment from which an appeal can be taken."

The section at the beginning of this article, limiting the right of appeal, was the result of a plan submitted by Judge James C. Smith, on the 15th of August. On the first vote Judge Smith's proposition was rejected; but on reconsideration a plan submitted by him, which was in substance embraced in the section in its final form, was approved, and the committee on revision was instructed to prepare a section accordingly. On motion of Mr. Cochran the original plan was amended so as to allow an appeal "from any determination of a general term in any civil action or proceeding by such general term, or, in case of its refusal, by any judge of the court of appeals." On Mr. Choate's motion a provision was added authorizing the legislature to "further restrict the right of appeal to the court of appeals;" and the Commission adopted an amendment offered by Mr. Russell, applying the limitation of the section to "a trust, expressed or implied, or a power."

The essence of this proposed limitation, omitting spe-

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cific descriptions of cases to which the section is applied, was adopted by the Convention of 1894, and appears in § 9 of article 6 of the new Constitution. I think one serious objection to the plan proposed by the Commission was the attempt to define the cases to which the section was applicable. The plan included details which properly belong in a code or system of procedure rather than in a Constitution, which I think should state principles, and not details.

Supreme Court.

The Commission presented to the legislature the following amendments relating to the supreme court:

"6. The present supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or may be prescribed by law, not inconsistent with the provisions of this article. The existing judicial districts of the state are continued until changed, as hereinafter provided. The supreme court shall consist of sixty justices, who shall be chosen by the electors of the judicial districts in which they respectively reside, and of whom twelve shall reside in the first, eleven in the second, six in the third, five in the fourth, seven in the fifth, five in the sixth, seven in the seventh, and seven in the eighth. Provided, however, that the supreme court justices in office at the adoption of this amendment shall continue to be justices of the supreme court during their respective terms. Once every ten years the legislature may alter the judicial districts, but without increasing the number thereof, and in case of changes in the boundaries of counties or the creation of new counties, it may, when necessary, exercise the same power, and may also, in such case, make changes in the distribution of justices to be elected in the several districts, and assign justices theretofore elected in one district for service in another.

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"7. The legislature shall divide the state into four judicial departments, of which the county of New York shall be one; the others to be bounded by county lines, and to be compact and equal in population, as nearly as may be. Once every ten years the legislature may alter the judicial departments, but without increasing the number thereof. There shall be one general term of the supreme court, consisting of five justices in and for each judicial department, of whom four shall constitute a quorum, and the concurrence of three shall be necessary to a determination. From all the justices of the supreme court the governor shall designate for terms of five years or for the unexpired portions of their respective terms of office, if less than five years, those who shall constitute the general term of each department, and shall designate the presiding justice thereof, and from time to time, as the terms of such designations expire, or vacancies occur, he shall make new designations as may be necessary, but not more than two such justices shall be designated from any one district for any general term, except that three may be designated from the first and second districts, respectively, for the departments to which they respectively belong. The governor may also, from the justices of the supreme court, make temporary designations, from time to time, in case of the absence, or inability for any cause to act, of any justice of any general term. Whenever any general term shall be unable to dispose of its business within a reasonable time, the governor, upon being certified thereof by the presiding justice, may designate five justices of the supreme court, who shall hold an additional general term in and for said department so long as the necessity therefor shall exist, or may, in his discretion, require the general term justices of any other department to hold an extra or additional general term in the department in arrears, so long as it may be necessary and practicable. No justice of the general term shall exercise any of the powers of a justice of the supreme court, other than those pertaining to the general term of which he is a member. Provision shall be made by law for holding the general term in each judicial district, and each general term shall have such jurisdiction as is now exercised by the

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supreme court at its general terms, until it shall be otherwise provided by law. Any justice of the supreme court other than those who shall be designated as general term justices may hold special terms, circuit courts, and courts of oyer and terminer in any county. The official terms of the justices of the supreme court shall be fourteen years from and including the first day of January next after their election."

One of the prominent features of the supreme court plan recommended by the Commission was a general term, to be composed of five justices. This plan, changing the name from "general term" to "appellate division" was incorporated in the Constitution by the Convention of 1894. In the article on the supreme court, in the chapter on the Convention of 1867, I have given an account of the plan proposed by Mr. Goodrich, a member of the judiciary committee, providing for a division of the state into three departments, with a general term in each, to be composed of five justices, with a presiding justice, to be designated from one department, and two justices from each of the other departments. The Goodrich plan was not adopted, but it is worth noting here because it is so similar to the plan recommended by the Commission of 1890 and by the Convention of 1894. It seems to have been the germ of the modern appellate division. Mr. Ferry, in the same convention, proposed three districts with five judges in each, elected by the people for ten years, to hold a court with appellate jurisdiction only.

In the Commission the committee on the supreme court presented a report recommending the continuance of the judicial districts as then organized, providing for four departments, as follows: The first judicial department shall consist of the first judicial district; the second, of the second judicial district; the third, of the third, fourth,

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and sixth judicial districts; and the fourth, of the fifth, seventh, and eighth judicial districts. Once in every ten years the legislature may alter the judicial districts or judicial departments, but without increasing their number.

There shall be one general term of the supreme court in and for each judicial department.

There shall be twenty justices of the general term. The justices of the supreme court who, at the time of the adoption of these amendments, shall be serving as justices of the general term, shall continue to be justices of the general term until the term of office for which they were respectively elected expires. The justices of the general term hereafter elected shall be chosen by the electors of the state. At the first general election after the adoption of these amendments four justices shall be so selected, and at the several elections preceding the expiration of the terms of office for which the several other justices of the general term hereby constituted were respectively elected, their respective successors shall be so elected.

From all the general term justices of the state the governor shall designate for terms of five years, or for the unexpired portions of their respective terms of office, if less than five years, those who shall constitute the general term of each department; and from time to time, as such appointments or terms of office expire or vacancies occur, he shall make new designations, as may be necessary. But not more than one such justice shall be designated from any one district for any one general term.

No justice of the general term shall hold chambers or circuit courts or special terms or courts of oyer and terminer.

In addition to the justices of the general term the supreme court shall consist of thirty-three justices, who

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shall be chosen by the electors of the judicial districts in which they respectively reside, and of whom seven shall reside in the first judicial district, four in the second district, four in the third district, three in the fourth district, four in the fifth district, three in the sixth district, and four each in the seventh and eighth districts.

The most important feature of this report was the proposed general terms, to be composed of five justices each, and providing for the election of the entire twenty justices by the electors of the state at large. This proposition elicited a vigorous discussion, and was criticized from two points of view: First, because it provided for the election of a separate general term, to be composed of a distinct body of judges, instead of general terms composed of justices of the supreme court, possessing general powers; and second, because it provided for the election of these general term justices from the state at large, instead of by departments or districts. The effect of the proposition was to provide for a secondary court of appeals. The people already had the right to elect the judges of the court of appeals, and this proposition gave the right to elect, in the same manner, justices who were to be divided into four subordinate appellate tribunals. So far as the plan proposed a general term, specially elected for this purpose, it was anticipated by Mr. Ferry's proposition already cited, submitted to the Convention of 1867, which provided for electing these justices by districts. The proposition to elect the entire twenty justices from the state at large was based on the idea that the general terms together composed one appellate tribunal, while primarily acting in distinct territorial divisions known as departments, but their jurisdiction was co-extensive with the state, and they might be sent from one department to another; it was therefore thought that, being, in this larger sense, state judges, they should be

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chosen as other state officers, from the state at large. When Mr. Choate, chairman of the committee on supreme court, moved the adoption of § 4, a long debate ensued in which many commissioners participated, and the subject was considered in all its aspects. Mr. Bush thought that "electors in one district should not be allowed to select judges who were to pass upon questions of interest to the people at large." Mr. Griffin supported the amendment, remarking that "the reason for the excellent representation in the court of appeals was due to the appeal to the mass of the people." Mr. Hornblower also favored the electoral plan, and said that judges elected by large constituencies had less local influences to contend with than judges elected by districts. "The larger the constituency, the better." This plan would make it imperative "for each party to place the best men in nomination. There had never been nominated by either party a candidate for judge of the court of appeals who would not have honorably held the office." Mr. Carter supported the committee plan, observing that the functions of the general term judges were to be general. "The general term was just as broad in its scope as the court of appeals. Its judges were to do duty for the whole state, and not for a section, and therefore the state at large should elect them." Mr. Fiero thought there should be permanency in the general term, and that its judges should have the same responsibility as the judges of the court of appeals.

James C. Smith opposed the plan. He said "state conventions were held for the distribution of political patronage, and to bring all the supreme court judges into the vortex would soon teach the politician the importance of the key. Under the district system the selection had been left to the bar." Mr. Cochran thought that under the plan all the judges might be elected from one district.

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Mr. Adams proposed to modify the plan by providing that not less than two nor more than three justices of the general term should be elected from each judicial district. Judge Barker thought that, on the matter of jurisdiction, it would be imprudent to make a separate court of the general term; it would lessen the importance and usefulness of trial judges. "District elections kept the judiciary purer, and all men chosen were well enough known to preclude the selection of unfit men." Mr. Townsend proposed that five general term justices be elected in each department. This was the Ferry plan of 1867. Mr. Boardman proposed a substitute for the committee plan by providing for four departments, with five justices in each, to be appointed by the governor from the whole body of justices elected in the several districts. Mr. Boardman also included in his plan a provision that "the governor, on the certificate of the presiding justice of any general term of the necessity thereof, may organize, in like manner, a second general term in such department, to continue until such necessity shall cease." Mr. Frost also proposed a substitute providing for fifty-three* supreme court justices, to be elected by the departments as follows: Fourteen in the first, eleven in the second, thirteen in the third, and seventeen in the fourth; and for a general term in each department, composed of five justices, to be selected from and by the whole body of justices, for terms of five years, or for a shorter unexpired term. A general term might be detailed to sit in another department. No justice of a general term could hold any circuit court, special term, or court of oyer and terminer.

For the purpose of determining the policy of the Commission concerning the supreme court, Judge Gilbert submitted four propositions, which were voted on with the following result: First, by a vote of 31 to 3, it was de-

*So in Commission journal.

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cided that there should be but four judicial departments; second, by a vote of 33 to 2, the number of justices in each department was fixed at 5; third, by a vote of 28 to 6, the general terms were to be composed of the present general term justices and four additional justices; and fourth, by a vote of 22 to 13, justices of the general term were prohibited from holding chambers or circuit courts or special terms or courts of oyer and terminer. It will be noted that these propositions did not touch the question of the method of choosing general term justices. The Commission rejected a motion by Mr. Adams to authorize the legislature to create another department and provide justices therefor "when the speedy dispatch of business shall require the same." Mr. Marshall offered an amendment to the committee plan, providing, among other things, that "upon the certificate of the presiding justices of any general term of the necessity therefor, the governor may, from time to time, transfer therefrom to any other of the general terms that he may designate, such a number of the cases pending before it as he may specify." The Commission rejected an amendment offered by Mr. Shepard, that the power to transfer causes be vested in the presiding justice of the general terms of the respective departments, instead of in the governor, and also rejected the original proposition. We shall have occasion to notice, in the next chapter, that the Marshall plan for the transfer of causes, modified substantially as suggested by Mr. Shepard, was included in the Constitution of 1894.

The third section of the committee's plan providing for one general term in each department, modified by providing specifically for five justices, also fixing the quorum at four, and requiring the concurrence of three in a decision, was adopted. Mr. Fiero submitted a plan of minority representation in the election of general term

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justices which was adopted by a vote of 19 to 16. The Commission rejected, by a vote of 11 to 20, a motion by Mr. Griffin, providing for "numerical equality of representation, so far as practicable, in the general term from the two leading political parties." As a result of amendments offered by Mr. Kellogg, Mr. Adams, and Judge Gilbert, the first clause of § 4 of the committee report was amended to read as follows: "There shall be twenty justices of the general term, five to be residents of each judicial department, and not more than three to be residents of any one judicial district except the first district." This was an important modification of the original plan, for, while retaining the provision for an election by the people of the state, the general term justices were to be elected from the respective departments, thus obviating the objection suggested during the debate, that all the justices might be elected from one department. The Commission rejected a motion by Mr. Kellogg that a general term be held in each district; also, by a vote of 15 to 20, a motion by Mr. Bartlett to strike out the provision for electing the general term justices by the people of the state; and, by a vote of 16 to 19, rejected a motion by Mr. Kellogg that the general term justices be elected by departments. The plan to elect general term justices on the state ticket was adopted by a vote of 20 to 14. The Commission rejected, by a vote of 6 to 26, an amendment offered by Mr. Shepard, providing that justices of the general terms be designated by the whole number of justices in convention, instead of by the governor. The provision depriving general term justices of the power to hold chambers or circuit courts or special terms or courts of oyer and terminer was adopted by a vote of 24 to 10.

The results showed that the Commission sustained the committee in its plan for four general terms, composed

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of five justices, each appointed for five years or for shorter unexpired terms, with a provision that five justices must reside in each department, but all were to be elected on a state ticket. This was in August. The Commission adjourned, to meet again in December. At the adjourned meeting the committee on revision presented its report. The following are the material parts of this report, so far as it relates to the supreme court. Section 6 of the existing judiciary article was continued, with modifications intended to provide for an increase of judges, but the number for each district was left blank. The report provided for four judicial departments, but the description was left blank except as to the first, which was to consist of the first judicial district.

"There shall be one general term of the supreme court, consisting of five justices in and for each judicial department, of whom four shall constitute a quorum, and the concurrence of three shall be necessary to a determination. There shall be twenty general term justices, and, subject to the operation of the provision herein continuing the service of present general term justices, five shall be residents of each judicial department, and not more than three shall be residents of any one judicial district, except the first judicial district (and the second judicial district)."

The next clause continued the justices of the general term then in office until the expiration of their respective terms.

"The general term justices hereafter elected shall be chosen by the electors of the state."

Provision was then made for electing successors to the general term justices then in office and for minority representation, as follows:

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"Provided, however, that in the event that the number of such justices then to be elected shall be four only, no elector shall vote for more than three.

"From all the general term justices of the state the governor shall designate for terms of five years or for the unexpired portions of their respective terms of office, if less than five years, those who shall constitute the general term of each department, and shall designate the presiding justice thereof, and from time to time as the terms of such designations expire or vacancies occur, he shall make new designations as may be necessary, but not more than two such justices shall be designated from any one district for any general term.

"The governor may also, from the justices of the supreme court, make temporary designations from time to time in case of absence or inability for any cause to act of any justice of any general term.

"Whenever any general term shall be unable to dispose of its business within a reasonable time, the governor, upon being certified thereof by the presiding justice, may designate from the justices of the supreme court five, who shall hold an additional general term in and for said department so long as the necessity therefor shall exist, or may, in his discretion, require the general term justices of any other department to hold an extra or additional general term in the department in arrears, so long as it may be necessary and practicable.

"No justice of the general term shall exercise any of the powers of a justice of the supreme court, other than those pertaining to the general term of which he is a member.

"Provision shall be made by law for holding the general term in each judicial district, and each general term shall have such jurisdiction as is now exercised by the supreme court at its general terms, until it shall be otherwise provided by law.

"A justice of the supreme court other than general term justices may hold special terms, circuit courts, and courts of oyer and terminer in any county. The official terms of the justices of the supreme court shall be fourteen years from

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and including the first day of January next after their election."

It seems clear from the discussion of the work of the Commission in the press and otherwise that the plan of electing general term justices on a state ticket was not generally approved. At the December meeting Mr. Choate moved that the plan of electing general term justices by the people of the state be "reaffirmed by this Commission." This motion was rejected by a vote of 11 to 15. It seems that twelve members of the Commission were either absent or did not vote. The Commission then adopted, by a vote of 21 to 5, a resolution offered by Mr. Wright, that supreme court justices be elected by judicial districts, as a substitute for that part of the report which proposed to fix the boundaries of the judicial departments. The Commission adopted the following plan submitted by Judge James C. Smith: "The legislature shall divide the state into four judicial departments, of which the city and county of New York shall be one, the others to be bounded by county lines, and to be compact and equal in population as nearly as may be. Once in every ten years the legislature may alter the judicial departments." This plan was included in the Constitution of 1894.

While the provision relating to designations of justices to the general terms was under consideration, the Commission adopted an amendment offered by Mr. Choate providing that "three justices may be designated from the first and second districts, respectively, for the departments to which they respectively belong." The Commission rejected Mr. Coudert's motion to strike out the provision that "not more than two such justices shall be designated from any one district for any general term." The Commission, by a vote of 6 to 20, rejected Mr. Bartlett's motion to strike out the provision that "no

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justice of the general term shall exercise any of the powers of a justice of the supreme court other than those pertaining to the general term of which he is a member."

The provision at the end of the proposed § 6, conferring on the legislature power to alter judicial districts oftener than once in ten years "in case of changes in the boundaries of counties or the creation of new counties," deserves some attention here, although it apparently received none in the Commission. This part of the section was not in the report of the revision committee which was presented to the Commission at the December meeting, and I do not find any reference to it in the journal. It was apparently inserted by the revision committee after the December meeting, for it appears in the second report of this committee, presented at the meeting of the Commission on the 23d of January, 1891, and nothing seems to have been said about it at that meeting. It was perhaps suggested to obviate difficulties presented by statutes creating new counties where judicial district lines might possibly be affected, as was the case in the act of 1854, erecting the county of Schuyler. A provision giving the legislature power to alter judicial district lines to conform to new county lines would have saved the court of appeals some trouble in construing the act of 1895 (chap. 934) which annexed to New York a part of Westchester county, which is in the second judicial district, but which did not, as construed by the court of appeals in *People ex rel. Henderson* v. *Westchester County,* 147 N. Y. 1, 30 L. R. A. 74, 41 N. E. 563, affect existing assembly, senate, or judicial district boundaries.

The original supreme court plan provided for fifty-three justices, twenty to serve in the general terms and thirty-three as trial judges. At the December meeting the Commission, on motion of Mr. Wright, filled the

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blanks in subdivision 6 by providing for sixty justices in all, and distributed by districts, as stated in the section at the beginning of this article.

The result of the discussion and deliberation concerning the supreme court, from the announcement of the committee's plan in the latter part of July, 1890, to the final adjournment of the Commission on the 23d of January, 1891, was that the principles contained in the committee's plan were substantially retained, with the exception of the method of choosing general term justices, which was changed from an election by the people of the state to an election by the people of each judicial district.

Having decided to make no change in the court of appeals the Commission devoted very serious attention to the relief of the supreme court and to a plan of appellate jurisdiction which would reduce, if not wholly remove, the objections to the old general term plan. A majority of the Commission thought at one time that the remedy would be found in an elective general term, distinct from any other court. This court was to be chosen in the same manner as the court of appeals, and possess the same power, except that its judgments would not be final, for the obvious reason that there was a still higher tribunal; but it was supposed that, by providing for the election of the members of the appellate branch of the supreme court, it would be given a dignity, character, and standing not possessed by the former general term, and that one result would be a decrease in the number of appeals to the court of appeals, leaving to that court the duty of settling great principles of law, determining constitutional questions, and reconciling differences of opinion between the several general terms. The policy of electing the general term justices on the state ticket was severely criticized. The situation presented anoma-

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lous and incongruous conditions. Incongruous because, theoretically, a state judge should be elected by the people of the state, and not by a single district, and anomalous because a judge so elected, while nominally representing a particular district, might be called to serve in an appellate capacity in a department composed of several districts, and in a tribunal co-ordinate at first with seven, then with three, then with four others. Under the first Constitution there was one supreme court, and its judges performed all the duties incident to a tribunal, either in the first instance or in review. The growth in population and the large increase of business made this court inadequate, and the Convention of 1821 earnestly sought for substantial relief. It was supposed that relief had been obtained by the continuance of the supreme court and the addition of eight circuit judges; but these circuit judges possessed only powers limited to the trial of causes and the general administration of justice, without any appellate jurisdiction. I have noted in a previous chapter the unsatisfactory result of this experiment, and have quoted the fundamental objection to it, stated by Governor De Witt Clinton in his message of 1828, when he said it is a "fatal error" to separate "the judges who try the fact from the tribunals that pronounce the law," by "creating circuit courts as distinct and independent forums, and not as emanations from the supreme court." Here was a direct and positive indorsement of the system which prevailed under the first Constitution, and the suggestion that the judicial functions ought to be united in one individual sufficiently to enable him to act as a trial judge and also in an appellate tribunal. The Convention of 1846 sought to restore the earlier conditions so far as practicable by the creation of one supreme court, distributed among districts which were substitutes for the former circuits, and under that

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plan each judicial district was independent. Its judges tried the causes, heard any other matters within their cognizance, and at stated periods came together in banc to review matters which had become the subject of an appeal. Notwithstanding the drawbacks incident to an octagonal general term, the system, in its relations to the judicial districts, was an ideal one; under it each judge was familiar with all phases of judicial service. His work at the circuit enabled him to become acquainted with the people and the various local influences and conditions which affected the causes brought before him for adjudication. The judges were in close touch with all aspects of social, political, and commercial life, and therefore, when acting as a court of review, were qualified to take an intelligent survey of the whole field, and establish principles and suggest policies with special reference to the needs and conditions of the people. But the system had some defects, chief of which was the fact that each district practically embraced a complete plan of judicial administration so far as it related to the supreme court, and there was no correlation of duties, functions, opinions, or judgments between the several districts. Indeed, it might almost be said that each district was a state in itself, with one supreme court substantially modeled on the supreme court as it existed under the first Constitution.

The Commission of 1890, in proposing a separate elective independent general term from which the trial justices were to be excluded, in effect sought to restore the objectionable conditions which existed under the Constitution of 1821. Under the proposed plan the trial justices would have occupied the same relation to the system that the circuit judges sustained under the second Constitution. They would have thus become only a part, and that a subordinate part, of the supreme court organi-

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zation, without any possibility of performing the highest duties which had appertained to the office of supreme court judge since the creation of the court, in 1691. Judge Barker, in the Commission, touched the core of the question in his objection that it would be imprudent to make a separate court of the general term, for "it would lessen the importance and usefulness of trial judges." This was substantially the criticism urged against the circuit judge plan of 1821. Judge Barker had learned, by long and distinguished service, both at the circuit and in the general term, the value of all kinds of experience as a qualification for the highest responsibilities of the judicial office; his objection was therefore based on experience, and not on mere theory.

The original plan of the Commission on this subject was an apparent attempt to restore a system which proved inadequate almost from its inception, and which had long been outgrown. But history cannot repeat itself. We cannot restore the conditions of 1821, and a circuit judge system which was impracticable in 1821 could not be more practicable in 1891. Fortunately, during the time that elapsed between the August and December meetings of the Commission the subject received careful public consideration, with the result that it was deemed unwise to divide the supreme court into two distinct and independent branches, each with a separate body of judges, and without any possibility of commingling in the administration of justice.

Superior City Courts.

"The superior court in the city of New York is continued for the period during which any judge of said court, in office on the 31st day of December, 1889, shall continue in office, and shall, on the expiration of said period, cease to exist. No general term of the said court shall hereafter

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be held, and all cases pending in the general term thereof are transferred for hearing and determination to the general term of the supreme court in the first department. The term of office of the judges of said court who shall have been elected after the 1st day of January, 1890, shall expire on the 31st day of December, 1894. No successors shall be elected or appointed in the place of any judge of said court, but, at the next general election, held not less than sixty days after any such judge shall cease to be a judge thereof, an additional justice of the supreme court shall be elected by the electors of the first judicial district. Upon the extinction of said court, the seal, records, papers, and documents of or belonging to the same shall be deposited in the office of the clerk of the city and county of New York, and all actions and proceedings then pending in the same shall be transferred to the supreme court for hearing and determination. Until the extinction of said court it shall be the duty of the judges thereof to hold circuits and special terms of the supreme court in the city and county of New York, as the general term of the first department may require. The court of common pleas for the city and county of New York, the superior court of the city of Buffalo, and the city court of Brooklyn are continued with the powers and jurisdiction they now severally have, and such further civil and criminal jurisdiction as may be conferred by law, but neither of the said courts shall exercise any appellate jurisdiction over orders or judgments made therein. The city court of Brooklyn shall be hereafter styled the superior court of Brooklyn. Said courts shall be composed, respectively, of the judges thereof now in office and their successors, and one additional judge of said superior court of Brooklyn, to be elected at the next general election after the adoption of this amendment, and his successors. Vacancies in the office of judge of said courts, occurring otherwise than by expiration of term, shall be filled in the same manner as like vacancies in the supreme court. It shall be the duty of the judges of said courts to hold circuits and special terms of the supreme court in their respective counties as the general terms of their respective departments may require. The

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general term of the supreme court for the first department may send any action pending in the supreme court for the first district or in the superior court in the city of New York or said court of common pleas for trial at a special or trial term of any of said courts, or at a circuit court held in said district. All appeals from any order or judgment made in either of the courts heretofore named in this section shall be taken directly to the general term of the supreme court for the department in which said court is situated; and every appeal from an order or judgment made in either of said courts, pending and not submitted for decision, is transferred for hearing and determination to such general term of the supreme court. Judges of the court of common pleas for the city and county of New York, of the superior court of the city of Buffalo, and of the superior court of Brooklyn, shall be chosen by the electors of the cities respectively in which said courts are instituted. Their terms of office shall be fourteen years from and including the first day of January next after their election. The legislature may, at any time, abolish either of the courts mentioned in this section, or reduce the number of judges thereof, and, in that event, may provide for an increase of the number of justices of the supreme court, to be elected in the judicial district in which such court is instituted, not, however, exceeding the number dispensed with by such abolition or reduction."

In the previous chapter I have noticed the amendments proposed in the legislature, beginning in 1876, providing for the abolition of the New York superior court and court of common pleas, and the transfer of their business and jurisdiction to the supreme court; and also the amendment adopted in 1880, increasing the number of judges of the court of common pleas from three to six. It is evident from the foregoing amendment that the Commission deemed it undesirable longer to continue the superior court of New York. It also proposed to reduce the other local courts to the position of trial courts, with-

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out any appellate jurisdiction, and the legislature was authorized to abolish them. The proposed abolition was to be gradual, whereas it will be observed in the next chapter that the abolition proposed by the Convention of 1894 was immediate and absolute. The original report of the committee on superior courts provided for the abolition of the New York superior court on the 1st of January, 1901, and for the election of an additional equivalent number of justices of the supreme court. The original report did not include any other local courts, but such courts were included in several propositions providing for their abolition, and an equivalent increase in the judicial force of the supreme court. The Commission at one time decided to abolish the superior court of Buffalo, cut off the term of one judge, and transfer the other two judges to the supreme court, but afterwards receded from this position, with the result indicated in the foregoing section. Numerous propositions relating to these courts were submitted, considered, reconsidered, and adopted or rejected by the Commission, but, in view of the subsequent abolition of all the local courts included in this article, the discussion which led the Commission to the conclusions stated in the foregoing proposed amendment now has little general interest. The subject will be resumed and considered further in the next chapter.

County and Surrogates' Courts.

"The existing county courts are continued, and the judges thereof now in office shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years. In the county of Kings there shall be an additional county judge, whose term of office shall be six years from the first day of January next after his election. The first

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election to that office shall take place at the next general election held after this amendment takes effect. County judges and county courts shall have the powers and jurisdiction they now possess, and the county courts shall also have original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding $2,000; but the legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only in which the sum demanded exceeds $2,000, or in which any person not a resident of the county is a defendant. A county judge may hold courts of sessions, with the criminal jurisdiction which courts of sessions now possess, or such as the legislature may prescribe, and he shall perform such other duties as may be prescribed by law. His salary shall be established by law, payable out of the county treasury. A county judge of any county may hold county courts and courts of sessions in any other county except the counties of New York and Kings, when requested by the county judge of such other county. The existing surrogates' courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be elected by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York. Surrogates and surrogates' courts shall have the jurisdiction and powers which the surrogates and existing surrogates' courts now possess, until it be otherwise provided by the legislature. The county judge shall be surrogate of his county, except where surrogates' courts now exist; but in counties having a population exceeding 40,000, wherein no surrogate's court now exists, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be six years. When the surrogate shall be elected as a separate officer his salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office

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longer than until and including the last day of December next after he shall be seventy years of age, nor shall any county judge or surrogate in any county, the population of which exceeds one hundred thousand, hereafter elected, practise as attorney or counselor in any court of record in this state. In the county of New York there shall be an additional surrogate. The first election to that office shall take place at the next general election held after this amendment takes effect. The official terms of surrogates of the county of New York hereafter elected shall be fourteen years from and including the first day of January next after their election; except that the first term to be filled by the additional surrogate herein provided for shall continue for seven years only, from and including the first day of January next after his election. Each of said surrogates may exercise all the powers and jurisdiction conferred by law upon a surrogate. Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the supreme court. The compensation of any county judge or surrogate shall not be diminished during his term of office."

The Commission proposed to continue § 15, modifying it, however, by providing for two county judges in the county of Kings, and by increasing the jurisdiction of the county court from $1,000 to $2,000, also by providing for an additional surrogate in the county of New York. I have already noted, in the preceding chapter, the amendment introduced in the legislature of 1885, providing for an additional county judge in Kings county, and that the purpose of the amendment was accomplished by the revised Constitution of 1894 and also by an independent amendment adopted at the same time, but which was superseded by the Constitution. I have also noted in the preceding chapter the efforts made in the Convention of 1867 to provide three surrogates for the county of New York, and the amendment introduced in 1883,

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intended to accomplish the same result in another way. The legislature, in 1892, provided for two surrogates in New York without amending the Constitution, and this number was made permanent by the Constitution of 1894. The Commission's recommendation to increase the money jurisdiction of the county court from $1,000 to $2,000 was adopted by the Convention of 1894, and included in the new Constitution.

Miscellaneous.

The Commission also proposed to abrogate §§ 17 (election or appointment of judges), 22 (review of judgments of city courts), 24 (time of electing judges under the judiciary article of 1869), 28, 1 (commission of appeals), and 28, 2 (additional general term).

Judicial pensions.—In previous chapters I have given an account of the origin and establishment of the policy of continuing the compensation of judges after their terms of office had been abridged by the age limit, the subsequent objections to this policy, and the efforts to abrogate it. Dissatisfaction with the policy manifested itself in this Commission, and a successful effort was made to incorporate in its recommendations an amendment to § 13, which would gradually terminate the policy without directly affecting judges then in office. The committee on miscellaneous provisions, in its report dated the 23d of July, and presented to the Commission at the adjourned meeting in August, proposed that the pension provision be amended as follows:

"The compensation of every judge of the court of appeals, and of every justice of the supreme court *now in office,* whose term of office shall be abridged pursuant to this provision, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder

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of the term for which he was elected. *No judge or justice who shall be hereafter elected shall be entitled to receive any such compensation after he shall be seventy years of age.*"

This abrogated the pension policy as to judges elected after the amendment should take effect. Judge James C. Smith presented a new view of the subject by the following proposed substitute for all the provisions of the section relating to compensation, including the provision fixing the age limit at seventy: "When any judge of the court of appeals or any justice of the supreme court resigns his office after having served as such at least fifteen years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation;" but the Commission declined to adopt this radical change of policy. The Commission adopted an amendment offered by Judge Barker to substitute for the words "or more" the words "on the term on which he is serving," also an amendment by Mr. Marshall to substitute the words "heretofore elected" for the words "now in office." A motion by Mr. Choate to amend by restoring and continuing the original pension clause as adopted in 1880 was lost by a vote of 12 to 21. Mr. Adams proposed that the pension be continued to judges elected before 1890 and discontinued as to judges elected after that date. The Commission adopted this suggestion, modified, on motion of Mr. Leary, "that it is the sense of this Commission that no pension shall be allowed to judges of the court of appeals or justices of the supreme court to be elected after November 1, 1890."

The committee on revision reported § 13 at the December meeting in the following form:

"No person shall hold the office of justice or judge of

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any court longer than until and including the last day of December next after he shall be seventy years of age. The compensation of every judge of the court of appeals and of every justice of the supreme court elected prior to November 1st, 1890, whose term of office shall have been or shall be abridged pursuant to this provision, and who shall have served as such judge or justice ten years of the term in which he is then serving, shall be continued during the remainder of the term for which he was elected. No judge or justice who shall be elected after November 1st, 1890, shall be entitled to receive any such compensation after the last day of December next after he shall be seventy years of age."

At this meeting the Commission, on motion of Mr. Marshall, struck out the words "of the term in which he is then serving," which were inserted at the August meeting, on motion of Judge Barker. The Commission, also, on Mr. Marshall's motion, amended the section by substituting for the words "who shall be elected after November 1st, 1890" the words "who shall be hereafter elected," which had the effect to postpone the operation of the section at least two years, and would have added to the possible pension list judges elected during that time. Mr. Choate again moved to restore the pension provision as it stood in the existing Constitution, but his motion was lost by a vote of 13 to 15. Judge James C. Smith moved to strike out the whole section. This would have had the effect to leave the existing § 13 undisturbed; but he stood alone on this motion, 26 votes being cast against it.

As a result of the discussion on this subject, § 13 was recommended to the legislature in the following form:

"No person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age. The compensation of every judge of the court of appeals and

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of every justice of the supreme court, heretofore elected, whose term of office shall have been or shall be abridged pursuant to this provision, and who shall have served as such judge or justice ten years, shall be continued during the remainder of the term for which he was elected. No judge or justice who shall be hereafter elected shall be entitled to receive any such compensation after the last day of December next after he shall be seventy years of age."

County judges and surrogates in certain counties not to practise.—The committee on the county and surrogates' courts included in its recommendations the following provision: "Nor shall any county judge or surrogate in any county, the population of which exceeds 100,000, practise as an attorney or counselor in any court of record in this state." This would have excluded county judges and surrogates of the counties of Albany, Erie, Kings, Monroe, New York, Oneida, Onondaga, Queens, Rensselaer, and Westchester from the right to practise. It was urged in support of this amendment that, as a matter of principle, it ought to include county judges and surrogates in all counties, for the reason that judicial officers of this grade should not be permitted to engage in practice in other courts, thereby sustaining professional relations to lawyers in one court and judicial relations in another court; but in favor of the population limitation it was said that in most counties the salaries were small and the county judges and surrogates could not afford to give up all practice. The Commission once rejected, but later adopted, a motion by Mr. Woods to amend the provision by making it applicable only to county judges and surrogates thereafter elected. The Commission rejected, by a vote of 3 to 32, a motion by Mr. Greene to strike out the population limitation, which would have made the provision applicable to all county judges and surrogates. The Commission also

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rejected a proposition by Mr. Marshall to strike out the population limitation and insert the words "elected after the adoption of this article," which would have made the provision applicable to all county judges and surrogates thereafter elected. The Commission also rejected a motion by Mr. Raines to reduce the limitation to 75,000. This, if adopted, would have added the counties of Chautauqua, Dutchess, Orange, St. Lawrence, Steuben, and Ulster. As amended by Mr. Woods the provision was reported at the December meeting by the committee on revision, at which time Mr. Frost renewed the motion to strike out the population limitation, but this was rejected, the Commission adhering to the provision as agreed to at the August meeting; and in this form the provision was included in the final report of the Commission. We shall have occasion to examine this subject again in the next chapter.

Passes to judicial officers.—This subject seems to have had its origin in the following resolution offered by Mr. Griffin:

"A judicial officer shall not perform an official act in which he knows is interested a person or corporation from which such officer shall have accepted a valuable gift or gratuity subsequently to the adoption of this amendment."

The committee on miscellaneous provisions, after considering Mr. Griffin's proposition, reported that it was not "prepared to recommend its enactment as part of the Constitution of the state." Mr. Carter moved the adoption of the committee's report, but Mr. Townsend moved to disagree with it and amend the Griffin resolution by making it applicable only to a judicial officer who received a gift or gratuity after his election. As a substitute for the Townsend proposition Mr. Hornblower

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offered the following: "No judicial officer shall accept or receive, during his term of office, any pass from a railroad company in this state." Mr. Townsend then withdrew his proposition and Mr. Wright offered the following substitute for the Hornblower proposition: "Nor shall any judicial officer accept from any person or corporation free transportation for himself or any member of his family over the line of any common carrier." Mr. Cochran then offered the following: "A judicial officer shall not perform an official act in which he knows is interested a person or corporation from which such officer shall have accepted, during his term of office, a railroad pass or other valuable gift or gratuity subsequently to the adoption of this amendment." This was lost by a vote of 7 to 22, and Mr. Wright's proposition was adopted by a vote of 17 to 12, and was included in the amended § 21, as recommended by the Commission.

Judicial terms.—Incidentally it should be noted that the committee on miscellaneous provisions proposed to fix the term of justices of the supreme court and general term justices at eight years; but, on Mr. Hornblower's motion, by a vote of 23 to 10 the term was fixed at fourteen years. A motion by Mr. Shepard to make these justices ineligible for re-election was rejected by a vote of 6 to 23.

Council of law reporting.—The Commission rejected a proposition by Mr. Fiero to establish a council of law reporting, to consist of the chief judge of the court of appeals, one of the presiding justices of the general term, to be selected by all the presiding justices from their number, the attorney general, and two members of the Bar, to be chosen in the manner to be prescribed by law. This council was to appoint a state reporter who should "report such decisions of such courts of this state as may

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be designated from time to time by such council, and under its direction and control."

Court of claims.—The Commission tabled Mr. Fiero's proposition to establish a court of claims, to consist of three judges, to be elected by the people of the state for six years, on a plan of minority representation.

Conclusion.

I have already stated that the report of the Commission was presented to the senate on the 4th of March, 1891. Why the Commission took such long adjournments and did not prepare its report for presentation at the opening of the session of the legislature in 1891 does not appear. The Commission practically agreed on its recommendations in August, but the discussion in newspapers, legal periodicals, among the members of the Bar and otherwise, doubtless had the effect to produce a serious change of view by the members of the Commission before they came together at the December meeting. The modifications then made seem to have been substantially final, and the report of the proceedings of the Commission does not disclose any reason why its propositions might not have been put in form for an early presentation to the legislature. Instead of closing up its work at that time the Commission took another adjournment of more than six weeks, and did not meet until the 23d of January, 1891. At that time the new schedules prepared by the committee on revision were approved without change by the twenty-two commissioners who attended, and the chairman was requested to present a formal report to the legislature. This report, presented on the 4th of March, manifestly came too late to enable the legislature to give the subjects embraced in it the consideration which their importance demanded, and the

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senate took no action except to refer the report to the judiciary committee. Besides, it seems clear that the legislature was not in accord with the recommendation of the Commission relating to the structure of the court of appeals, for at that session, 1891, the legislature passed an amendment providing for a court of appeals, to be composed of a chief judge and fourteen associate judges, while the Commission was opposed to any change in the court. What the result might have been if the Commission's report had been presented at the opening of the session, thus giving the legislature time to consider all the proposed changes, we cannot conjecture; but it is probable that several of the Commission's recommendations would have been approved.

As a result of the election of 1891 the legislative and executive branches of the government were, at the session of 1892, in political accord for the first time in several years; and it then became possible for these two branches of the government to agree on a bill for a constitutional convention to carry into effect the will of the people as expressed at the election of 1886. The history of the controversy which postponed the convention from 1887 until 1894 will be given in the next chapter; but the change, in 1892, of political conditions which had given rise to that controversy, and which change deprived the legislature and the governor of any further excuse for not enacting a convention law, should not be overlooked in considering the result of the work of the Judiciary Commission of 1890. That Commission was based on the idea that the judiciary article of the Constitution was the part which most needed serious and important attention; but the people had voted for a convention with general authority to revise and amend the Constitution in all its parts, and in relation to any subject; and we shall find, in the next chapter, that the judiciary was not

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the only important subject which required attention, but that other subjects were deemed of even greater importance than this. It is not surprising, therefore, that the legislature of 1892 concluded to call the delayed convention instead of giving its attention to the Commission's proposed revision of the judiciary article, and it is no reflection on the Commission that the legislature adopted this course. The mandate of the Constitution which requires the legislature to call a convention when the people demand it is a continuing mandate, and its obligation was no more imperative on the legislature of 1887 than on the legislature of 1892, while it remained unfulfilled. It was therefore the plain duty of the legislature to call a convention instead of attempting to modify the Constitution by a series of legislative amendments, even if recommended by a commission, whose recommendations, however wise or proper, had no more actual force than the recommendations of any other persons or of individual members of the legislature.

The experiment of a commission as a substitute for the convention demanded by the people, if judged by its immediate results, was a failure; but if judged by its ultimate and permanent effect on constitutional reform, it must be conceded, I think, that the work of this commission was not a failure, but that it fully justified its creation; and while it seemed, in 1891, as if the work of the Commission had been totally ignored, and was all for naught, we shall see in the next chapter that many of its most important suggestions were adopted, three years later, by the Convention of 1894, and were incorporated in the new Constitution. The Convention took the place of the legislature as the recipient of the Commission's suggestions, and gave them more consideration than could have been given by the legislature at a regular session, and with better results. By sugges-

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tions and debate in the Commission, and by discussion in various forms throughout the state, the plans of the Commission were given tangible expression; and by directing and forming public opinion concerning the apparent needs of our judicial system, the Commission prepared the way for the reforms proposed by the Convention, thereby enabling that body to perform its work much more readily and satisfactorily than it could have done without the preliminary discussion and consideration of the judiciary article by the Commission and the people of the state. I think this chapter should not be closed without briefly noting the reforms or policies proposed by the Commission, and which were accepted by the Convention.

First. The structure of the court of appeals.—The Commission recommended that the court be continued with only seven judges. The Convention also decided to continue the court without change.

Second. Limitation of appeals.—The specification of cases in which an appeal could not be taken, recommended by the Commission, was not adopted by the Convention, but the principle of restricting appeals from the unanimous judgment of the appellate division was applied in a modified form in the new section relating to the jurisdiction of the court of appeals. The provision authorizing an appeal in any case by permission of the appellate division was included in the new Constitution, while the alternative allowance of an appeal by a judge of the court of appeals was omitted, but subsequently included in an amendment to § 191 of the Code of Civil Procedure. I have already noted the vote of the Commission not to increase the money limitation beyond $500. While the Commission and the Convention both proposed to confer on the legislature power further to restrict the right of appeal, in the new Constitution the money limitation was specifically abrogated.

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Third. Increasing the number of justices of the supreme court.—The Commission proposed an increase of fourteen justices; the Convention proposed an increase of twelve, besides the eighteen composing the local courts in New York, Brooklyn, and Buffalo.

Fourth. Judicial departments.—Both the Commission and the Convention recommended four departments, and, except in the case of the first department, they were, by both plans, to be constructed by the legislature.

Fifth. Appellate division.—The Commission proposed a general term, to be composed of five justices. The Convention modified this plan by changing the name of the general term to the appellate division, and creating an appellate division of seven members in the first department, and five in each of the other departments. I have already shown that the idea of a general term, to be composed of five justices, did not originate with the Commission, but the Commission put the plan in form, and it was adopted by the Convention, including a quorum and the number necessary to concur in a decision. The method of designating justices for the appellate division was the same in both cases. Under the Commission's plan not more than two justices could be selected from the same district; by the Convention plan a majority of the justices of the appellate division must be residents of the department. The Commission plan authorized an additional general term, to be created by the governor, who might also require the general term justices in one department to hold a general term in another department in arrears; instead of this plan, the Convention adopted the plan proposed by Mr. Marshall, as modified by Mr. Shepard, providing for a transfer of causes from one department to another by direction of the presiding justices of the appellate division. The Commission proposed to limit a general term justice ex-

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clusively to the duties of the appellate court. The Convention plan permits a justice of the appellate division to perform the duties of a "justice out of court, and those pertaining to the appellate division or to the hearing and decision of motions submitted by consent of counsel."

Sixth. Judicial pensions.—The Commission proposed to abrogate judicial pensions as to judges elected after the amendment should take effect. The Convention substantially adopted this plan by providing that no judge elected after January 1, 1894, should be entitled to a pension.

Seventh. Passes.—The prohibition against accepting passes was limited by the Commission to judges; the Convention extended the prohibition to all public officers.

Eighth. Abolishing local courts.—The Commission proposed to abolish the New York superior court after the expiration of the term of the judges in office December 31, 1889. The Buffalo superior court, the New York court of common pleas, and the Brooklyn city court were continued, the name of the latter court being changed to the superior court, and one judge was added to its membership. These courts were, however, limited to the trial of causes, and were deprived of any appellate jurisdiction. It was made the duty of the judges of these courts to hold circuits and special terms of the supreme court in their respective counties whenever required by the general term. The Commission plan vested in the legislature the power to abolish these courts, and to provide for the election of an equal additional number of justices of the supreme court. The Convention modified the Commission plan by providing for the immediate abolition of all of these courts, making the judges of them justices of the supreme court, with power to act only in their respective counties, and increasing accordingly the

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number of justices of the supreme court in the judicial districts embracing such counties.

Ninth. Kings county judge.—The Commission and the Convention both provided for an additional county judge in Kings county.

Tenth. County court jurisdiction.—The Commission and the Convention both increased the money jurisdiction of county courts from $1,000 to $2,000.

Eleventh. New York surrogates' court.—The Commission and the Convention both provided for two surrogates in the county of New York, although it should be noted that between the Commission and the Convention the legislature, by statute, provided for an additional surrogate in that county.

Twelfth. County judges and surrogates not to practise.—The Commission and the Convention both prohibited county judges and surrogates in certain counties from engaging in practice, but the Convention increased the population limit from 100,000 to 120,000, and also extended the prohibition to acting as referee.

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