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.

Nearly all of this volume is devoted to a history of the fourth Constitution, but that history necessarily includes the consideration of many provisions which had their origin during earlier constitutional periods, some reaching back to the foundation of the colony. Some of the provisions which were included in this Constitution are of great importance; they had long received consideration by the legislature, and had become distinct and apparently permanent features of our public policy. According to the general plan of the book, the historical development of these subjects belongs in the history of the Constitution in which they are included for the first time.

The last chapter includes a brief summary of suggestions and amendments proposed or adopted since the Constitution of 1894 went into operation. The third volume closes the general study of our constitutional history, at least by periods, but the reader will find several important topics considered in the fourth volume, in connection with the judicial interpretation of the Constitution.




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CHAPTER XII.

The Fourth Constitution, 1894.

Eight years the people were compelled to wait for a constitutional convention after they had demanded one. For six years this delay was the clear result, I think, of differences between the Governor and the legislature. Whether these differences were justifiable, whether they were actually prompted by partisan motives, whether the legislature obeyed, in a reasonable manner, the mandate of the Constitution to provide for a convention after the people had voted for one, and whether either party to this controversy should have yielded to the other, each reader must determine for himself after a perusal of the facts. That the controversy was of a partisan character is evident from the charge in the Governor's veto message that the bill for a convention was intended to secure a Republican majority in that body, and the countercharge in the report of the assembly committee, that the Governor's proposed plan was intended to secure Democratic control of the same convention. An important constitutional amendment, which will be hereafter noted, was the direct result of this controversy, and we may therefore profitably examine it, not only because it was a manifestation of the intense partisan spirit which then infected public affairs, but also because it shows how the fundamental law may be affected and altered by influences which can have no proper place under a government intended to express and protect the individual, social, and political rights of all the people.

Governor Hill, in his annual message of 1886, after calling attention to the requirement that the question of

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calling a constitutional convention should be submitted to the people that year, said it was difficult to anticipate what the temper of the people might be in respect to the necessity of another constitutional convention. "It may well be doubted whether it will be favored, owing to the expense incident to its holding and the improbability of its work in the end being acceptable to the people." The legislature submitted the question of holding a convention, and it is evident that the people did not share Governor Hill's doubt as to the necessity of a convention, for, at the November election, in 1886, the question was answered in the affirmative by a vote of 574,993 to 30,766. This was a very positive expression of opinion in favor of a convention. Forty years had elapsed since there had been a convention whose work had been accepted by the people, and while, as appears in preceding chapters, much of the rejected work of the Convention of 1867 had since been adopted by independent amendments, those amendments were fragmentary, and the Constitution needed a revision and restatement even if there were no great reforms which should be incorporated in it. On an affirmative answer to the constitutional question the legislature, at its next session, is required to "provide by law for the election of delegates to such convention."

The subject was brought to the attention of the legislature of 1887 by the Governor, in his annual message, and also by several bills to provide for a convention. Governor Hill said the details of the convention were "left to the discretion of the lawmaking power." He thought it was "desirable that the convention should be a sufficiently numerous body to enable all parties and classes as well as all the varied and diverse interests in the state to be represented;" but that it should be somewhat smaller than the Convention of 1867. The Governor's

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most important suggestion, however, related to the formation of the convention, and he made specific suggestions concerning the number and manner of electing the delegates. "It is believed," he said, "that, so far as possible, the various interests in the state should be represented in the convention, which should include not only the adherents of the two principal political parties, but the prominent representatives of the prohibition, license, woman suffrage, labor reform, and anti-monopoly sentiment, as well as those identified with any other special interest of importance, desiring changes in the organic law of the state, thereby rendering it emphatically the people's convention, as contemplated by the Constitution." To accomplish this result he thought the law should provide for the election of as many delegates at large as might be practicable. The Governor then suggested a convention of 110 members, "of which 68 should be elected by districts, 2 from each congressional district, and 42 should be elected from the state at large, no elector being permitted to vote for more than 15 delegates, and the 42 delegates receiving respectively the highest number of votes should be declared elected. This would probably secure 15 delegates at large to each of the two principal political parties, leaving 12 delegates at large to be selected by other interests, and leaving the district delegates to be elected as the electors of the various districts should determine,—either according to existing political divisions or upon a nonpartisan basis, or otherwise." The Governor also suggested that it might be desirable to provide for minority representation in the election of district delegates, in which event no elector should be permitted to vote for more than one. The Governor urged the election of delegates by congressional districts instead of by senate or assembly districts, as in the case of former conventions, "because the last ap-

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portionment made in the state (which was in 1883) related to congressional districts, and was based upon the Federal enumeration of 1880, while there has been no apportionment of senatorial or assembly districts since 1879, which was based upon the state enumeration made in 1875,—over eleven years ago,—and it is admitted that the population of the several districts has greatly changed since that period." The Governor said it was assumed that "there will be no endeavor to obtain any supposed political or partisan advantage by a refusal to permit the people of the state to be fairly and equitably represented in their own constitutional convention according to the last enumeration and apportionment of its inhabitants."

Speaker James W. Husted introduced a bill on the opening day of the session, providing for a convention of 128 members, 32 from the state at large, but no elector could vote for more than 16; New York and Richmond counties together were to elect 21, but no elector could vote for more than 7; Kings county was to elect 9, but no elector could vote for more than 3; the remaining 66 delegates were to be chosen from the 22 senate districts outside of New York, Kings, and Richmond; each district was to elect 3, but no elector could vote for more than 2. Under this plan three political parties or interests might have been represented in the counties of New York, Kings, and Richmond, while elsewhere only two parties would probably have been represented.

James P. Graham, of Kings county, introduced a bill in the assembly providing for a convention of 224 delegates, 96 by senate districts, 3 from each, no elector to vote for more than one, and 128 by assembly districts, one from each. This provided for minority representation in the delegation from senate districts. The bill provided that all adult persons "without distinction of sex,"

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who had been citizens ten days, inhabitants of the state one year, and of the county four months, might vote for delegates.

Frank B. Arnold, of Otsego county, introduced a bill in the assembly, providing for a convention of 160 delegates, 128 by assembly districts, one from each, and 32 from the state at large, but no elector could vote for more than 16.

Michael C. Murphy, of New York, introduced a bill in the senate providing for a convention of 288 delegates, 256 to be elected by assembly districts, 2 from each, and 32 from the state at large, but no elector could vote for more than 16.

It will be observed that all of these bills, except the one introduced by Mr. Graham, followed the convention act of 1867, by providing for 32 delegates at large, but permitting an elector to vote for only 16. I do not find that any bill was introduced to carry into effect Governor Hill's suggestion of a convention chosen in part by congressional districts. The Arnold bill was passed. It provided for the election of delegates in November, 1887, required the convention to meet and organize at Albany on the 3d Monday (15th) of January, 1888, and authorized it to sit anywhere in the state.

On the 10th of May, 1887, Governor Hill vetoed the Arnold bill on the following grounds: First, that it postponed the convention until the next year. The Governor thought the convention ought to have been held in 1887, and that a postponement of it was in "direct defiance of the will of the people, and without precedent in the history of the state." Second, "The bill contemplates a partisan convention by making no provision for representation other than to the two principal political parties of the state." The Governor said its only provision for minority representation was in the choice of delegates

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at large, which would probably be divided between the two principal political parties. "It thereby virtually excludes from membership the representatives of the elements of organized labor and prohibition, who should properly be afforded an opportunity of participating in the work of such a convention." Third, it provided for the election of delegates at the regular November election instead of at a special election. This he thought would complicate the election of delegates with partisan considerations. He said a constitutional convention was "not the proper field for securing mere party advantage. The people do not desire a strict partisan convention, nor will they countenance any effort to engraft upon the Constitution the mere political dogmas of any partisan organization. The ablest, best, and purest men in the state should be selected for the work of such a convention, regardless of political considerations or party predilections." Fourth, "It provides for or permits the submission to the people of the proposed amended Constitution at the general election of 1888." He thought the amendments should not be submitted at a presidential election, for the reason that they would probably be overshadowed by the importance of the national contest, and therefore would not receive proper consideration. I have noted in a previous chapter the debate on a similar question in the Convention of 1867 on a proposition to submit the new Constitution at the general election in 1868. That Constitution was in fact submitted at the general election in 1869. An examination of this subject shows that, beginning with the Constitution of 1846, all constitutions and amendments, except one amendment in 1854, have been submitted to the people at the November election, and several amendments have been so submitted at presidential elections. The general election law of 1896 requires amendments to be sub-

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mitted at the general election, unless otherwise directed by the legislature. Fifth, "The basis of representation proposed for the convention is grossly partisan and unjust." Governor Hill said the practical effect of the bill was to provide for a convention which would represent the minority instead of the majority of the people. He said the assembly representation was to be chosen from districts created in 1879, based on the state census of 1875. "No one pretends that that apportionment is fair or just at the present time. Its glaring inequalities cannot be justified or excused. It is maintained only by the persistent refusal of the legislature to provide for a new enumeration and reapportionment in accordance with the express commands of the Constitution." The Governor then pointed out the differences and discrepancies between several counties and their assembly representation, and said that the bill "provides for the election of delegates in accordance with this partial and inequitable basis of representation." He said the fairness of the congressional apportionment of 1883, based on the Federal census of 1880, had never been questioned, and that there was "no difficulty in providing for the election of delegates from congressional districts. A certain number could be chosen from each district, and a provision could easily be made for proper minority representation." He said the objections stated would doubtless lead "substantially all the people of the state to the same conclusion at which the more reputable portion of the press of the state have already arrived; namely, that the bill was urged as a partisan measure, that its passage was secured only under caucus pressure, and that its essential provisions are in open disregard of the general interests of the state." In closing the message the Governor said he believed that the conclusion at which he had arrived "fairly represents the general sentiment of the state. The

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newspaper press, that usually so faithfully announces public opinion, does not advocate this measure in its present shape; the people do not want it, and, in fact, hardly any one outside of the legislature, and not blinded by party zeal, has ever even assumed to believe that it could receive executive approval."

Early in the session the assembly appointed a select committee to consider all convention bills. This committee reported the bill, which was passed, and when the Governor's veto message was received it was referred to the same committee. On the 26th of May the committee presented its report, remarking, at the outset, that the veto message had been "prepared with more haste and less care and research than usually attends the preparation of documents of this importance in the executive chamber, and they find, with all due respect to the Executive, that the objections to said bill are unreasonable, fanciful, and misleading; and so far as said message assumes to state facts, it is in many respects erroneous." The committee further said that the bill was "in complete accord with the spirit of the laws governing the state, and whose most important provision follows the rule of representation approved by the people in an almost unbroken line of precedents, from the foundation of the state government to the present day." The committee then pointed out that the delegates to the conventions of 1777, 1801, 1821, and 1846 were chosen on the basis of assembly representation; that in 1867 the first departure was made from the established rule of choosing delegates by assembly districts. That the work of that convention was, in the main, unsatisfactory to the people, and had all been rejected except one article. If the committee intended to suggest the inference that the rejection of the work of the Convention of 1867 was due to the method of choosing its members, I think such an inference was

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wholly unwarrantable, for reasons which I have pointed out in the chapter on that convention. Commenting on the Governor's suggestion that the convention be chosen by congressional districts, the committee said it would have required the adoption of a "unit of representation hitherto unknown in this state for any state purpose, and it would have enabled the Democratic party to have made additional and unforeseen thrift out of the unjust and revolting congressional apportionment of the year 1883, under which the Republican party of this state was wronged out of its fair share of representation in the national Congress." The acute condition of party feeling is further indicated by the observation that the "Governor's care for the interests of the Prohibition and Labor parties is touching in the extreme." The committee then referred to the "startling unanimity" with which the Democratic party had opposed "every measure which seeks to draw additional revenues for state purposes from the sale of intoxicating liquors, and so relieve the real property of the state from a part of the burdens of taxation which it now bears," and reminded the Labor party that the "Democratic party, while making pretenses of being in accord (and in some respects it may be) with the aims of that organization," was "secretly its bitter and unrelenting adversary." The committee, referring to the fact that the Labor party cast sixty thousand votes in the city of New York at the last election, said the Democratic members of the assembly had voted almost unanimously against a recent bill to give the Labor party an inspector of election in the election districts in that city. The committee thought that the Prohibition and Labor parties would have been represented under the proposed bill, for the reason that the two principal parties "would have found it for their interest to give the principles upon which these organiza-

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tions are founded fair representation in their state and district nominations." Concerning the Governor's objection to the time of electing delegates, the committee thought that both economy and prudence demanded the election at the time of choosing other public officers, and as to the time of holding the convention, the committee thought there were "no such reasons for urgency as existed at the time of holding previous constitutional conventions." Concluding its report, the committee expressed the opinion that "it was the intention of the Executive and of the Democratic party, of which he is the representative, always to prevent, if possible, the holding of a constitutional convention, as directed by the people, and to defeat any bill which this legislature could pass which would not be likely to insure a partisan and Democratic majority in the convention. Your committee are of the opinion that the Executive and other leaders of the Democratic party have determined to set at naught the words of the Constitution, and to defy the expressed command of the people rather than give opportunity for discussing, in a constitutional convention, the great questions involving the limitations of corporate power and the relations of capital to labor, which would be likely to make more definite and certain the lines which now divide the Labor party from the Democratic organization. No special pleading will cloud the popular judgment or conceal the partisan motives which inspired this message. As the representatives of the people whose strict command the Executive has thus thwarted and disobeyed, it remains for the legislature to appeal for its justification to that power which is above governors and legislatures,—the people themselves." An attempt was made to pass the bill over the veto, but it did not receive the necessary two-thirds vote.

Here we have an issue sharply defined between the

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legislature and the Governor, each unhesitatingly charging the other with a desire to gain party advantage. A Republican legislature passed a convention bill by which a majority of the delegates were to be elected by assembly districts, following a custom which, with the exception of the Convention of 1867, was established before the state government was organized, and differing from the Convention of 1867 only in the districts selected as the basis of representation. Like the convention act of 1867, the bill offered the principal opposing party one half of the delegates at large, and each party was to take its chances in the election of district representatives. Governor Hill said, in his veto message, that "fair-minded men will concede that such a convention ought not to represent the minority of the people, to the exclusion of the majority." If this were adopted as a true rule of representation all delegates should be elected at large, and each party should have the privilege of electing all of them. It is practically impossible to devise a scheme of representation by districts which will make sure the supremacy of the party which may, on a state issue, happen to cast the largest number of votes. Local considerations, the personality of candidates, real or imaginary local issues, and many other causes which cannot be anticipated or explained, enter into the election of district delegates; one party may, therefore, sometimes carry the state on the general ticket and another party may elect a majority of local representatives. Governor Hill's suggestion that the Democratic party was in the majority, while true from one point of view, is not accurate when considered in connection with the entire vote. Thus, in 1887, when delegates to the convention would have been chosen if the bill had not been vetoed, the Democrats elected the state officers by an average plurality of 14,166 out of a total vote exceeding a million; yet we

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find by comparison that, of the entire vote for secretary of state, the Democratic party cast 45.4 per cent, the Republicans 43.8 per cent, the Labor party 6.8 per cent, and the Prohibitionists 4 per cent. This gave the Democrats a margin of 1.6 per cent,—an excess that certainly need not have caused any special exultation on the one side nor dismay on the other. In 1887 the Republicans elected 72 members of assembly and the Democrats 56. According to these returns the Republicans, under the vetoed bill, would have chosen 88 delegates to the convention, and the Democrats 72, including the delegates at large.

But Governor Hill suggested a convention chosen by congressional districts, and in his annual message proposed 110 delegates, 68 to be chosen by districts, 2 from each. Forty-two delegates were to be chosen from the state at large. and no elector was to vote for more than 15. This provision, according to the vote of 1887, would have given the Democrats and Republicans 15 each and the Labor party 12. In 1886 the Republicans carried 19 congressional districts and the Democrats 15. If Governor Hill's original suggestion had been adopted, and the result by congressional districts had been the same in 1887, the Republicans would have elected 38 district delegates and the Democrats 30. This number, added to the number elected at large, would have given the Republicans 53, the Democrats 45, and the Labor party 12. Neither party would have controlled the convention. Governor Hill said, in his veto message, as already quoted, that such a convention "ought to represent the majority of the people of the state," but, as already shown, the election returns of 1887 did not indicate that any party was in the majority. The result from a political point of view could not have been materially different if all the delegates had been chosen by congressional

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districts, either on a plan of giving each elector the right to vote for all the delegates, or on a plan of minority representation; for if, in 1887, the Republicans could have carried nineteen districts out of thirty-four, as they did in 1886 and 1888, they would have controlled the convention on any probable basis of representation.

Looking at the subject calmly after the lapse of fifteen years, it is not easy, in view of this probability, to discover the real purpose of Governor Hill in vetoing this bill; at any rate, the charge of extreme partisanship made against him by the assembly committee seems too severe, especially when we remember that if the legislature had adopted any of the Governor's suggestions concerning the election of a convention by congressional districts the Democratic party could scarcely have hoped to secure control of the convention.

The Governor also objected to the bill because it provided for electing delegates by districts which had been created under an enumeration taken twelve years before; that the increase in population had materially changed the relative strength and positions of several districts, and that these discrepancies ought to have been equalized and new districts established before choosing delegates to the convention. There was much force in this objection. If the ratio of increase in population from 1875 to 1880 continued until 1887, the population of the state in 1887 was, in round numbers, not less than 925,000 greater than in 1875. While this increased population was not unrepresented, because all the people lived in some assembly district, the ratio of representation had become widely diverse. It goes without saying, therefore, that a new apportionment based on the population of 1885 would have made material alterations in the assembly districts, and would have given several counties a larger representation and others less than they had under the

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apportionment of 1879. It was necessary, however, to work out the problem under existing district conditions, unless districts were to be abandoned, and all the delegates elected on a general ticket. The legislature could not create new assembly or senate districts without another enumeration of the inhabitants of the state. An enumeration bill had been passed by the legislature in 1885, but was vetoed by Governor Hill because it provided for taking statistics relative to various subjects,—statistics which, he said, were "elaborate, costly, and useless," and were not required by the Constitution. He expressed his willingness to sign a bill providing for an enumeration only, but intimated that he could not approve a bill which provided for the collection of statistics in addition to an enumeration.

The legislature did not pass this bill over the Governor's veto, and did not pass another enumeration bill, but adjourned on the 15th of May. On the same day the Governor convened the legislature in extraordinary session for the purpose of considering the enactment of a law for an enumeration as required by the Constitution. The legislature adhered to the position it had taken at the regular session, and again passed a bill providing not only for an enumeration but also for the collection of statistics on specified subjects. Governor Hill vetoed this bill, substantially on the grounds stated in the former message, and also on the additional ground that the legislature convened for the purpose of enacting an enumeration law had no power to enact a law on any other subject, and that the provisions in the bill for obtaining statistics were foreign to its main purpose and therefore unconstitutional. In explanation of the situation presented by these bills and the Governor's vetoes, it may be worth while to cite the statute of 1855 (chap. 64) which was intended to establish permanent procedure for

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a decennial enumeration. That statute required the secretary of state to appoint marshals (afterwards called "enumerators") in each town and ward before May 1st, and prescribed their duties, whose compensation was a local charge. Enumerators were appointed in 1865 and 1875 by the secretary of state without any special authorization by the legislature, and the secretary of state, in 1885, possessed all the authority that had been exercised by his predecessors. His neglect to appoint enumerators and initiate proceedings for taking the census was doubtless the result of a movement to amend or repeal the act of 1855, and provide only for an enumeration of inhabitants, omitting the collection of other statistics. Governor Hill sent a special message to the legislature on the 19th of January, 1885, recommending this course, and citing the recommendation of the secretary of state, in 1875, that the gathering of statistical information be omitted. The Governor suggested other provisions in relation to the subject, including the appointment of enumerators under civil service rules and after competitive examination. He thought the statistical information gathered in connection with previous enumerations was no longer desirable, and was not of sufficient value to warrant the large additional expense made necessary in obtaining it. Nevertheless, it was doubtless true that if the secretary of state had complied with the statutory mandate, and appointed enumerators, an enumeration would have been taken in accordance with the original statute and requirements of the Constitution, unless the legislature had interfered by limiting the field of information to be covered by the enumerators; and if nothing had been done in this respect, an enumeration of the inhabitants would have been obtained, even if other unnecessary or undesirable information had been gathered; and the legislature of 1886 would have been

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in possession of the information required to make a new legislative apportionment, and the constitutional convention could then have been chosen in 1887 on the basis of an apportionment which must have been the result of an agreement between the legislature and the Governor, for the reason that the political majority in the legislature could not command the requisite two-thirds vote to pass a bill over the Governor's veto. The failure of the legislature and the Governor to agree on an enumeration law resulted in a postponement of the constitutional enumeration until February, 1892, at which time the Democratic party was in control of both the executive and legislative branches of the state government. We shall have occasion to observe later in this chapter that this delay in taking the enumeration resulted in a constitutional provision intended to be self-executing, and absolutely securing an enumeration at the time prescribed by the Constitution, without hindrance or delay by any branch of the government.

The disagreement of the Governor and legislature relating to a convention limited district representation either to senate or assembly districts based on the state census of 1875, or to congressional districts based on the Federal census of 1880. Governor Hill preferred the latter census and the congressional apportionment because five years nearer the date of the convention bill, and which would, at least to some extent, reduce the inequalities in district population which had grown up since the census of 1875. The legislature was doubtless justified in its unwillingness to depart from the long established custom of choosing delegates by assembly districts, and to elect them by congressional districts, which, as suggested by the assembly committee, in its report, were not used for any state purpose. The legislature undoubtedly had power to apportion the delegates among the

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various counties according to any ratio it might see fit to adopt. Thus, it could have estimated the population of the state in 1887, could have made a new apportionment of assembly districts or delegate districts, for the purposes of the convention, and could have prescribed the number of delegates to be chosen in each county. This would not have been an easy task nor would it have been satisfactory, because it was practically impossible to make an estimate of the population of the state at that time by counties. Several counties declined in population between 1875 and 1880, while others showed a large increase. I think the vetoed bill was much more fair as between parties than any of its predecessors, except the convention act of 1867, for, under the earlier convention laws, there was no provision for minority representation. The convention act of 1867 initiated this rule, and it was followed in 1887. I think it must be universally conceded that the vetoed bill was much more fair in this respect than the law under which the convention was finally chosen in 1893.

This controversy between the Governor and the legislature exhibits the intensity of party feeling which prevailed between 1885 and 1895; but this was not the only manifestation of that feeling. Every good citizen must hope that we have fallen on better times, and that the painful pictures of partisan contests so common during that period will not be presented to our view again. It seems clear that they will not be repeated as to any attempts, real or imaginary, to obtain partisan advantage by a constitutional convention, for if the rules relating to such conventions, incorporated in the Constitution of 1894, prove adequate to the purpose intended, no such controversy between the governor and the legislature as that which occurred in 1887 can be witnessed again. The annual message of Governor Hill, in 1887,

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and his veto message, together with the vigorous language used in the assembly committee's report concerning the Governor, made an agreement between these two branches of the government practically impossible; for after the Governor, in his annual message, had assumed, in advance, to advise in detail the course which the legislature ought to pursue in obeying a constitutional mandate, even pointing out specifically the path which that body ought to follow, and especially after the direct charge in the veto message of intentional partisanship on the part of the legislature, and that it apparently intended to ignore public opinion and pass a bill which could not be acceptable to conservative citizens, it was hardly to be expected that the legislature could, with self-respect, yield to such executive criticisms. On the other hand, the severe animadversions on the Executive, contained in the assembly committee's report, were not calculated to bring the Governor round to the view of the question entertained by the legislature. The veto message and this report do not make pleasant reading, but they cannot be ignored by the student of our political institutions. They have made much history, for not only did this unhappy controversy postpone for many years the convention demanded by the people in 1886, but, during this interval, most significant and important events occurred which presented to the Constitutional Convention of 1894 problems which did not exist in 1887; but the controversy made history also in another way, as already suggested, by producing a constitutional amendment intended forever to prevent its repetition. Governor Hill, in his annual messages of 1888, 1889, 1890, and 1891, renewed his recommendations for a constitutional convention, and also for an enumeration of the inhabitants of the state.

In 1888 Mr. Arnold, who had been elected to the senate in 1887, introduced a bill for a convention to be com-

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posed of 160 delegates, chosen in the manner prescribed by his assembly bill, which was vetoed in 1887. Mr. Hill was re-elected governor in 1888 for three years. The legislature continued under Republican control; little hope could therefore be entertained that a convention law could be enacted until both the executive and legislative branches of the government had passed under the control of one political party. No convention bill was introduced in 1889. Senator J. Sloat Fassett introduced a bill in 1890 providing for a convention to be composed of 160 delegates, one from each senate district and one from each assembly district, but it was not passed. In 1891 the Democratic majority in the legislature honored Governor Hill by electing him to the United States Senate; but, notwithstanding this expression of confidence, his party associates in the legislature evidently were not in accord with him concerning a constitutional convention, for we find that, at the same session, Charles P. McClelland, a Democrat from Westchester county, introduced in the assembly a bill for a convention to be composed of 160 delegates, 128 to be chosen by assembly districts, and 32 from the state at large; the 20 receiving the highest number of votes were to be declared elected, and the 12 receiving the next highest were to be designated or appointed by the state board of canvassers. The assembly, which was then Democratic, passed the bill under a suspension of the rules, and it was sent to the senate, where it apparently received no attention. It is worth noting here that this bill was the vetoed Arnold bill of 1887, except that it divided the delegates at large by giving one party 20 and the other 12, instead of giving to each party 16, as provided in the original bill. It adopted the original Republican plan of assembly district representation, which had been so vigorously condemned by Governor Hill in 1887. Roswell P. Flower was

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elected governor in 1891. The Democrats also carried the assembly, and, as a result of the election, secured control of the senate. The executive and legislative branches of the government now being under the control of the same political party, longer delay in the enactment of a law for a constitutional convention could not be excused because of partisan differences. Governor Flower, in his annual message of 1892, urged legislation providing for a convention, suggesting that the failure of the legislature to adopt the recommendations of the Judiciary Commission of 1890, and the unsatisfactory results of amending the Constitution piecemeal by legislative amendments, were reasons for calling at once a convention which might examine and revise the entire Constitution, and include in it such provisions as recent development had seemed to make desirable. At this session William Sulzer, of New York, a prominent Democrat and speaker of the assembly in 1893, introduced a bill which, following the original Arnold bill of 1887, provided for a convention of 160 members, 128 to be chosen by assembly districts, one from each, and 32 from the state at large, but no elector could vote for more than 16. The Democrats now seemed willing to choose a convention according to the Republican plan of 1887, although there had been no change in assembly districts. While the bill was pending an amendment was offered providing for the appointment by the Governor of eleven additional delegates, five to represent labor organizations, and three Prohibitionists, and three advocates of woman suffrage. The bill as passed (chap. 398) omitted the provision for representation by advocates of woman suffrage, but continued the Governor's power to appoint representatives of the other two classes. It provided for the election of delegates on the second Tuesday of February, 1893, following, in this respect, Governor Hill's suggestion that

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delegates be chosen at a special instead of a general election. The act also provided for submitting the work of the convention at the general election in 1893, thus, as already noted, following a custom which, with one exception, had been universal since 1846.

Early in the session of 1892 the legislature passed an act providing for an enumeration to be taken in February. On the basis of this enumeration the legislature, at an extra session in April, 1892, made a new apportionment of senators and members of assembly. The apportionment bill and the convention bill were approved by the Governor on the same day. Governor Flower, in his annual message of 1893, said that "popular sentiment" seemed to favor a postponement of the election of delegates to the constitutional convention from February to the regular election day in November. The Governor said it had been estimated that the expense of a special election would be between six and seven hundred thousand dollars. He also said that doubt had been expressed concerning the constitutionality of the convention act of 1892, on the ground that the legislature could not confer on the governor the power to appoint delegates to the convention. The Governor expressed himself in favor of minority representation, and suggested that, if the power of appointment were deemed invalid, provision be made for the election of representatives of the labor and prohibition interests and also of advocates of woman suffrage.

The convention act of 1892 was amended by providing for a convention of 175 members, 160 to be chosen by senate districts, 5 from each, and 15 to be chosen from the state at large. There was no minority representation, but women were expressly made eligible as delegates. It will be observed that here was a radical change from the policy adopted in 1892, and a return to the convention

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act of 1867, with the exception that the delegates at large were not to be divided between parties, and with the further exception that five delegates instead of four were to be chosen from each senate district. The Republican party, in the legislature of 1867, offered its political opponents one half of the delegates at large, and an equal chance in the election of district delegates. The Republican bill of 1887 did the same. The first Democratic law, 1892, made the same provision for minority representation. The second Democratic law, 1893, reversed this policy, and proposed a convention without any express provision for minority representation. Governor Flower's suggestion relative to representation by labor and prohibition interests and advocates of woman suffrage was not adopted, and none of these interests could hope to be represented except through one of the leading political parties. We shall have occasion to observe hereafter that the plan of electing local delegates by senate districts, which was inaugurated in 1867 and continued in 1893, was incorporated in the Constitution of 1894, and the convention of 1918 will be composed of delegates chosen by senate districts, three from each, with fifteen delegates from the state at large. Assembly district representation, which prevailed in the election of delegates to the first four constitutional conventions, has thus probably been permanently abandoned. It may be noted, in passing, that the result of the election of delegates to the Convention of 1894 would not have been materially different in respect to political representation if the assembly district plan of 1892 had been continued.

This book is not intended to be a history of political parties, and the reader will find in these pages little that will aid him in determining which political party, if any, is entitled to the credit of a given constitutional change, or responsible for the conditions which produced it. But

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I make no apology for introducing political considerations in a discussion of the evolution of the Convention of 1894, for the beginning of the movement for a convention was marked by partisan feeling so pronounced, and it continued to be so intense until the consummation of the project in the convention act of 1893, that it is practically impossible to present an intelligible view of this period by simply reciting the provisions of proposed statutes, without also, to some extent, pointing out the springs of action which probably influenced the statesmen of that period in their apparent attempt to gain an advantage for their party in choosing members of a convention whose only legitimate purpose was the revision of our organic law. In a government by party it may not be reasonable to hope for a total exclusion of party considerations in framing or revising the fundamental law, because each party presumably believes its own policies ought to prevail and will best conserve the welfare of the state; but now that we have reached our latest Constitution it should be said to the honor of all our constitution-makers, that they have shown a patriotism far wider than any mere party interest, and have sought to establish a Constitution on the most enduring principles of right and justice, to preserve the blessings of liberty and promote the prosperity of the people under an enlightened free government.

At the November election, in 1893, the following delegates were chosen to the convention.

Delegates at Large.

J. Rider Cady, Joseph H. Choate, John M. Francis, Augustus Frank, John I. Gilbert, William P. Goodelle, Michael H. Hirschberg, Frederick W. Holls, Jesse Johnson, Edward Lauterbach, John T. McDonough, Daniel

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H. McMillan, John F. Parkhurst, Elihu Root, Commodore P. Vedder.

District Delegates.

First senate district.—Lucius N. Manley, Frederic Storm, Charles L. Phipps, Nicoll Floyd, Nathaniel S. Ackerly.

Second senate district.—Mirabeau Lamar Towns, William H. Cochran, John G. Schumaker, John B. Meyenborg, Almet F. Jenks.

Third senate district.—Stephen B. Jacobs, Henry A. Powell, William H. Allaben, Solomon Galinger, Charles B. Morton.

Fourth senate district.—Joseph C. Hecker, Frank H. Vogt, William A. Faber, Andrew Frank, Robert M. Johnston.

Fifth senate district.—William D. Veeder, William Sullivan, Thomas J. Farrell, William B. Davenport, John Cooney.

Sixth senate district.—James W. Riggs, Eugene A. Curran, George W. Roderick, William M. Mullen, Thomas W. Fitzgerald (until August 2).

John C. Kinkel, Charles L. Pashley, William Deterling, J. Lott Nostrand, and Charles J. Kurth (from August 2, seated after contest).

Seventh senate district.—William C. Whitney, Wright Holcomb, De Lancey Nicoll, John M. Bowers, Arthur D. Williams.

Eighth senate district.—John Bigelow, Frank T. Fitzgerald, Leonard A. Giegerich, Elliot Sandford, Morris Tekulsky.

Ninth senate district.—Joseph M. Ohmeis, Joseph Koch, Charles Goeller, Aaron Herzberg, Henry D. Hotchkiss.

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Tenth senate district.—Gideon J. Tucker, Delos McCurdy, Charles H. Truax, William Q. Titus, James W. McLaughlin.

Eleventh senate district.—Robert E. Deyo, M. Warley Platzek, Francis Forbes, Nelson J. Waterbury, William P. Burr.

Twelfth senate district.—Nelson Smith, William McM. Speer, Jacob Marks, John D. Crimmins, David McClure.

Thirteenth senate district.—Andrew H. Green, James P. Campbell, Joseph I. Green, Eugene Durnin, Thomas Gilleran.

Fourteenth senate district.—Charles W. Dayton, Michael J. Mulqueen, John A. Deady, Stephen S. Blake, Chauncey S. Truax.

Fifteenth senate district.—Andrew C. Fields, William Church Osborn, William T. Emmet, Adolph C. Hottenroth, John Gibney.

Sixteenth senate district.—William D. Dickey, Henry W. Wiggins, William H. Mase, Charles W. H. Arnold, Ira M. Hedges.

Seventeenth senate district.—John A. Griswold, George L. Danforth, Jacob M. Maybee, Howard Chipp, Jr., George H. Bush.

Eighteenth senate district.—Roswell A. Parmenter, John H. Peck, William J. Roche, Amos H. Peabody, Edwin C. Rowley.

Nineteenth senate district.—A. Bleecker Banks, Edwin Countryman, Peter A. Rogers, William Kimmey, Dennis P. Kerwin.

Twentieth senate district.—Abram B. Steele, Edward A. Brown, Walter L. Van Denbergh, Charles C. Lester, Edward C. Whitmyer.

Twenty-first senate district.—Chester B. McLaughlin, Charles H. Moore, Edgar A. Spencer, Frederick Fraser, Thomas W. McArthur.

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Twenty-second senate district.—Vasco P. Abbott, John G. McIntyre, William H. Baker, William H. Steele, Elon R. Brown.

Twenty-third senate district.—Henry J. Cookinham, John C. Davies, Charles S. Mereness, James W. Barnum, Abraham L. Kellogg.

Twenty-fourth senate district.—D. Gerry Wellington, Ceylon H. Lewis, Louis Marshall, George Barrow, Thomas G. Alvord.

Twenty-fifth senate district.—Charles A. Fuller, William J. Mantanye, Abram C. Crosby, H. Austin Clark, George F. Lyon.

Twenty-sixth senate district.—John W. O'Brien, Henry R. Durfee, Frank H. Hamlin, Frank E. Tibbetts, George R. Cornwell.

Twenty-seventh senate district.—William H. Nichols, Milo M. Acker, Charles R. Pratt, Owen Cassidy, Charles A. Hawley.

Twenty-eighth senate district.—Nathaniel Foote, Merton E. Lewis, John A. Barhite, George W. Clark, James H. Redman.

Twenty-ninth senate district.—Nathan A. Woodward, Lockwood R. Doty, Myron L. Parker, William Pool, I. Sam Johnson.

Thirtieth senate district.—Charles Beckwith, Herman F. Trapper, William Turner, James S. Porter, Philip W. Springweiler. (The seats of Mr. Beckwith and Mr. Trapper were contested respectively by Harvey W. Putnam and Thomas A. Sullivan, who were admitted on the 28th of June. Mr. Beckwith did not qualify as a delegate. Mr. Trapper qualified and was a member of the Convention until June 28.)

Thirty-first senate district.—Henry W. Hill, Tracy C. Becker, John Coleman, George A. Davis, Jonathan W. Carter.

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Thirty-second senate district.—Benjamin S. Dean, Louis McKinstry, Charles Z. Lincoln, Oscar A. Fuller, Frank B. Church.

In compliance with the statute, the delegates met in the assembly chamber at the capitol in Albany, on the 8th of May, 1894, and the Convention was organized with Joseph Hodges Choate, of New York, president, Thomas G. Alvord, of Syracuse, first vice president, William H. Steele, of Oswego, second vice president, and Charles E. Fitch, of Rochester, secretary. President Choate, on taking the chair, said it was "a momentous event when the delegates of a state of many millions of people gather together after an interval of almost fifty years, for the purpose of revising and amending the fundamental law of the state." He referred to the Convention of 1867, most of whose work had been rejected, and said that since the Constitution of 1846 great changes had taken place, —"Our population has multiplied over and over; the wealth of the state has magnified to an enormous degree; the habits and customs of the people have largely changed;" yet, under that Constitution, which the Convention was called on to amend, "there has been a general uniform, ever-advancing prosperity, comfort, and well-being of the people of this state." He said the delegates had not met as partisans but as "citizens and servants of the people;" and he expressed the belief that "on the great questions of policy and principle" that might come before the Convention the delegates would not be "actuated by any partisan spirit whatever." He said the Convention was not called on to treat the Constitution "with any rude or sacrilegious hands." The people had become accustomed to its provisions, and the Convention would be false to its trust if it "entered upon any attempt to tear asunder this structure which, for so many years, has satisfied, in the main, the wants of the people of the

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state of New York." He then called attention to the subjects which he thought should receive the attention of the Convention, including reapportionment of the districts of the state, the government of cities, the relief of the court of appeals, the protection of the purity of suffrage,—with a "respectful consideration" of the delicate question of extending the elective franchise to women,—education, "the protection, the fostering, and permanent establishment of our common schools, and the discussion, and, perhaps, the decision, of that other delicate and difficult question,—whether its due protection requires, and how far it requires, the retention of all public moneys from all rival sectarian institutions of learning,"—and a reform in methods of legislation "so that a breathing interval of at least one hour or one day for consideration shall be allowed to the members of the legislature and the people, who are watching their movements at every step in the progress of a bill, from its introduction to its final passage." He expressed the wish that the Convention might subject itself to a "self-denying ordinance" against "idle talk," for the subjects needing consideration were numerous and the time was short.

Following the custom of previous conventions, several committees were appointed to consider subjects submitted by amendment or otherwise. It will probably be most convenient to examine the work of the Convention as distributed among the several articles into which the Constitution is divided. Each subject, whether adopted or only suggested, can thus receive independent treatment in connection with the article to which it relates.

Art. I. Bill of Rights.

Numerous amendments to this article were proposed, but only a few were adopted.

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Drainage of agricultural lands.—The following was added to § 7:

"General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches, and dikes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes."

In previous chapters I have given a sketch of the movement for a constitutional provision authorizing the drainage of agricultural lands, which was included in the proposed Constitution of 1867, and which was considered, but finally rejected, by the Commission of 1872. In the Convention of 1894 the subject was included in an amendment introduced by Mr. E. R. Brown on the 1st of June, adding to the provision in § 7 of article 1, relating to private roads, a clause authorizing the opening of "ditches for low lands," which were to be opened and the damages paid in the same manner as private roads; but it will be observed that the new provision was not limited to agricultural lands, but authorized the drainage of any "low lands." On the 5th of June Mr. Sandford offered an amendment to § 7, providing that "the necessary use of lands for the construction and operation of works serving to retain, exclude, or convey water for agricultural, mining, milling, domestic, or sanitary purposes is hereby declared to be a public use." This amendment was also introduced on the 15th of June by Mr. G. A. Davis. It will be remembered that a similar provision was proposed by Mr. Dudley, in the Commission of 1872. On the 12th of July Mr. Foote proposed an amendment to § 7 by adding a clause that "the legislature may provide by general laws for the construction of dams and reservoirs for the improvement of water powers, and for

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taking private property, when necessary, for that purpose. But the expense of such improvement, including compensation to the owners of the property taken or damaged, shall be paid by the owners of the property to be benefited, two thirds of whom must petition for the proposed improvement." On the same day Mr. Parker introduced an amendment including the drainage provision proposed by the Convention of 1867, as follows: "General laws may be passed permitting the owners or 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 law shall be enacted for such purposes."

The committee on preamble and Bill of Rights unanimously reported the Parker amendment. While it was under consideration in committee of the whole, Mr. Parker said it was in the interest of farmers, who, under existing laws, could not drain their lands without first proving that it was in the interest of public health. Mr. E. R. Brown supported the amendment, remarking that "the drainage of lands is analogous to the private right of way," and that "we propose to put the drainage of lands upon the same basis, guarded by the same limitations, and the same restrictions." Mr. Foote proposed the following substitute for the Parker amendment: "The necessary use of lands for the construction and operation of works serving to retain, exclude, or convey water for agricultural, manufacturing, domestic, or sanitary purposes, may be declared by the legislature to be a public use." Other amendments were offered to § 7 while the drainage provision was under consideration, but they sought to modify the first part of the section relating to taking private property for public use, whereas, under the drainage clause, private property would be usually

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taken for a private use. All amendments to the Parker drainage clause offered in committee of the whole were rejected, and that committee recommended the adoption of the clause in its original form. On the third reading Mr. Peck again offered the amendment which had been proposed by Mr. Foote in committee of the whole, with the same result. The Convention also rejected an amendment offered by Mr. Hottenroth that, in drainage cases, damages should be first paid unless immediate acquisition was deemed necessary by the court, in which case relief might be granted to the owner according to the discretion of the court. The only amendment to the Parker provision accepted by the Convention was offered by Mr. E. R. Brown by which "dikes" might be constructed as well as drains and ditches, and with this change the amendment was passed and appears at the end of § 7.

A statute of 1895, passed to carry the provision into effect, and a decision of the court of appeals, declaring it unconstitutional in part, will be found in a note to this section in the fourth volume of this work.

§ *10. Anti-gambling amendment.*—In former chapters I have noticed briefly, but without detail, the prohibition against lotteries which was included in the Constitution of 1821 and continued in the Constitution of 1846. The Convention of 1894 reopened the subject in a discussion of amendments intended to enlarge or modify the scope of the earlier provisions. This discussion took a wide range, including reference to lotteries in our early state history, and also a consideration of various later forms of gambling. The occasion, therefore, seems opportune for a brief historical sketch of some of the principal aspects of the development of lotteries, and the conditions which induced the Convention of 1821 to include in the Constitution the provision that "no lottery shall

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hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law."

That our colonial forefathers fully appreciated the evils of lotteries, especially in private transactions, is evident from the act of 1721, which, after referring, in the preamble, to various forms of determining or altering the title to property by lot or chance "to the manifest prejudice of trade, and obstructions of commerce," and which had "proved of pernicious consequence to merchants, shopkeepers, and traders," sometimes resulting in double the value being put on "commodities, beyond their intrinsic worth," prohibited the disposition of goods "by way or in manner of lottery, raffling, balloting, voluntary subscriptions, or other method that shall depend on or be determined by lot or chance." This act doubtless had a restraining effect on lotteries for the disposition of property, but it seems that lotteries for money prizes were not deemed to be within the prohibition of the statute, and this class of lotteries was continued without statutory restriction. The colonial legislature, therefore, passed another act in 1747, the preamble of which referred to private lotteries which had been set up with "pernicious consequences to the public, by encouraging numbers of laboring people to assemble together at Taverns where such lotteries are usually set on foot and drawn." Another act, passed in 1772, following the instructions to Governor Tryon, in 1771, recited that the previous statutes had been "ineffectual" for the suppression of private lotteries, which have "proved highly prejudicial to trade, and occasioned idleness and inattention to business, been productive of fraud and imposition, and given birth to a dangerous spirit of gaming," and which "may be attended with distress, impoverishment, and ruin to many

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families." The act declared all lotteries not authorized by the legislature to be "common and public nuisances," and imposed severe penalties for its violation. By another statute, passed in 1774, persons carrying on private lotteries were indictable, and judges were required specifically to charge grand juries on this subject.

These statutes contained radical and comprehensive prohibitions against private lotteries of any kind. But the statesmen of those early times seem to have discovered a distinction between private and public lotteries, and while private lotteries were forbidden under severe penalties, lotteries for the purpose of raising funds for various public purposes were authorized by numerous statutes, beginning in 1746, and continuing through seventy-five years, until the adoption of the Constitution of 1821. A brief reference to these statutes will show the wide range of subjects included in this indirect method of raising money for public purposes. During this period lotteries were authorized for the following purposes: 1746, fortifications in the city of New York; 1746, to found a college; and that no moral question was supposed to be involved in the transaction seems clear from the preamble, which recites that "inasmuch as it will greatly tend to the welfare and reputation of the colony that a proper and ample foundation be laid for the regular education of youth, and as so good and laudable a design must readily excite the inhabitants of this colony to become adventurers in a lottery of which the profits shall be employed for the founding a college for that purpose." Other acts on the same subject were passed in 1748, 1753, 1754, and 1756; the last of which directed the payment of one half of the proceeds of the lotteries to the "governors of the college of the Province of New York, for the advancement of learning in the said college." This was "Kings College," which, after the Revolution, became

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Columbia College and later Columbia University. In 1756 an act was passed authorizing a lottery by the people of Richmond county for the purchase of arms and accoutrements; and another for the erection, in the city of New York, of a jail "for prisoners of war." In 1758 the city of Albany was authorized to raise by lottery funds to pay the expenses incurred by the city in the "last war." In 1759 the legislature prohibited the sale in the colony of tickets for any lottery "erected or schemed in the neighboring colonies." In 1761 and 1762 a lottery was authorized for the erection of a lighthouse at Sandy Hook; and in the latter year a lottery was also authorized to raise money for repairs on the city hall in New York. In 1763 the legislature authorized a lottery to raise money to be used as a bounty to encourage the production of hemp in the colony as a means of overcoming the balance of trade with Great Britain. The modern beet sugar bounty in this state has the authority of a high colonial example. The practice thus inaugurated and established during the colonial period was continued by the government of the new state, and prior to the Constitution of 1821 lotteries were authorized for the following purposes: 1778, for rebuilding the Ulster county courthouse and jails; 1790, to aid the city of New York in discharging an indebtedness of £13,000, incurred in providing accommodations for the Congress of the United States; 1795, for the erection of a poorhouse in the city of New York; 1797, 1803, and 1804, for the construction of certain great roads; 1800 and 1803, for improving the navigation of the Hudson river between Albany and Waterford; 1803, for improvement of the port of Sag Harbor, and highways in Schoharie; 1804, improving the Hudson river below Albany; 1801, for the promotion of literature, —$50,000 to be paid to the Regents of the University for the support of academies, and $50,000 to be used for com-

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mon schools; 1803, for the New York Society for the Relief of Poor Widows and Small Children; 1804 and 1807, for a statehouse in Albany for the accommodation of the legislature, Council of Appointment, the courts of justice, and the common council; 1806 and 1814, for the New York city board of health; 1805 and 1814, for Union College; 1810, for the purchase of the David Hosack Botanic Garden at Elgin; 1810, for Fairfield Academy, for a chemical and anatomical school; 1814, for Hamilton College, New York College of Physicians and Surgeons, Asbury African Church, to pay its debt and establish a school, and for the New York Historical Society; 1817, for a ferry between Hudson and Athens; 1820, authorizing the city of Albany to dispose of certain public lands by lottery to raise $250,000 to discharge indebtedness incurred in the "erection of an academy, a Lancaster school, and in various other public improvements."

During the period covered by the first Constitution, the legislature, while authorizing public lotteries for various purposes, tried, by severe statutes, to repress private lotteries. Thus, in 1783, a law was passed substantially re-enacting the colonial anti-lottery statute, and reciting the evil effects of lotteries, declaring them common and public nuisances, and requiring the judges to charge grand juries to present indictments for offenses against the act. The statute prohibited lotteries under various penalties, and specifically imposed on certain public officers the duty of using their utmost endeavors to prevent and suppress lotteries not authorized by the legislature. The lotteries authorized by Congress were excepted from the operation of this statute. In 1819 the statute of 1783 was re-enacted with some important additions. It contained the proviso relative to lotteries authorized by Congress, and established a system of annual licenses for the sale of lottery tickets, which

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licenses were to be issued by the mayors of cities and supervisors of towns. In the city of New York the license fee was fixed at $500, to be divided equally between the institution for the education of the deaf and dumb and the free school. In the cities of Albany, Hudson, Schenectady, and Troy the license fee was fixed at $100, and in towns and villages at $50, to be used for the support of the poor. The act also contained provisions relative to the appointment and removal of managers of lotteries, payment of prizes by the comptroller, and established a general procedure for the management of lotteries already authorized.

I have now given a brief summary of the statutes relative to public and private lotteries prior to the Convention of 1821. There are many other statutes not cited relating to details of administration, or amending prior statutes by modifying procedure, or giving a new direction to the proceeds of lotteries previously authorized. An examination of the whole field discloses a considerable body of legislation on this subject, including not only the statutes which I have cited, which are among the more important relating to specific objects of lottery enterprises, but also various administrative statutes: such as the act of 1807, prohibiting registration of lottery tickets, and prohibiting insurance either for or against the drawing of a lottery or any particular ticket; various statutes relative to the office of manager of lotteries, and his appointment and removal by the governor; payment of prizes by the comptroller; the operations of the state lottery office; and numerous other details which need not be mentioned here, but which were important features of the peculiar financial system which was the result of this method of raising money for public purposes, instead of resorting to taxation of property. There were two parallel lines of legislation, one prohibiting private lotteries,

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the other authorizing public lotteries, by which, in one case, the legislature declared specifically, in numerous preambles, that private lotteries were inimical to public interests in various ways, and especially detrimental to private morals, and in the other case the legislature declared that this method of raising money for public purposes was legitimate, would probably be approved by public opinion, and would even excite the people to contribute liberally for education and other public purposes, in the hope of securing personal advantage by the prizes offered in connection with a given lottery. The logical effect of this contradictory attitude toward lotteries was the expressed declaration that it was wrong for an individual to raise money for his own use by a lottery, but that it was right for the state or a municipality to raise money for its use in a similar manner. The contradiction was especially emphasized by the act of 1820, which authorized the city of Albany to dispose of land by lottery to raise money to pay a debt, which, according to the preamble, the city could not conveniently pay without disposing of its vacant lands, and even the payment of the interest by taxation was "becoming injurious to the prosperity of the city, and burthensome to its citizens;" but if one of such citizens, in like embarrassed financial circumstances, attempted to dispose of his own property by lottery to raise money for the payment of his private debt, he was subject to a heavy penalty and was also guilty of a crime. So, lotteries were authorized for the establishment of educational institutions; but an individual or a company or a number of individuals could not have raised money for a like purpose in the same way. Private lotteries were deemed prejudicial to the morals of the community, but in the preamble to the statute authorizing the founding of Kings College (1746) it was suggested that an institution of learning would be of such high beneficial

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character to the colony that the people would willingly, from patriotic motives, become adventurers in such a laudable scheme.

The motives which actuated the statesmen of our early history in thus attempting to promote various public enterprises by lotteries, instead of resorting to the usual method of raising money by taxation, were not always subject to criticism, if we take into consideration the conditions of society incident to the settlement of a new country, the difficulty of establishing and enforcing a just and satisfactory policy of taxation, and the slow improvement of valuable taxable property to which resort might be had in raising money for the support of government. Besides, there were several extraordinary occasions when the people might well have been excused for resorting to indirect sources of revenue rather than to direct taxation. These conditions grew out of the wars in which the colony was frequently engaged, including the Revolutionary War, and which necessarily imposed a heavy burden on the people. The preambles to several of these early lottery statutes show that lotteries were proposed to avoid the necessity of taxation, said to be too heavy for the people to bear by reason of losses sustained or indebtedness incurred in time of war, and in carrying forward certain public enterprises deemed essential for its welfare. Relief from the burdens of direct taxation was especially assigned as a reason for several of the early lotteries. But one fact should not be overlooked; while these lottery statutes, and the reasons for them stated in the preambles, show conditions which would have made direct taxation extremely burdensome, they also show that business must have been fairly prosperous, with plenty of money in circulation, else the people would have been unable to contribute to the lotteries; from which we may infer that even if tangible property subject to taxation was deemed

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inadequate as a source of public revenue, the people possessed adequate financial ability to carry on these enterprises to raise money for public purposes in this indirect manner. There was money, even if there was little visible taxable property. The public lottery statutes show a wide variety of purposes for which it was deemed legitimate to induce the people to contribute a nominal sum in the hope of realizing large returns. They include lotteries for municipal indebtedness and improvements, public buildings, education, charity, improvement of navigation, promotion of agriculture, and public health. If there was a legitimate reason for public lotteries it was probably to be found in the fact that each investor actually made a contribution to the public treasury, either state or municipal, for a purpose which was in itself legitimate. Thus, using the Union College endowment act of 1805 as an illustration, each purchaser of a ticket contributed a fixed sum, a part of which was used for prizes and expenses, and the remainder went into the college fund provided by the statute, and which was to be used for promoting the welfare of the institution and of its students. Even if the investor lost, he might perhaps console himself with the reflection that he had contributed something to aid the college in carrying on its work. It was doubtless true, however, that the predominant idea in all these public lotteries was the hope of gain; the appeal of the statute was to the cupidity of men rather than to their patriotism, and instances were probably rare where the possibility of winning a prize was a secondary matter. The statutes against gaming, passed during the period of the lottery acts, related to other aspects of the same subject, and it clearly appears from the preambles to several of these statutes that the evils resulting from this practice were as serious and pernicious as those resulting from private lotteries.

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It is a significant circumstance, especially in view of modern developments concerning lotteries, that early in our national history this form of raising money for public purposes should have been expressly authorized by Congress. An act passed in 1812, amending the charter of the city of Washington,—incorporated in 1802,—authorized the city to raise $10,000 a year by lottery for public improvements, stipulating only that the object of the improvement must be approved by the President of the United States. But the statute contained no provision directing the sale of tickets anywhere outside the District of Columbia. It will be observed that this statute was of the same general character as several New York lottery statutes already cited, relating to various aspects of municipal affairs. In *Cohen* v. *Virginia* (1821) 6 Wheat. 264, 5 L. ed. 257, the Supreme Court of the United States held that the foregoing provision in the charter of Washington did not authorize the corporation to force the sale of tickets in such lottery in states where such sale was prohibited by the state laws, and therefore that such tickets could not be sold in Virginia, contrary to a statute of that state prohibiting such sale. The Washington act and the *Cohen Case* were cited in the debate on lotteries in the Convention of 1821, and Mr. Wheaton, who was also Supreme Court reporter, said that in that case "the court were of the opinion that Congress might, in the exercise of its powers as the supreme legislature of the Union, establish lotteries for revenue purposes, or any other national object within the sphere of the general powers of the Federal government, and compel the sale of tickets throughout the country, notwithstanding the state laws to the contrary." But he did not believe that "Congress would ever resort to a source of revenue so corrupting and demoralizing in its effect, and the power of this state to prohibit the sale of lottery

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tickets from other states was unquestioned." By an act passed in 1842 Congress prohibited the sale of lottery tickets in the District of Columbia after January 1, 1843, except as to certain specified lotteries then in operation.

When the Convention of 1821 began its work, a public lottery system had become thoroughly intrenched as a part of our social and financial policy, and had been the subject of frequent legislative regulation. Through the comptroller's office it affected the financial operations of the state, and had assumed political importance through the governor's power of appointment and removal of managers of lotteries. That the system had become obnoxious, and that its evils were fully appreciated, is manifest from the action proposed and taken by the Convention, as well as by the debates elicited by an amendment prohibiting future lotteries. Mr. Young was apprehensive that the prohibition might not be effectual, and that "tickets from other states and from the city of Washington, under the authority of the general government, would be poured in upon us, and that we should lose the revenue, without an exemption from the evils that attend them." Mr. Edwards said that lotteries constituted a "legalized system of gambling;" that all classes of society were affected by its pernicious influences, and that, like other gambling, "its tendency was to destroy industry and economy;" that benevolent societies considered it "a fruitful source of pauperism," and he thought "it was the very worst mode which could be resorted to for the purpose of raising a revenue, as but a very small portion of the money extracted in various ways from the people ever found its way into the public treasury." It seems that Chancellor Kent was not quite ready for the sweeping change contemplated by the amendment, for he proposed to permit the continuance of public lotteries, if authorized by a two-thirds vote of the legislature. His

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amendment was rejected in committee of the whole, and the recommendation of a select committee, "that no lottery shall hereafter be authorized in this state," was agreed to by a vote of 53 to 47.

On a subsequent discussion of the amendment, Chief Justice Spencer expressed the opinion that no constitutional provision would prevent men from dealing in lottery tickets as long as it was allowed in other states, and that it would therefore not be wise in us "to shackle our legislature in such a manner that no man can hereafter receive any benefits from that source, notwithstanding we experience all the evils resulting from the sale of tickets from other states." He thought this was not a fit subject for constitutional interposition, and preferred to leave it to the discretion of the legislature. Mr. Dodge said the principle by which lotteries were established and supported "was a gambling principle." He said that public lotteries tended to "demoralize the state," and loosened the moral obligations of society; and that men frequently used all their earnings to purchase a share in a lottery ticket, and deprived their families of the "necessaries of life." Replying to the suggestion that the proceeds of lotteries may be wanted as a revenue, and that they operate as a tax on the vices of the community, he said a "tax on vices of this kind operates as an encouragement to vice." Referring to the suggestion that no other state had adopted a provision prohibiting lotteries, and that the general government had authorized a lottery, he said "New York was now called upon to set an example to her sister states."

The influence of established custom in forming opinions on debatable questions, especially questions relating to subjects which have become a part of the social order, is illustrated by the remarks of several delegates, who expressed doubt as to the propriety of the lottery amend-

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ment. Chancellor Kent said that, while he was no friend to lotteries in general, he could not "admit that they were, *per se*, criminal or immoral when authorized by law. If they were nuisances, it was in the manner in which they were managed. In England, if not in France, also, there were lotteries annually instituted by government; and it was considered as a fair way to reach the pockets of misers and persons disposed to dissipate their funds. The American Congress, in 1776, instituted a national lottery, and perhaps no body of men ever surpassed them in intelligence and virtue. Lotteries have been authorized by Congress under the present Constitution of the United States, and very frequently by the legislature of this state. He was unwilling to say that all these had been, from the beginning, immoral acts. It was a business that properly belonged to legislative discretion, and we did not come here to establish systems of ethics. There might be occasions in the future progress of society in which a resort to lotteries to raise necessary funds might be expedient, and he doubted the policy of thus abridging the power of the legislature upon ethical theories."

While the amendment was before the Convention a second time Colonel Young moved to add a provision prohibiting horse racing, but this motion was rejected. Mr. Duer said he "supposed it was an admitted truth in political economy, a truth in the present state of that science almost regarded as elementary, that the plan of raising a revenue from lotteries ought not to be adopted by a wise and moral government, since, of all taxes, it was the most unjust and unequal in its mode of imposition and collection, and the most pernicious in its operation." He thought the "larger portion of the revenue derived from lotteries would always be drawn from the pockets of the poor, and that by a process which was certain to debauch the morals, and augment the poverty, of those who

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were betrayed into vice by legislative seduction." He quoted from a report of a committee of the British Parliament the statement "that their annual lotteries were the sources of more vice, profligacy, and misery, particularly in the metropolis, than all other causes operating injuriously on the morals of the people, connected and combined." Replying to the argument that lotteries were a tax on vice, he said they were not a tax, "but a bounty on vice. Their effect was not to restrain or repress, but to stimulate and encourage." Referring to the suggestion that the subject should be left to the discretion of the legislature, he said "this was exactly one of the subjects on which the discretion of the legislature was not to be trusted," because the legislature was under a strong temptation "to resort to lotteries as a mode of raising revenues," and the Constitution ought to preserve it from this temptation. Other delegates participated in the debate, but without adding materially to the arguments already cited. The amendment was finally adopted by a vote of 67 to 45, Chancellor Kent, Chief Justice Spencer, and some other prominent delegates voting in the negative. The legislature of 1822, in obedience to the requirement of the Constitution, passed a stringent anti-lottery law, and provided for closing up the lotteries which had already been authorized.

Statutes against lotteries and gaming have since been continued with important additions, and with one serious modification, which will be noted. The Constitutional Convention of 1846 continued the prohibition against lotteries, and the same prohibition was included in the Constitution proposed by the Convention of 1867. An important addition to this class of legislation was enacted in 1877, when, by chap. 178, bookmaking and pool-selling on races, and other forms of gambling, were prohibited, under severe penalties. This statute, with

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amendments, appears as §§ 351 and 352 of the Penal Code. In 1887 the legislature, by chap. 479, radically modified the gaming laws. This statute, known as the "Ives pool law," authorized racing and poolselling between the 15th day of May and the 15th day of October in each year, and during this period certain racing associations might conduct races on their race tracks or grounds for thirty days; and §§ 351 and 352 of the Penal Code were to be suspended as to such race tracks or grounds during the time that races could be conducted thereon, as authorized by the statute. The statute imposed a tax of 5 per cent on the gross receipts for admission on race days to such race tracks or grounds, which tax was to be paid to the comptroller and be used as prizes "for improving the breed of cattle, sheep, and horses at the various county fairs throughout the state by the State Agricultural Society." A person who should engage in poolselling contrary to this statute was declared to be guilty of a felony. In 1894 the 5 per cent tax was extended to all receipts, instead of being applicable only to admissions, as provided by the original statute.

We come now to the Convention of 1894, by which bookmaking and poolselling were added to the constitutional prohibition against lotteries, as contained in the former § 10 of article 1. When the Convention began its deliberations this section (renumbered 9 in the new Constitution) was in the following form:

"No law shall be passed abridging the right of the people peaceably to assemble and to petition the government or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; nor shall any lottery hereafter be authorized or any sale of lottery tickets allowed within this state."

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On June 15, two amendments were introduced, one by C. H. Truax, evidently intended to enlarge the scope of the existing section by adding a provision that "nothing here contained shall prevent the distribution by lot or otherwise, by duly incorporated art associations, among their members, of pictures, sculptures, etchings, engravings, and other works of art;" and the other by Mr. Tekulsky, amending the latter part of the section to read as follows: "Nor shall any lottery hereafter be authorized or any sale of lottery tickets *or of pools or other chances upon the result of any race or trial of the speed or endurance of contesting horses or the making, placing, or registering any bet or wager upon or concerning any such race or trial of speed or endurance in any manner soever, be allowed within this state.*" The new matter is italicized. This was the basis of the amendment finally adopted by the Convention. Both amendments were referred to the committee on preamble and Bill of Rights. That committee reported the following amendment to the latter part of the section:

"Nor shall any lottery *or the sale of lottery tickets, poolselling, bookmaking, or any other kind of gambling hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.*"

Discussing the amendment, Mr. Storm said its design was to "extend or define the prohibition already contained in the present Constitution, and which is against public gambling in the form of lotteries. This amendment is framed so as to explicitly prohibit the equally pernicious form of public gambling known as poolselling, which has come into existence since the present Constitution (1846) was framed, and the manifest and enor-

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mous evils of which are notorious." Referring to the Ives pool law, Mr. Storm said that "if gambling is wrong at certain times of the year, and in all but certain places, it is wrong all the time and everywhere. It is an absurd anomaly to have an open and a closed season for a practice which the best thought declares an evil, and which is legally a crime." He spoke of the pernicious effect of this form of gambling, and said that, in order to "catch the working people, horse racing and poolselling are now carried on at night by electric light." Mr. Durfee said poolselling had frequently been attempted at country fairs, and country lads had thereby been led to form a taste for gambling. Mr. Dean opposed the amendment. He said the Convention had already adopted a bi-partisan scheme of election boards by which the appointment of a chairman was determined by lot. That was a lottery. He said that laws not supported by public sentiment bred contempt, "and there is nothing more dangerous than public disregard for the law." Mr. Nicoll said the Convention ought to put its seal of condemnation upon all kinds of gambling. He estimated that $20,000,000 were invested in race tracks, and that they gave employment to 100,000 men, and while the effect of the amendment on this investment and on the men so employed might make him pause, "upon going over the thing" in his own mind he thought that the Ives pool law "was an act dangerous to public morals." He was determined to vote against all kinds of gambling. Mr. Choate said that while the amendment attempted to prohibit "any other kind of gambling," it was specifically aimed at bookmaking and poolselling. The amendment sought to reach the evil which the legislature had legalized, "making one law in Utica and another law in Gravesend; one law on one side of a fence, and another law on another side of a fence, and a condition of law in regard to this matter of

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poolselling and bookmaking which is certainly very iniquitous." Mr. Schumaker said that gambling could not be prevented; that it was impossible "to prevent men from betting." "The crying evil of the day is the race track gambling." Mr. Abbott opposed the amendment because it was "purely a matter of legislation." He thought public sentiment did not demand it and would not sustain it. Jesse Johnson said the amendment was aimed at a form of gambling which, like the lottery, had proved "more powerful than the legislature. . . . It is worse than the lottery because it is branded as a cancer everywhere save within the inclosures where it is allowed to go on unimpeded." Mr. Bigelow suggested that the amendment would have the effect of protecting the Ives law, because it used the word "hereafter." Mr. E. R. Brown said it was because the Ives pool law was "an affirmative sanction of gambling that this measure was brought before this body," and he believed it "a necessary thing that this constitutional convention should show that there never should be a law affirmatively justifying gambling."

Mr. Lauterbach thought it was time to consider the subject "in the light of ethics, morality, and propriety, so that the state itself, awakening to a consciousness of the iniquitous policy which itself has pursued, shall conduct itself decently, and not indecently." He said it was the duty of the Convention to proceed promptly to do its share in abolishing the "copartnership of the state with criminals, which every one will agree will be found unparalleled in the record of any civilized community." He said the Ives pool law legitimatized the business of horse racing, and rendered lawful the pursuit of poolselling and bookmaking,—a "pursuit receiving the express sanction and approval of the Empire state,"—and, on the payment of a mere pittance of 5 per cent of the

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gross receipts for admission, racing associations might be permitted to carry on, "as a lawful avocation, the most iniquitous, vile, and wretched business that has ever been carried on within the borders of this state. Long has the existence of this wrong been recognized, but every effort to induce the legislature to come to the rescue has been futile." The legislature had frequently been importuned to put an end to it, but the wrong had been steadily maintained, under various pretenses, the chief among which was the excuse that the tax might properly be used for the "encouragement of horse breeding by the distribution of prizes at country fairs. . . . Now, here, at this Convention, and in this presence, I implore that an end shall be put to it forever. Sweep the whole brood together,—gamblers, poolsellers, bookmakers,—all the racing fraternity into oblivion forever."

Several other delegates briefly supported the amendment, and it was adopted by a vote of 109 to 4. It seems clear from the discussion that the advocates of the amendment expected by it to abrogate the provisions of the Ives pool law and prevent any further operations under it. The Ives pool law of 1887 and a few other kindred statutes were revised, in 1895, by chap. 570, including the establishment of a state racing commission, with authority to issue licenses to racing and steeple-chase associations to conduct races under regulations prescribed or authorized by the statute. This statute also required notices to be posted on the grounds whereon such races are held, to the effect that "all disorderly conduct, poolselling, bookmaking, or any other kind of gambling, is prohibited;" which notices must also contain a copy of § 351 of the Penal Code. The statute also prescribed penalties or forfeitures for certain specified violations, which were declared to be exclusive of any other penalty prescribed by law, and to be recovered in a civil action. As a com-

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panion to this statute the legislature, at the same session, 1895, amended § 351 of the Penal Code, specifically declaring bookmaking and poolselling to be a felony, except that "when an exclusive penalty is provided by law for an act hereby prohibited, the permitting of the use of premises for the doing of the act in such case shall not be deemed a violation hereof, or of § 343 of this Code." Section 351 was revised in 1901, but continued the exemption from punishment under it in cases where an exclusive penalty was otherwise provided by law. The racing law continued the tax on gross receipts. This tax, in 1903, amounted to $211,416.64; the gross receipts of the various racing associations amounted to $4,228,-332.80.

It will be observed that the Convention added to the prohibition against bookmaking and poolselling a mandate requiring the legislature to pass "appropriate laws" to prevent such offenses. The legislature, at its first session after the new Constitution took effect, reduced the grade of offenses intended to be covered by the new provision, from a crime to a mere civil penalty. The provision of the racing law declaring that persons violating specified provisions should be liable only in a civil action was held constitutional in *People ex rel. Sturgis* v. *Fallon*, 152 N. Y. 1, 37 L. R. A. 419, 46 N. E. 302.

§ *17. Abrogation of the provisions requiring a codification of the law.*—In the chapter on the Convention of 1846 I have given an account of codification as there considered, and have noted two amendments incorporated in the Constitution; namely, one providing for codification of procedure, included in the judiciary article, and the other for codification of substantive law, included in the first article. The legislature promptly fulfilled the constitutional requirement by the creation, in 1847, of a commission for each purpose. Commission-

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ers under § 17 were named in the act and were to hold office two years. It seems that this commission, on a preliminary examination of the subject, estimated that it would take seven years to reduce the unwritten law to a "systematic code" as required by the Constitution, and that it would cost at least $50,000. This estimate led the senate, in January, 1848, to submit to the judiciary committee the question whether it would not be wiser for the codifiers "to revise our statute law, adapting it to the new Constitution, omitting what is useless or has been repealed, and adding notes of explanation with reference to the decisions of our courts." The committee reported that, in its opinion, the practicability and expediency of a complete codification of the law rested with the commissioners, and that the legislature had no right to limit their action in the matter. At the same session the code commissioners, in response to a resolution by the assembly, requesting them to inform that house at what time they would be able to report, gave a synopsis of the plan of revision proposed by the commissioners on practice and pleadings, and said the work of the two commissions was so intimately connected, and the line between rights and remedies was often so indistinct, that it was scarcely practicable for the code commission to present a complete revision on any subject without first being informed of the scope of the revision relating to remedies, to be proposed by the other commission. The practice commission proposed a code of procedure in 1848 which was passed, and which was amended generally in 1849. The code commission's proposed revision of the statutes relative to highways, bridges, and ferries was presented to the legislature in 1849. At the same session the legislature created a new commission on codification, and appointed commissioners who were to hold office two years. Besides delays which rose from

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conditions already noted, there were frequent changes in the commission, which prevented a continuous and systematic study of the subjects necessarily involved in the revision. Three years passed without any substantial result. In January, 1850, the comptroller reported that the commission had then cost $13,500. Only one bill had then been reported, and this had not been passed. The legislature, at this session, evidently deeming it unwise to continue the commission, repealed the statute creating it, and thus abandoned the plan of codification contemplated by the Constitution. In 1850 Mr. Worden, a former member of the commission, presented a report including a revision of the statutes relative to the executive and legislative departments of the state government, and some other subjects of public administration. After the termination of this commission, codification remained in abeyance until 1857, when the subject was revived, and three commissioners were appointed to prepare and report to the legislature a political code, a civil code, and a penal code. The commissioners were to hold office five years. In 1862 the terms of the commissioners were extended until April 1, 1865. The Political Code was reported to the legislature in 1860, and the Civil and Penal Codes in 1865.

In 1870 another commission was created to revise the statutes, and, by a law passed in 1873, the commissioners were also authorized to include in their revision the Political Code, the Penal Code, the Code of Civil Procedure, and the Code of Criminal Procedure; and the Civil Code was added to the scheme by an act passed in 1875. The first part of the new Code of Civil Procedure became a law in 1876, and the second part in 1880. A Penal Code and a Code of Criminal Procedure were passed in 1881. A Code of Evidence was passed in 1886, but it was not approved by the governor. It was permitted

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to expire at the end of the thirty-day period, without a formal veto. The legislature of 1887 provided for a commission to examine this Code of Evidence and report to the legislature, "incorporating therewith such changes, alterations, and amendments as, in their judgment, may be deemed essential and proper," but limited substantially to a codification of the existing law of evidence. The commission submitted to the legislature of 1889 a proposed Code of Evidence, which was passed, but this also failed to receive the Governor's approval.

The legislature of 1889 created a new commission for the purpose of revising the general statutes on certain specified subjects, and the commissioners were also authorized, in their discretion, to propose revisions of general statutes relating to other subjects. By a law passed in 1893 it was made the duty of this commission, among other things, to "report by bill such measures as they deem expedient." It will be observed that, as a result of these two statutes, the revision commission created in 1889 possessed all the authority which had been vested in all former commissions; it had the power conferred on the codification commissions of 1847, 1849, 1857, and 1870, and also the power conferred upon the practice commissions of 1847 and 1849, and the commission on the Code of Evidence, created in 1887. Thus, the new commission combined all the functions which had been vested in former commissions, and it had power not only to propose revisions of statutes, but also the codification of any branch of law or equity. It was a codification commission under § 17 of the Constitution, and it had all the powers of a practice commission, because the purpose of the section on practice and pleadings in the judiciary article of 1846 had been substantially accomplished by the enactment of the codes of procedure, whereby the subject of procedure had become a part of

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the general statutes, and was therefore included in the field of revision covered by the act of 1889.

This commission was in office and engaged in the work of revision when Mr. Doty, in the Convention of 1894, introduced an amendment, on the 25th of May, to abrogate that part of § 17 relating to codification. A few days later Mr. Hawley proposed to amend the section by changing "shall" to "may," thus relieving the legislature from the imperative obligation to appoint codification commissioners. The Doty amendment was reported favorably by the judiciary committee, and the committee on preamble and Bill of Rights also reported an amendment abrogating the codification provisions of § 17. Mr. Doty, explaining the object of the amendment, said it was designed to take out of the Constitution obsolete matter, and that the constitutional provision relating to codification was simply an injunction on the legislature to do certain things which could be done without it. He thought the provision had become "dead matter," and was unnecessary and useless. In reply to a question by Mr. Peck, Mr. Doty said he did not think the amendment would affect anybody in office, and that the legislature, without this provision, had ample power to create an office. In this connection it may be worth while to note that Alvah Worden, who was a member of the Convention of 1846, and who was also appointed a code commissioner under the act of 1847, said, in a communication to the senate judiciary committee, in 1848, that, as a member of the Convention, he deemed the insertion of the codification provision "into the body of the instrument unnecessary, inasmuch as the adoption of the new Constitution would render a thorough revision of the law indispensable. Had it been entirely omitted the defects in the laws, and the manifest necessity of their thorough revision and reform, would, before this, have led to the

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creation of a commission with similar powers." He said further that "the people, at the adoption of the Constitution, well understood this provision, and have a right to suppose that it will be faithfully carried into execution." Mr. Forbes, in the Convention of 1894, objected to the Doty amendment, because § 17 imposed on the legislature a duty to go on continuously "and finish this business of codification." He said codification had not been completed in its entirety, and that the adoption of this amendment would be an abandonment of the principle of codification. That the legislature construed § 17 as a continuing mandate seems clear from the statutes already cited creating code commissions, including the acts of 1873 and 1875, which vested in the Commission of 1870 authority to report a political, a civil, and a penal code, as well as from the code of evidence act of 1887 and the revision commission acts of 1889 and 1893. The Doty amendment was adopted by a vote of 124 to 17. It was doubtless true, as suggested by Mr. Doty, that the revision commission in office in 1894 was not affected, nor its powers limited, by the abrogation of the codification provision in § 17. That commission continued its work, and a large number of bills proposed by it, both before and after the adoption of the Doty amendment, were passed by the legislature. The commission was terminated on the 31st of December, 1900, but the legislature has ample power to create other commissions and provide for other revisions without express constitutional authority.

§ *18. Damages for death caused by negligence.*—The following amendment was adopted:

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

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The slow development of conditions resulting in constitutional change, which I have had frequent occasion to mention in these pages, found another illustration in the foregoing provision relating to damages in case of death. At the Revolution we declared ourselves the beneficiaries of the English common law, and by our first Constitution this field of jurisprudence continued to be one of our most valuable possessions, with all its rich and pervading influences; but we have not hesitated to modify it frequently, nor to borrow and appropriate the modifications of it worked out in the legal system of the mother country. The abrogation by the British Parliament, in 1846, of the common-law rule, which denied a right of action in cases included in this section, and the enactment of a statute expressly authorizing such an action, was approved in this state by a like statute for the same purpose, which was passed the next year.

According to the parliamentary journals, Lord Lyttelton presented in the House of Lords, in February, 1845, a bill "for compensating the families of persons killed by accidents." The bill was passed by the House of Lords on the 17th of June, and sent to the Commons, where it received some consideration. On the 26th of July action on it was deferred three months; but at the expiration of that time the House was not in session. On the 7th of April, 1846, the bill was again introduced, this time by Lord Campbell, and was passed by the House of Lords and sent to the Commons, where it was also passed with important amendments which were agreed to by the House of Lords, and the bill became a law on the 26th of August, 1846. The preamble recites that "whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case

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should be answerable in damages for the injury so caused by him," wherefore it was enacted:

"That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony;" which was followed by this provision, inserted by the House of Commons:

"That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they think proportionate to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury, by their verdict, shall find and direct." I do not find that any attempt was made in Parliament to limit the amount recovered.

On the 13th of December, 1847, the New York legislature, by chap. 450, enacted the English statute, almost in its original form, and without any limitation of the damages which might be recovered. The bill was passed in the senate without a negative vote, and with only two votes against it in the assembly. But notwithstanding this strong preponderance of legislative opinion in favor

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of the new law, it was not universally accepted as a wise measure. At the next session, 1848, the Syracuse & Utica Railroad Company presented a petition to the assembly for a repeal of the law, and a like memorial was presented by the Ontario Steam & Canal Company. The opposition to the law manifested itself anew in 1849, by a bill introduced in the assembly which amended the original act and limited the recovery to $3,000. This limit was subsequently increased to $5,000, and in the senate a motion to increase it to $10,000 was rejected by a vote of 7 to 13. That the measure was supposed to have a direct effect on corporations appears from the fact that the amendatory bill of 1849 was referred in the senate to the committee on railroads. It will be observed that these statutes authorized a recovery for the benefit of the widow and next of kin, and, unlike the English statute, did not authorize an action for the benefit of the husband in case of the death of his wife. The courts having decided that the statute did not apply in the latter case, the legislature, in 1870, by chap. 80, amended it, giving a cause of action for the benefit of the husband in case of his wife's death. The provisions relating to this class of actions were, in 1880, included in §§ 1902–5 of the Code of Civil Procedure, and these sections were in force in 1894.

This subject was brought to the attention of the Convention of 1894 by Mr. Tucker, who, on the 12th of June, introduced an amendment providing that "no statutory limitation shall be placed upon the amount of damages recoverable by civil action for the loss of human life." On the 13th of July Mr. Tekulsky offered an amendment providing that "no law shall be passed limiting the amount of damages which may be awarded by court or jury in any action whose cause shall be the loss of any human life, or in which there shall be involved

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a question of the death of any citizen or inhabitant of this state. But the amount of damages in any such action shall remain forever entirely within the discretion of the jury impaneled to try the same."

The majority of the committee on preamble and Bill of Rights, to which the Tucker amendment was referred, reported it adversely, "regarding it as more appropriately a subject for legislative treatment." A minority of the committee, composed of Mr. Veeder, Mr. Tucker, and Mr. Andrew H. Green, presented a report proposing the following section: "No statutory limitation shall be placed upon the amount of damages recoverable, or upon the right to recover in a civil action for the loss of human life or for injury to the person," which, during the first debate, was modified and presented by the minority in the following form: "The right of action is hereby given for loss of life and for injury to the person; and no statutory limitation shall be placed upon the amount of damages recoverable or upon the right to recover by civil action for the loss of human life or for injury to the person."

The proposed amendment was considered as a special order, again in committee of the whole, and later on third reading. It elicited a long and animated debate, and apparently every aspect of the question was included in the discussion. Thirty-eight delegates spoke on the amendment, either in regular debate or in explanation of their votes on its final passage. It is manifestly impracticable to give a summary of the entire discussion. There was much repetition and reiteration of opinions, and the issues actually involved were quite limited. These issues included a consideration of the question of the propriety of the amendment on its merits, and also whether it was expedient to incorporate in the Constitution a subject on which the legislature had ample power

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to act without the aid of a constitutional mandate or inhibition.

Mr. Francis, speaking for the majority of the committee, said the subject was one of legislative cognizance, and did not properly belong in a written constitution; that the legislature had power to act and had acted through statutes relating to the subject, and that it could, by amending these statutes, accomplish all that was sought by the proposed amendment. The accuracy of these suggestions was admitted, but it was asserted that the legislature had, by an improper exercise of its power, imposed a limitation on the amount of damages recoverable in case of death, and that there should be no such limitation. It was further urged that the legislature had frequently been requested, but had persistently refused, to abrogate this limitation. The supporters of the amendment therefore deemed it necessary, as a means of abrogating a limitation imposed by the legislature, and establishing beyond legislative interference the rule that the jury should be the sole judge of the damages which might properly be awarded in cases under the statute.

This amendment belongs to a large class of constitutional provisions which are unnecessary if considered only from the standpoint of legislative power; but the people have learned that legislative power is not always properly exercised, and that it needs restraint and limitation; therefore, numerous provisions have been included in all our Constitutions, which are not strictly the expression of essential principles of government, but are intended to prescribe legislative duties and impose legislative restrictions. We shall find several more of the same class of amendments as we proceed in our consideration of the work of this Convention.

It seems hardly probable that this constitutional amendment would have been suggested had the legis-

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lature been willing to abolish the limitation and leave the rule as established by the original English statute of 1846 and the first New York statute of 1847. It was urged in support of the amendment that the statute which changed the rule of the common law was intended to afford compensation for the injury sustained by the husband, wife, or next of kin, that the amount of injury depended upon the circumstances of each case, and that it was unreasonable to establish an arbitrary maximum for all cases. This limitation tended to nullify the real purpose of the statute, by assuming that, while primarily the person who committed the wrongful act was bound to pay the damages thereby sustained, such damages could not in any case exceed $5,000, and it reduced the value of all lives, and the influences, benefits, and relationships dependent on those lives to a uniform valuation. This was not compensation in all cases.

Mr. C. H. Truax proposed that the amendment be stated in the terms of the statute, with the provision that "no law shall be passed limiting the amount to be recovered for damages to person or property." Mr. McKinstry proposed to state the amendment in the following form: "The right of action is hereby given for loss of life and for injury to the person, and whatever statutory limitation may be placed upon the amount of damages recoverable by civil action for the loss of human life, such amount shall be the minimum as well as maximum amount, to the end that all human lives shall be held as of equal value before the law;" and he argued in support of it that there was no "equity or practicability in adjudicating upon the value of human lives in dollars and cents;" that a man's earning capacity may not be continuous; while he may earn large sums this year, he may not be able to earn anything next year, and *vice versa;* that no jury can absolutely determine what a man

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is worth to his family; "human life cannot be replaced, and therefore there can be no adequate recompense made for its destruction;" the damages should be "punitive, and not actual." Mr. Cassidy proposed to incorporate in the Constitution the provisions of the Code of Civil Procedure on this subject, omitting the limitation, observing that the Tucker amendment only prohibited a limitation, but did not preserve the right of action. He thought the adoption of such an amendment would be of no practical effect if the right of action remained subject to the discretion of the legislature. Mr. Marshall proposed the following form for the purpose of preserving the right of action and preventing any limitation on the recovery: "The right of action to recover damages for injuries resulting in death, now existing, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." This was agreed to in committee of the whole.

The subject was considered further on third reading, at which time several delegates spoke briefly while the vote was being taken. In addition to the general arguments for and against the proposed amendment, Mr. Lincoln furnished some statistics showing, among other things, that, according to the report of the Bureau of Vital Statistics, 5,295 deaths occurred in the state in 1893 from accident or violence; but it did not appear how many of those deaths occurred under circumstances which might have given rise to a cause of action. It also appeared from the report of the railroad commissioners that, for the year ending June 30, 1893, 742 persons came to their death by means of railroad accidents, but that only thirty of these persons were passengers on trains, and of this number only ten were killed under circumstances which might have entitled their survivors or personal representatives to maintain a cause of action.

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During the same period 306 railroad employees were killed, and 1,602 were injured. It also appeared from the report of the factory inspector that forty-six deaths were reported by various manufacturers during the year. President Choate, in explanation of his vote against the amendment, said he looked upon it "as a mere piece of legislation, which ought not to have a place in this or any other constitution;" that the limit ought to be raised, but it ought to be raised by the legislature. "This is a purely artificial cause of action, not founded in reason, not founded in right, but simply a creature of legislative action; and in my judgment ought to be always subject to the control of the state which created it."

The amendment in the form suggested by Mr. Marshall was adopted by a vote of 107 to 40. Thus another inflexible rule of the common law was abrogated, first by statute and then by the Constitution, and a new clause was added to the Bill of Rights. The legislature of 1895 amended the Code of Civil Procedure by omitting the limitation on the amount of damages recoverable in this class of actions.

Overtures not adopted.—The amendments approved and recommended by the Convention were only a small part of the reforms proposed. Many of those accepted were probably not more important and valuable than many which were rejected; but within the limited time at its disposal the Convention selected the amendments for consideration which were deemed of most immediate necessity, and not because they were in all cases intrinsically superior. This process of selection involved an examination of numerous amendments; hence, the work of the Convention is only partially represented by the amendments finally passed. But the history of the Convention would be incomplete without some account of the constitutional reforms proposed and to some extent

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considered, even if not accepted; and while it will not be profitable to fill these pages with descriptions of all the proposed amendments, a brief reference to the subject of each, with such additional details as circumstances may seem to warrant, will show the wide range of investigation and suggestion covered by the deliberations of the Convention. Many persons will doubtless think that some of these propositions are mere abstractions, that others are of distinctively legislative cognizance, and relate to details clearly within the discretion of the legislature, while it must be conceded that some others were intended to state essential constitutional principles. Many of these propositions probably represent only the individual views of delegates, while others came from large and distinct classes of people, or from special interests which thus sought protection through the Constitution, or were intended to effect social and commercial reforms from a particular point of view. It will also be observed that many of these amendments were not new in this Convention. Some of them can be traced back to the first Convention, 1777, while others were of much more recent date; but besides these a large number now appear for the first time.

Mr. Woodward proposed to prefix to the preamble the declaration that "we, the people of the state of New York, hold these truths to be self-evident: that all men are born free and equal, and that all governments are founded upon one or the other of two principles: upon equal rights or upon exclusive privileges. That our government, both state and national, is founded upon the principle of equal rights." He also offered amendments to the first article, declaring that the powers of government should be divided into three departments,—the legislative, executive, and judicial,—each exclusive of the others; that the people of the state "are a part of the

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American nation;" that the Constitution and laws of the United States are the supreme law of the land, "to which paramount allegiance and obedience are due from every citizen;" against sectarian appropriations; that "secret societies, associations, and combinations of men for the purpose of illegally interfering with the business or occupation of private individuals or corporations, in an unlawful manner or by force of numbers and violence, should be suppressed by the strong arm of the law;" that "no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall be passed or enacted in this state;" that "treason against the state shall consist only in levying war against it, or against its legal and duly constituted authorities, by an armed force or force of numbers, or using violent explosives for the destruction of property, buildings, or the lives of its citizens or public officers, and no person shall be convicted of treason, unless upon the testimony of two witnesses of the same overt act or on confession in open court;" and that "the power of the courts to punish for contempt shall be limited and regulated by legislative acts." Mr. Roche also proposed a section distributing the powers of government, and Mr. Fuller also offered an amendment relating to Federal relations in substantially the form proposed by Mr. Woodward.

Trial by jury.—Mr. Dickey proposed that every jury shall consist of six persons only; Mr. Marks, that additional jurors should attend the trial and be substituted in place of regular jurors in case of their disability; Mr. Platzek, that a verdict might be rendered by three fourths of a jury; Mr. Woodward and Mr. Goodelle, that a jury trial should be deemed to be waived unless demanded by the parties; Mr. J. I. Green, that in case of the disability of a juror in a criminal action the trial might be continued before the remaining jurors; and Mr. E. A.

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Brown, that in case of a disagreement the court might direct a verdict by two thirds of a jury.

Religious toleration.—Mr. Lauterbach proposed that the section be amended by providing that "no person sworn as a witness shall be incompetent on account of, or be interrogated in relation to, his opinions on matters of religious belief;" Mr. Roche, that "no person shall be incompetent to hold any public office, or be a witness or juror, on account of his opinions on matters of religious belief; and all associations or combinations which have for their object the proscription or exclusion of persons from public office or employment because of their religious profession shall be unlawful." Mr. Francis proposed to amend the first clause of § 3 as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be allowed in this state to all mankind; but without further encouragement or any pecuniary aid from the state." This amendment was reported favorably by the committee on preamble and Bill of Rights, amending the additional clause so that it would read "but without pecuniary aid from the state." This amendment was once made a special order, but was not reached by the Convention. This subject, however, is closely related to the provisions of § 4 of article 9, prohibiting appropriations for sectarian purposes, and it involves substantially the same principle.

Rights of persons.—Mr. J. I. Green proposed to amend § 6 by including the provision that "in any trial or proceeding in any court whatever, *or at or in any examination or proceeding before any court or board or officer whatever,* the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions." Mr. Smith afterwards proposed a similar amendment in the following form: "In any criminal

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case, before any court or officer, the person accused or under suspicion shall be allowed to appear or defend in person and with the assistance of counsel. . . . No person charged with a criminal offense shall be compelled to testify or to produce any paper or give or furnish any evidence against himself. . . . No person shall be deprived of life, liberty, property, the possession and privacy of the person, or the enjoyment of any natural right without due process of law. . . . This state shall not make nor enforce any law which shall abridge the privileges or immunities of the citizens of the state or of the United States, nor deny to any person within its jurisdiction the equal protection of the laws. . . . No person shall be required or compelled to submit to a physical examination in cases to recover damages for personal injuries."

Private property.—Mr. Marks proposed that where private property should be taken by a municipal corporation for public use the compensation, unless paid by the state, should be determined by a jury or three commissioners, and in all other cases the compensation should be determined by a jury. An adverse report on this amendment was sustained by a vote of 93 to 58. Mr. Marks afterwards presented the amendment in another form. Mr. Hottenroth proposed that private property should not be taken for a public use "without just compensation, including the full value thereof, together with all expenses necessarily incurred in proving and obtaining the same;" also that "when private property shall be taken for public use the compensation and damages shall be first paid unless the court having jurisdiction of the proceeding shall, upon a hearing of the persons interested, deem immediate acquisition necessary. If the necessity is established to the satisfaction of the court, it shall thereupon grant to the owner such immediate or

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partial relief as justice requires. Notice of all proceedings shall be given to the owners, in the manner prescribed for the service of process in the supreme court of this state;" Mr. Marks, that compensation for private property should be determined by a jury "when required by the owner of the property, and, if not so required," by commissioners. This amendment was reported favorably by the committee on preamble and Bill of Rights. I have already noted the previous rejection of a similar amendment offered by Mr. Marks, who, in opening the debate in committee of the whole on the new amendment, said he had been encouraged to present it again by the fact that fifty-eight delegates had voted on the other amendment to disagree with the adverse report of the committee. There was a long and interesting debate on this amendment in committee of the whole, and Mr. Marks was strongly supported in his contention that the owner of the property should have the option to determine whether his compensation should be fixed by a jury or by commissioners. At the conclusion of the debate the committee of the whole reported progress, and asked leave to sit again; but leave was refused by a vote of 59 to 69. The next day a motion by Mr. Root that the amendment be "rejected entire" was adopted by a vote of 72 to 68.

Labor.—In addition to Mr. McDonough's amendment relating to prison labor, which was adopted, several propositions were offered, some of which I quote in full. Mr. Coleman and Mr. Kellogg proposed that "the right of an employee to recover damages for injuries to the person, sustained in the course of employment, shall not be denied for the reason that such injuries were caused by the act or negligence of a coemployee;" also that "all contracts limiting the liability for injuries to employees, made prior to the sustaining of the injury, shall be in-

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valid." These amendments were reported in the following form by the committee on industrial interests:

"The right to recover damages for injuries to the person of an employee of a corporation or company engaged in the transportation of passengers or of freight, sustained in the course of employment, shall not be denied for the reason that such injuries were caused by the act or negligence of a coemployee. . . . All contracts hereafter made exempting from, or limiting liability for, injuries to employees, shall be invalid. . . . In all actions whatsoever for injuries to the person, contributory negligence shall not be a bar to recovery, but may be given in evidence in mitigation of damages, and in all such actions the jury shall be the sole judges of both the law and the fact of the negligence of either party to the action."

This report was not considered by the Convention, but was left on general orders at final adjournment. Mr. Tucker proposed that employees of corporations be paid weekly, and entitled to preference over other creditors in case of insolvency; also that the legislature might fix the number of hours that should constitute a day's work except in agricultural occupations; "it may prohibit the employment of women and minors in exhaustive services; and prevent the use and occupancy of tenement houses for unsanitary labor;" Mr. Woodward, that "every citizen of this state shall be free to obtain employment whenever possible, and any person, corporation, or agent thereof, maliciously or unlawfully interfering or hindering in any way any citizen or person from obtaining or enjoying employment already obtained, shall be deemed guilty of a crime or misdemeanor, depending on the means used;" also that "the rights of the laborer shall receive just protection through laws calculated to protect him in his labor and to promote the industrial welfare

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of the state;" Mr. Springweiler, that "no law shall be enacted making it unlawful for any number of persons peaceably to band themselves together for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, decreasing the hours of labor, or bettering the moral or material condition of themselves or others."

Amendments providing for a court of arbitration were offered by Mr. Gilbert, Mr. Gibney, and Mr. Church.

Abolishing capital punishment.—Mr. J. I. Green proposed an amendment providing that no person "should be deprived of life for any cause whatever, nor actually confined in any prison, after indictment, awaiting trial for any cause, for a longer period than ten months;" Mr. Tucker, abolishing capital punishment, and substituting imprisonment for life, prohibiting pardons and commutations on life sentences, and substituting "judicial retrial" upon another indictment on discovery of new evidence; Mr. Blake, abolishing the death penalty as a punishment for crime, and substituting life imprisonment at hard labor, with the right to a new trial on newly discovered evidence; also depriving the governor of the pardoning power in case of murder in the first degree. These amendments were all reported adversely. Mr. Blake, on a motion to disagree with the adverse report on his amendment, discussed the subject of capital punishment with great earnestness, learning, and ability; but the report was sustained by a vote of 85 to 50.

Miscellaneous.—Mr. E. R. Brown proposed to amend the section relating to the freedom of the press by providing that if it appeared to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted "and the costs shall be paid by the party bringing the action;" Mr. Tucker, that "no person shall be im-

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prisoned for debt nor for an unpaid fine imposed for contempt of court, except a person owing a debt not exceeding $50 to a female for labor or services by her rendered;" also "as political rights are not dependent upon the possession of property, nor modified by it, no property qualifications shall ever affect the right to vote or to hold office or to perform any public service or duty within this state;" also that "persons accused of crime shall be entitled to speedy examinations," and magistrates should be required to attend for this purpose; also to prohibit corporal punishment or solitary confinement of persons committed to penal, charitable, or reformatory institutions; Mr. Lauterbach, that the court, on appeal, shall award judgment on the record or grant a new trial. Mr. Blake proposed that proceedings for divorce be "had in open court before a judge thereof;" Mr. Lincoln, that the term of agricultural leases be extended from twelve years to twenty; Mr. E. R. Brown, taking a different view, that the word "agricultural" be omitted, thus limiting to twelve years all leases of land; Mr. Floyd, that the section relating to Indian contracts be amended by making it applicable only to lands included in state reservations; Mr. Kellogg, that no law should be enacted "to cure a jurisdictional defect in any proceeding affecting the title to property;" Mr. Hamlin, that "no witness shall be detained longer than may be necessary to obtain his deposition; and thereafter he shall be discharged on his own recognizance;" Mr. Davenport, prohibiting imprisonment exceeding three months, or a fine exceeding $100, unless the accused be first given a right, at his election, to a trial by a common-law jury; Mr. Osborn, a new § 19, providing that "none of the powers of the state shall be delegated to any county for use beyond the limits of such county;" Mr. Barhite, that either party "to a criminal action or proceeding, except in capi-

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tal cases, may have process for obtaining evidence without the state, for use in such action or proceeding;" Mr. Goeller, that the rightful wife or widow may take proceedings to assert her right of dower, either inchoate or vested, in land conveyed by her husband by a conveyance in which a pretended wife is fraudulently joined.

Art. II. Suffrage.

In previous chapters I have given a sketch of the discussion, from time to time, in constitutional conventions and elsewhere, relative to the elective franchise, and have noted the gradual evolution of this right or privilege until its culmination in what was supposed to be a perfected statement of it by the Commission of 1872, and which was adopted by the people in 1874. The Convention of 1894, therefore, had little occasion to give this subject any extended consideration, especially so far as the principles of suffrage had been already established. The Convention did, however, deem it important to consider questions relating to the extension as well as the restriction of the elective franchise: first, by extending it to adult women; second, by imposing an educational qualification as a prerequisite to the right to vote; and third, which was perhaps a corollary to existing provisions, a proposition was seriously considered to incorporate in the Constitution the principle of compulsory voting, with disfranchisement as a consequence of the neglect of this duty. Other incidental matters were also considered, including a clearer definition of the status of inmates of charitable institutions, regulations concerning registration, and a provision for bi-partisan election boards.

§ 1. *Qualifications of voters.*—It will be observed that the only amendment to § 1 affected the status of naturalized citizens, and required a longer term of full citizen-

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ship before the right to vote could be exercised. Naturalization, and the rights and privileges of naturalized citizens in relation to the elective franchise, gave occasion for an examination of this subject in its various aspects and from many points of view, extending to a study of it beyond its immediate relation to the state alone, and including also the relations of the states to one another, as affected by the elective franchise. Recent events in the conduct of elections prompted several delegates to suggest a longer term of citizenship as a prerequisite to the right to vote, and these suggestions led to an inquiry as to the number of naturalized voters and the status of such voters in other states, as defined by their Constitutions. For the purpose of ascertaining the number of persons naturalized, Mr. Lincoln offered a resolution, which was adopted, requiring clerks of courts to report to the Convention the number of persons naturalized in 1893, "classifying the same according to nationality." The returns made by such clerks were compiled by Mr. Lincoln, and appear in convention document No. 35. According to this compilation, 18,991 persons were naturalized in the state in 1893, of whom 9,216 were naturalized in the county of New York.

The study of the status of naturalized citizens in other states disclosed the fact that in several of them foreign persons were entitled to vote after a declaration of their intention to become citizens, and before full naturalization. The wide difference of constitutional provisions relative to the elective franchise suggested the propriety of an effort to procure the adoption of a uniform rule of citizen suffrage in all the states. Mr. Lincoln accordingly offered the following preamble and resolutions, which were referred to the committee on suffrage:

"Whereas, sixteen states, to wit: Alabama, Arkansas, Colorado, Florida, Indiana, Kansas, Louisiana, Michi-

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gan, Minnesota, Missouri, Nebraska, North Dakota, Oregon, South Dakota, Texas, and Wisconsin, by their Constitution, grant the right of suffrage to aliens who have filed a declaration of their intention to become citizens, but who have not been naturalized, thus permitting persons to participate in the government of this country who are subjects of a foreign power, and who owe allegiance neither to the state nor to the United States, thereby giving rise to occasions when the vote of aliens may change the course of government; therefore,

"Resolved, That it is the sense of this Convention that such grant of suffrage is contrary to the spirit of the American Constitution; that the right of suffrage ought to be uniform throughout the Union, and that no person ought to be permitted to vote who is not a citizen of the United States.

"Resolved, That we hereby request Congress to recommend and submit to the several states, for their consideration, a proposed amendment to the national Constitution, requiring all voters to be citizens, and prohibiting any state from granting the right of suffrage to any person who is not a citizen of the United States."

The committee reported the resolutions adversely, with the statement that the "members of this committee were unanimous, and agreed entirely with the sentiment embodied in the resolution, as well as in the spirit which prompted its proposal; but they have deemed it unwise and inexpedient to report affirmatively upon this resolution, for the reason that they were afraid it would be considered that this Convention was meddling improperly with the affairs of the Federal government. Especially were they afraid that, were this resolution to be passed by this Convention, it might be regarded as a discourteous criticism upon the Constitutions of our sister states." The report was made a special order, and the

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subject of the resolutions was debated by several members of the Convention.

The advocates of the resolutions urged in favor of their adoption that it was a manifest incongruity to permit persons to participate in the affairs of government before they had become citizens, and while they still owed allegiance to a foreign power; that the elective franchise ought primarily to be based on citizenship, especially so far as the exercise of the franchise may affect the organization of the government; that New York had steadily adhered to the principle of citizen suffrage; that, by reason of her position in the Union, this state might properly suggest to her sister states the propriety of adopting uniform national citizen suffrage; that suggestions of amendments to the Federal Constitution had frequently come from state constitutional conventions, and that this Convention might appropriately initiate a movement for an amendment to the Federal Constitution, requiring all voters to be citizens. The opponents of the resolutions thought that it was outside the province of the Convention to suggest an amendment to the Federal Constitution which would have the effect to change the status of foreign born persons in sister states; that the elective franchise was exclusively a matter of state regulation; that it was improper for New York to criticize the Constitutions of other states in this respect, and that the difference of qualifications of voters in the various states was a subject in which New York had no concern. The Convention declined to recommend that Congress propose to the states an amendment to the Federal Constitution requiring all voters to be citizens, and the adverse report was sustained by a vote of 64 to 48.

The subject of naturalization was also included in an amendment proposed by Mr. Roche to § 4, but which I think may properly be noticed here. The amendment

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limited to the supreme court, the county court, and the New York common pleas the power to admit persons to citizenship, which courts were to be held for this purpose at stated intervals and on due notice; and laws were to be passed prescribing the procedure in naturalization cases, including forms of application, to be signed and verified by the applicants. Mr. Roche's amendment was not adopted, but the suggestion contained in it was put into practical form at the next session of the legislature by chapter 927 (1895), which prescribed a detailed procedure in naturalization cases, and for this purpose limited jurisdiction to the supreme court and the county court.

Early in the Convention several amendments were offered to § 1, proposing to extend the term of citizenship as a prerequisite to the right to vote, thus requiring naturalization earlier than under the existing Constitution, under which a voter must have been a citizen ten days before he could vote. Mr. Lauterbach proposed to fix the term at three months; Mr. Porter and Mr. Roche, at thirty days; Mr. Lincoln, at six months; while Mr. Ackerly proposed to continue the term at ten days. The committee on suffrage made a report on the Roche amendment, modifying it, however, by extending the proposed term from thirty days to sixty days. In committee of the whole Mr. Roche, discussing the amendment, urged that thirty days was a sufficient period for naturalization before election, and sought to amend the committee report by restoring the amendment to its original form. His motion for this purpose was lost, and a report of the committee, fixing the period at sixty days, was sustained by an almost unanimous vote. When the amendment was on third reading the Convention adopted Judge Countryman's motion to extend the period from sixty days to six months; but, on further reflection, the Convention concluded that this was too long, and, on Mr. Root's motion,

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fixed the period of required citizenship at ninety days; and in this form the amendment was approved by the people.

Several other important amendments to this section were proposed and should be briefly considered. I have noticed in previous chapters the efforts in earlier conventions to require an educational qualification, and have noted particularly the report on this subject by the committee on suffrage in the Convention of 1867. The subject was revived in the Convention of 1894 by several amendments intended to impose this additional qualification on voters. Mr. Gilbert proposed that a person who should thereafter acquire the right to vote must be able "to read the Constitution in the English language, and write his name;" Mr. Lincoln, that after December 31, 1899, no person not then qualified should have the right to vote who could not read the Constitution in the English language, and write his name; except that a naturalized voter might be permitted to vote if able to read and write his name in the language commonly used by the government whose allegiance he may have renounced; Mr. Alvord proposed a similar amendment applicable to all voters after five years from the adoption of his proposed amendment, but which made no exception in favor of naturalized voters. Mr. Barhite proposed similar qualifications after January 1, 1900, and Mr. Goodelle after January 1, 1905. A majority of the committee on suffrage reported the Gilbert amendment favorably, modified to read as follows:

"After the first day of January, 1895, no person shall have the right to register or to vote or be eligible to office under the Constitution of this state, who shall not be able to read the Constitution in the English language and write his name; provided, however, that the provisions of the section shall

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not apply to any person who now has the right to vote, or to any person prevented by a physical disability from complying with its requirements."

It will be observed that this provision made no exception in favor of naturalized voters, who would have been required to learn the English language. Mr. Tucker, a member of the suffrage committee, dissented from the majority report, on the ground that the amendment proposed discriminated against the foreign born voters, declaring that he would "never consent to disfranchise, now or hereafter, any American citizen, and deprive him of his voice and share in the government, and of the privilege and the protection of voting for those who are to conduct and administer it, because that citizen learned, in his childhood, to speak in a tongue other than English." He submitted "that the broad and generous spirit of American democracy revolts at distinctions among citizens, founded upon the accident of birth and language. Our fathers abolished such distinctions, and their sons should refuse to restore and sanction them." This subject was made a special order, but was not reached. Mr. Lauterbach proposed to exclude from the right of suffrage persons confined for a penal offense, public inmates of any almshouse or other asylums, and persons adjudged to be idiots and lunatics. Mr. Dickey proposed to fix the voting age at twenty years. Mr. Maybee proposed to abrogate the provision requiring a four months' residence in a county.

Woman suffrage.—In the chapter on the Convention of 1867 I have given a sketch of the development of the proposition to extend the elective franchise to women, even anticipating later history somewhat by the statement of the more important statutes relating to the rights and privileges of women, from which it appears that women are on a substantial equality with men under the law and

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the Constitution, except as to the right of suffrage, which makes a fundamental discrimination against women, and deprives them of any direct power in administering the government. For more than forty years prior to the Convention of 1894 the woman suffrage movement had been developing and gaining strength, and it is not surprising that a vigorous attempt should have been made by its advocates at this Convention to eliminate forever the disqualification of women to exercise the highest functions of citizenship, and to place men and women on an equal footing as to their constitutional rights and privileges. The movement was well organized and thoroughly prepared to present the strongest arguments in favor of this extension of the franchise. In addition to a general newspaper discussion, numerous public meetings were held, petitions and arguments prepared, and at the opening of the Convention the advocates of the movement were on the ground, ready to begin their work. There were numerous arguments before committees by the ablest representatives of the cause, and a remarkable symposium of nineteen speakers, who discussed various aspects of the problem before the Convention at an evening meeting. Petitions from all parts of the state were presented to the Convention, urging the adoption of the proposed amendment. Six hundred thousand persons are computed thus to have made known their approval of the movement, while fifteen thousand presented their objections to it. Except for the woman suffrage movement, the suffrage article of the Constitution would have taken comparatively little of the time of the Convention. The scope of the statutes and other forms of enlargement of woman,s sphere, which appear in a former chapter, gave the advocates of the woman suffrage movement hope that the Convention of 1894 would concede the right for which women had been contending nearly half

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a century, and that they might at last enjoy full realization and consummation of the "Declaration of Rights" adopted by the Seneca Falls Convention of 1848. So much had been done by statute, custom, and social reforms, that it seemed easy to take the next and last step, —eliminate the word "male" from the Constitution, and abrogate the suffrage distinction between men and women.

The amendments proposed presented the subject in a variety of aspects, including the immediate abrogation of the suffrage distinction in the Constitution; a partial suffrage, limited to questions of taxation and to certain local elections; the submission of the question to women themselves; and the submission of the suffrage amendment to male voters. Mr. Dean proposed to confer the right of suffrage on all citizens, without regard to sex. Mr. McKinstry proposed to add to article 10, § 2 (local officers), the provision that "the legislature may provide that in such local elections all citizens may vote who are otherwise qualified by law, regardless of sex." Mr. Moore proposed to confer on adult women the right to vote on all questions "relating to schools, excise, and taxes." Mr. Lincoln proposed that "any woman who possesses the qualifications for the right of suffrage required of men by this Constitution, and who is the owner of real estate in her own right, and which is assessed to her upon the last preceding assessment roll of the town, ward, or district in which she resides, may vote at any election upon any question which may be submitted to the vote of the taxpayers of the state, or of any political subdivision or municipal corporation thereof;" also that "the legislature may by law confer upon women possessing the qualifications of age, residence, and citizenship prescribed in this article for men, and not otherwise disqualified, the right to vote at any election for any state or local officer or upon

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any question which may be submitted to the vote of the people of the state or of any political subdivision or municipal corporation thereof, and may also provide that women shall be eligible to any office in this state;" Mr. Bigelow, adding the following to § 1: "The legislature shall have power to extend to females all or any of the rights, privileges, duties, responsibilites, immunities, and exemptions to which they would be entitled or for which they would be liable if the word 'male' were stricken from this section." The validity of chapter 509 of the Laws of 1901, authorizing women to vote on tax questions in towns and villages, could not have been questioned under any of these provisions. Mr. Tibbetts proposed to confer on adult women possessing other qualifications the full right of suffrage, from 1895 to 1906, inclusive, and that in 1907 the men should vote on the question of striking the word "male" from the Constitution. Mr. Ackerly proposed to confer on women the right to vote for all school officers and on all school questions. Mr. Moore and Mr. Abbott proposed to submit the question of woman suffrage to women themselves, following Horace Greeley's suggestion in the Convention of 1867. Under both plans the question was to be submitted to adult women who had been registered for the purpose, except that under Mr. Abbott's plan only women who could read and write were permitted to vote on the question or to possess the right of suffrage if the proposition were adopted. Mr. Moore's plan imposed no educational qualification, and under it women were to possess the right of suffrage if 100,000 voted on the proposition, and a majority of them voted in favor of it. Mr. Tucker and Mr. Foote proposed a separate submission of the question to male voters, and offered amendments for that purpose.

The Tucker amendment was used as the basis of discussion and action by the Convention. This amendment was

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

§ 2. *Bribery at elections.*—Mr. Dean proposed an amendment which, in effect, *ipso facto* disfranchised a voter convicted of bribery at elections, made a person paying or offering a bribe a competent witness against the receiver of it, and prohibited the governor from pardoning persons convicted of offenses against the section, or restoring them to citizenship, except on proof that the conviction was obtained through fraud or perjury. Mr. Emmet proposed to strike out of the existing section the

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last sentence; namely, "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," and to substitute for it the following: "All persons convicted of bribery or of any infamous crime shall be forever excluded from the right of franchise." Mr. I. S. Johnson proposed to extend the existing section to primary elections, caucuses, and conventions. The Dean amendment was reported adversely by the committee on suffrage; the other amendments were not reported. The committee on revision omitted the temporary provision in the last sentence, which was stated by the committee and adopted by the Convention in the following form:

"The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime."

This was the only amendment to the section.

§ 3. *Voting residence.*—The New York Soldiers' and Sailors' Home at Bath was the principal moving cause of an amendment to this section, although the Sailors' Snug Harbor on Staten Island and other similar institutions added incidentally to the situation which produced the amendment. The first named institution, familiarly known as the Soldiers' Home, was organized, as its name imports, for the purpose of providing a home for disabled soldiers and sailors. The movement for such a home began to take definite shape in 1876, and was formally recognized and approved by the legislature in a concurrent resolution adopted at the session of 1877. The preamble to this resolution recited that in thirty-five counties there were 641 "soldiers and sailors

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of the Union Army and Navy, reduced to want and supported as a public charge in the county poorhouses of the state; that a farm of 240 acres near Bath has been purchased to provide a home for these disabled soldiers and sailors, and private subscriptions are in the process of collection for the purpose of erecting thereon suitable buildings for their accommodation;" wherefore it was resolved that "the people of the state of New York, in legislature assembled, heartily sympathize with the project for the removal from the Empire state of the disgrace attending the presence in the county poorhouse of so many hundred of her brave defenders, and that it is the sense of this legislature, if the proposed institution shall be fully completed by private subscriptions, at an aggregate cost for lands and buildings of not less than $100,000, that the state should make adequate provision for the maintenance of such institution as one of the charities of the state, if transferred to it free of encumbrance, as should provide for the proper support of the worthy disabled soldiers and sailors of the state in this or in some other similar institution." The legislature of 1878 provided for the transfer of the title to the property of the new institution to the state, and the organization of a board of trustees, and made appropriations for the purchase of the property and the support of the home. Since that time the institution has been regularly maintained by the state.

The legislature manifestly intended to separate indigent soldiers and sailors from other indigent persons, and prevent their classification as poor persons. This is consistent with other legislation enacted about the same time, by which separate local funds were to be raised for the support of poor soldiers and sailors, without sending them to almshouses. Almost at the beginning of the history of the home a question was raised as to the voting status of its inmates; and a few weeks before the election of 1879,

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Attorney General Augustus Schoonmaker, Jr., was asked for an opinion on this question. He expressed the opinion in substance that the home was intended to provide a permanent abode, and that soldiers and sailors who went to the home intending to make that their future abode thereby acquired a residence, and could vote in Bath; but that persons who went to the home only for a temporary sojourn did not become residents, but retained their legal residence at the place where they lived when received into the home. It seems, however, that a large number of inmates of the home immediately began to vote at Bath. The manifest disadvantage of this practice in its effect on local affairs soon became apparent, and, according to the statement made by Mr. Nichols, in his speech in the Convention, on the amendment hereafter quoted, the leaders of both the political parties determined to have the question of the status of the inmates judicially settled. For that purpose a case was presented to the supreme court in 1886, and which reached the court of appeals and was decided in 1887, appearing as *Silvey* v. *Lindsay*, 107 N. Y. 55, 13 N. E. 444, in which the court decided that the home is an "asylum," and its inmates are supported at public expense, within the purview of the section of the Constitution now under consideration. "The fact of the presence in that institution of an inmate, therefore, does not constitute a test of his right to vote, and is not to be considered in determining that question. He must find the requisite qualifications elsewhere." Mr. Nichols further stated that since that decision "there had been no effort on the part of nonresident soldiers to vote."

The Convention considered the subject from several points of view, including not only an application as well as the reversal of the principle enunciated by the court of appeals, but also the question of providing for an election at the soldiers' home, and transmitting the returns to the

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home district, substantially in the manner prescribed in the first section, in the case of soldiers absent from the state.

Mr. Jenks proposed the following addition to the section: "Provided, however, that the residence of any honorably discharged soldier or sailor of the late Civil War, at any soldiers' or sailors' home in the state as an inmate thereof, must be deemed a residence for the purpose of voting for national or state officers, and within the meaning of § 1 of this article, and such home shall not be deemed an asylum within the meaning of this section." Mr. Lester proposed the following addition to the section: "Nor while an inmate of any institution maintained wholly or in part by charity." Mr. O'Brien proposed to strike out the words "nor while kept at any almshouse or other asylum or charitable institution, and who is wholly or partly supported by charity, public or private." Mr. Lauterbach proposed to state the section in the following form: "For the purpose of voting, no person shall be deemed to have gained or lost a residence *solely* 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 or of the United States, or of the high seas, nor while a student of any seminary of learning," omitting the following: "Nor while kept at any almshouse or other asylum, at public expense, nor while confined in any public prison." Mr. Cochran proposed the following addition to the section: "Provided, that no elector who is an honorably discharged soldier or sailor of the late Civil War, and who is kept at any soldiers' or sailors' home within the state, shall be deprived of his vote for state or national officers by reason of his absence from the election district wherein he shall then be a resident; and the legislature shall provide the manner in which such absent electors may vote for all

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state or national officers, and for the return and canvass of such votes in the election district in which these voters may respectively reside." Mr. Nichols offered the following amendment to § 3 of the militia article, relating to this subject, and it is for that reason stated here: "Provided, that no elector who shall have been in the military or naval service of the United States, and who shall be kept at such almshouse or other asylum, shall be deprived of his vote by reason of his absence from the election district wherein he shall be then a resident, and the legislature shall have the power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside." It will be observed that this was somewhat broader than the Cochran amendment. Mr. Parkhurst offered an amendment to the registration section relating to the transmission of votes by inmates of soldiers' homes to the local districts, "and for the return and canvass thereof in said districts." The Parkhurst amendment is so closely related to the subject of this section that I have quoted it here instead of under the registration section. The O'Brien amendment was reported favorably by the committee on suffrage, but the other amendments were not reported.

Mr. O'Brien, discussing the amendment, said it was intended "simply to carry out and effectuate the spirit of the section of the present Constitution," and extended so that "no one shall gain a residence while kept in any institution of a charitable nature." While the O'Brien amendment was under discussion Mr. Burr proposed the following addition to the existing section: "Provided, however, that the residence of any honorably discharged soldier or sailor of the late Civil War at any soldiers' or sailors' home in the state as an inmate thereof must be

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deemed a residence for the purpose of voting for national or state officers, within the meaning of § 1 of this article, and such home shall be deemed an asylum within the meaning of this section." This suggestion was objected to because it divided a man's voting status, and would have required him to vote in two places if he wished to vote for all officers; besides, he could not vote on propositions except at his original place of residence, and where elections were held at different places on the same day it would be impracticable, if not impossible, for him to vote in both places. Mr. Holcomb proposed to provide specifically that "the provisions hereof shall not be construed to affect soldiers who may be inmates of state soldiers' homes, or sailors who dwell upon the Sailors' Snug Harbor foundation in Richmond county, or like institutions." Mr. Lauterbach said that one object of the amendment was to bring within the constitutional provision the Sailors' Snug Harbor, a private institution, not receiving public support, by adding the words "or institution wholly or partly supported," and the words "or by charity," which, he said, was "simply amplifying terms so as to cover that particular case and other cases." Mr. Root said the amendment involved no new principle. "It merely covers an omitted case in the provision of the Constitution which we now have, and which is uniformly approved. It puts the inmates of institutions which are upon private foundations in the same position as members of our institutions of learning, and relieves many communities in this state from the incubus of a great body of voters who can overcome the votes of the general citizens, and who yet have no interest in the governmental affairs of the community." Mr. Lester said the amendment did not deprive the inmate of an institution of his right to vote at his home residence, but it prevented "the accumulation of

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a large vote in a charitable institution in a neighborhood where such vote overwhelms the votes of those who reside in the vicinity, who are responsible for the management of the affairs, and who are interested in the success of the community." The O'Brien amendment was adopted by a vote of 98 to 53.

§ 4. *Registration of voters.*—The existing provision that "laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage hereby established," was incorporated in the Constitution by the Convention of 1821. This provision imposed a duty on the legislature, which was vested with entire control of the subject. The committee on suffrage in that Convention proposed an additional provision that "the legislature may provide by law that a registry of all citizens entitled to the right of suffrage, in every town or ward, shall be made at least twenty days before any election, and may provide that no person shall vote at any election who shall not be registered as a citizen qualified to vote at such elections." We get a glimpse of the political conditions of the time from the remarks of Chief Justice Spencer, who expressed his gratitude "to the committee for their exertions to prevent the evils that were attendant upon our mode of election. He thought the course recommended by the committee would conduce to peace and quietness at the polls, and prevent those scenes of iniquity and perjury that had been often witnessed with pain, and which had a powerful tendency to sap the foundation of morals and the principles of justice." Mr. Burroughs also said that he had "witnessed the scenes of corruption and crime at the polls," which the section was intended to prevent. General Root opposed the principle of the report because it contemplated "the establishment of a tribunal unknown to our laws, sitting in secret, making out a register upon evidence not capable of being con-

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tradicted; and this, too, without providing for the proscribed, whose names were not on the register, any mode of redress." General Root's observations show the undeveloped condition of opinion and experience on this subject, and are clearly not applicable to a modern registry board, which does not sit in secret, and which makes its lists only upon clear and competent evidence; and any voter "proscribed" has an ample remedy to procure the entry of his name on the registry. But the subject of election machinery has developed greatly since the Convention of 1821. Martin Van Buren said the "register was no part of the qualifications of voters, and that the legislature now have the power to pass laws authorizing an enrolment of the electors."

The first part of the section, requiring registry laws to be enacted, was adopted, but the second part was rejected. The rejected clause is interesting in connection with the action of the Convention of 1894, because it suggested the completion of the registry twenty days before election, and also because it authorized the legislature to make registration compulsory. The discussion led to a proposition a few days later by Mr. Munro, to the effect that only adult male persons who had gained a settlement under existing settlement laws should be entitled to vote; that the legislature should provide for the registry of such persons in each town and city; "and while the name of any elector shall continue inscribed in such register, and he continue actually to reside in such city or town, he may vote in that city or town for all elective officers whatever," and such voter might, on changing his residence, also transfer, by certificate, his right to vote.

Mr. Munro's plan of a list of electors was not without merit, for it gave the citizen a fixed and permanent standing as a member of the community, and if his public status was at any time questioned, he need only refer to the list

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to show his qualifications to act as a citizen; and when he transferred his residence, he could, by the certificate proposed, transfer all his rights as a citizen to the place of his new residence. The Munro plan was quite similar to the practice of enrolling citizens in the ancient Greek democracies. The principle of this plan is applied under our modern election system, which provides for transferring to the new registry in rural communities the names appearing on the last preceding poll list of the election district. This preserves the continuity of the citizen's right to vote, except where personal registration is required, and he may feel sure that this right will not be disturbed unless he fails to exercise it, or removes to another election district. The Munro plan was not reported, and so stands in our constitutional history as a mere suggestion.

The Convention of 1846 continued without change the provision adopted in 1821. The Convention of 1867 recommended an addition, making registration compulsory, requiring it to be uniform in all cities, and to be completed in all cases, four days before each general and special state election and charter election in cities. It will be observed that personal registration was not required. The Commission of 1872 considered these additional provisions, but declined to recommend them.

The committee on suffrage in the Convention of 1821 evidently intended to provide, or at least to authorize, a complete scheme of registration of voters. It will be observed that the first sentence of the proposed section was mandatory, while the second sentence was directory. It recommended to the legislature the enactment of laws providing for compulsory registration, to be completed twenty days before an election. The Convention retained the first part of the section, but rejected the remainder, thus expressing its unwillingness to commit the state to

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the permanent policy of a registration of voters as a prerequisite to the exercise of the elective franchise. It seems evident that the legislature construed the provision retained, namely, that "laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established," as a mere suggestion, or, at least, as not specifically commanding a registry of voters; for if the provision was deemed mandatory the constitutional obligation seems to have rested lightly on the legislators of that period, or perhaps it was deemed capable of a construction which would amount to a compliance with its requirements without a formal registry. What should be deemed "proper proofs" and when a voter's right should be deemed "ascertained" were questions to be determined by the legislature. The new general election law, enacted in April, 1822, soon after the new Constitution was approved, and while its provisions were still fresh in the minds of statesmen, did not provide for a registry. A reason for this omission may probably be found in the fact that the Constitution so clearly defined the persons who had the right to vote that a special registry or list of voters was unnecessary. Under the definition prescribed by the Constitution a voter must, first, have been a taxpayer, in which case his name would have been found in the assessment roll; or, second, a fireman; or, third, within the year must have performed military duty; or, fourth, have been for three years a resident of the state, and for one year a resident of the town or county, and have been assessed for highway labor; or, fifth, if a colored voter, a citizen of the state three years and the owner of real property one year. These qualifications were all evidenced by public records which were accessible to officers charged with any duty connected with the elections, and also must have been matters of common knowledge in the community. These require-

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ments, taken in connection with the long residence in the locality, prescribed as a prerequisite to the right to vote, almost necessarily made every man's status so well known that there was little need of a formal list of voters. The abolition of property qualifications, in 1826, and the adoption of manhood suffrage, except as to colored voters, changed the situation somewhat so far as concerned the record evidence of a voter's status; but the requirement of a long residence in the community afforded ample opportunity for acquaintance with newcomers and an inquiry into their antecedents, so that, in most parts of the state, which were then sparsely settled, there was little or no reason to expect that persons not qualified would attempt to vote.

Notwithstanding the mandate of the Constitution the legislature was slow to require a general registry. This seems to have been the plain meaning of the provision, but during many years a challenge to a voter was substantially the only method by which his right could be ascertained, if the record evidence of his qualifications was deemed insufficient. This challenge required certain "proofs," but this was not the preliminary evidence which the Constitution clearly indicated.

In 1823 Governor Yates reminded the legislature of this subject, remarking that at recent elections difficulties had arisen "at some of the polls with regard to the true construction to be given to the article which defines the right of suffrage," and that "the intention of the makers of the Constitution ought to be realized;" and he recommended "explanatory laws, enabling the inspectors correctly to ascertain the citizens entitled to vote, and thus prevent improper exclusions by hasty and unadvised decisions during the election." A registration would have fully answered the Governor's suggestion. In 1827 Governor De Witt Clinton suggested that "lists of qualified

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voters in each town may be periodically compiled and resorted to as conclusive evidence of a right to exercise the elective franchise in a particular place, by which means partiality, fraud, and perjury may be prevented." Governor Seward, in 1839, admonished the legislature of the danger of neglecting to place proper safeguards about the exercise of the elective franchise, observing that "the test of the qualifications of electors, and the form of applying it, have been found deplorably deficient in our populous cities." In 1840 he renewed his suggestions, urging the importance of legislation on this subject.

The rapid increase in population in the larger towns finally prompted the legislature, eighteen years after the constitutional provision took effect, to provide a method of determining in advance the right to vote at an election. In 1840 the legislature, by chapter 78, enacted for New York city a law which required the creation of election districts containing not more than five hundred voters, and provided for a "perfect list" of such voters to be completed the second Saturday in October. No person could vote unless his name was on this list. Later, at the same session, by chapter 361, persons might be registered without personal application if known to be qualified voters, or if their right was duly established. In 1841 Governor Seward referred to complaints against this registry law, and admitted that it had some defects which ought to be corrected. He said a general registry law had been suggested for all cities and villages, and also for the whole state. He approved such a law if it could be so framed as to prevent illegal voting, and not exclude any legal voter. The experiment of even a nonpersonal registration was apparently not satisfactory, for the registration provisions of the statute were repealed in 1842. The statutes for the next fifty years disclose a remarkable fluctuation of legislative opinion on this subject, which is

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shown by numerous enactments, amendments, and repeals, covering a great variety of detail, and the policy was still in an evolutionary condition when the Convention of 1894 determined to deprive the legislature of further discretion, and fix, once for all, in the Constitution itself, a provision for compulsory registration. A few of these statutes and also executive communications will now be noticed.

Governor King, in 1857, referring to the "abuse of the elective franchise," said all would agree that the popular vote "should be free, and should be pure. . . . All know that in the city of New York, and measurably in other large cities, it is not pure, and often is not free." The Governor expressed the hope that the legislature would find a proper and adequate "corrective," but did not specifically recommend a registry law. In 1858 Governor King recommended a registry law. In 1859 he renewed the recommendation, citing other states where registration laws had been in successful operation, and urged the enactment of such at that session. The legislature, in compliance with the Governor's suggestion, passed, at this session, chapter 380, which required a list of voters to be completed in cities on the last Wednesday, and elsewhere the last Tuesday, preceding the election. The act did not require personal registration. The poll list kept at the last preceding general election was made the basis of the registry, and the names of all persons residing in the district who voted at such election were to be entered in the registry.

In 1861 Governor Morgan said the registry law had been of "signal value" in protecting the proper exercise of the elective franchise. Governor Fenton, in 1865, while expressing the opinion that the registry law had been "of great utility in protecting the purity of the ballot box," thought it fell short "of accomplishing the entire

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object for which it was framed," and he commended it to the further consideration of the legislature. The legislature, at this session, passed another registry law (chap. 740), which limited the registry to cities, and election districts including some part of an incorporated village, except in New York and Brooklyn. The last preceding poll list was made the basis of the registry, except that personal registration was required after the first day, and the list was to be completed in New York and Brooklyn on the last Saturday, and elsewhere on the last Friday, before election. Chapter 812 of the Laws of 1866 authorized the registry boards in New York and Brooklyn to use the poll lists to aid them in making the registry, but each person was required to appear personally before the board, and prove his right to vote at the next election.

In 1869 Governor Hoffman recommended "one registry law for the whole state, imposing equal conditions and restrictions everywhere, and it should be the aim thereof to secure to every citizen his right of suffrage, free from intimidation, corruption, or onerous exactions." Again, in 1870, Governor Hoffman called attention "to the want of uniformity in the registry and election laws. All laws relating to elections should be uniform in their principles and general in their application." The Governor said that grave doubts had been expressed by very intelligent men whether the registry laws, "while they oftentimes embarrass honest voters, are, in any material degree, effective for the protection of frauds;" and that better results would be attained with small polling districts and by a free exercise of the right of challenge. The legislature evidently did not agree with the Governor on the question of uniformity, for, by chapter 503, it repealed all provisions of former statutes requiring a registry of voters, except as to New York, which left other parts of the state without any registry law. Chapter 138,

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passed at the same session, provided for a registry in New York, to be completed on the last Tuesday before election.

Governor Hoffman, in 1872, considering the efficacy of registry laws in preventing frauds, said that the inconvenience occasioned to the electors by such laws "is not to be counted against them if, by their means, we can insure pure elections. I have little faith in them to prevent fraud at the polls. They have been tried, and have failed to prevent it. More frequent charges of fraud, and of frauds of a grosser character, have been made since registry laws were put in operation than before. Many who have watched their working insist that they can be easily made, and have been made, a convenient cover for frauds which, without them, could not have been committed. They have this effect, certainly, that the vigilance necessary to detect illegal voting has to be extended over several days, instead of the one day of election, requiring more time for this purpose than men will spare from their private business; and so the watchfulness over the poll list is, ordinarily, less general and probably less complete than under the system of challenging on the day of election. Upon principle, a registry law, if any be passed, should apply to all parts of the state alike. Yet I am satisfied that intelligent public opinion in the rural districts, among men of all parties, does not favor one there. The inconvenience and expense to the electors in such districts from such a law are very great, with no adequate good result in compensation. The conviction, however, prevails extensively among intelligent men that in large cities registry laws can be made useful in securing the purity of the ballot, and this conviction is so strong that the continuance of the system in the larger cities may be advisable."

In 1872 the legislature passed a new law for New York

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(chap. 675) which required a registry to be made on personal application only, and to be completed the second Saturday (ten days) before election. At the same session the legislature enacted chapter 570, providing a general registry law for cities and incorporated villages containing over 10,000 inhabitants each, as determined by the last census, excepting New York and Brooklyn. Poll lists were to be used as a basis of the registry, which in cities was to be completed on the last Saturday, and elsewhere on the last Friday, before election. An amendment of this act in 1873, chapter 824, made it applicable to all cities except New York and Brooklyn, but continued the limitation to villages of 10,000 inhabitants.

In 1880 Governor Cornell, in his annual message, discussing the subject of election frauds and the necessity of preserving the purity of the ballot, said that a "well-guarded registry law for all incorporated villages" was also believed to be necessary for the correction of existing evils. The legislature, following the Governor's suggestion, considered several aspects of the subject of registration, and passed four important statutes. Chapter 142 provided a scheme of personal registration in towns in counties containing 300,000 inhabitants. The registration was to be completed "at least ten days before the next ensuing annual town meeting or general election." By the population limit this act applied only to Kings county. Chapter 465 amended chapter 570, Laws 1872, above cited, by requiring the registry to be completed on the last Wednesday before election in cities and the last Tuesday in villeges, and, by chapter 508, the population limit in villages was reduced to 7,000. This was only a partial compliance with the Governor's recommendation, and nearly all villages were still left without any registry law. At the same session the legislature, by chapter 576, provided for

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registration in cities containing 16,000 inhabitants, and in towns abutting against such a city. The registry was to be based on the poll list, and be completed on the Friday preceding the election. Personal application for registration was necessary on the last day. This act was subsequently applied to several other towns and cities.

Governor Hill, in 1890, considering recent reforms in the method of voting, and other changes in election machinery, recommended a general registry law for the whole state, urging its necessity in connection with the proposed adoption of the Australian ballot system. He said personal registration was required in New York and Brooklyn, but this was not proposed to be disturbed or extended. Commenting on the suggestion that registration in country districts was not necessary, because the voters were known to one another, he said this was only partially true, and that, especially in presidential elections, men not known came to the polls, voted, and went away, and their identity was not ascertained. The Governor thought a general registration would remedy this, for the voter's name must then have been found on the registry list, or he could not have received a ballot from the election officers. The legislature, at this session, adopting the Governor's suggestion, passed a general registry law (chap. 321), which required the completion of the registry on the last Friday before election. Personal registration was required in cities, but elsewhere the poll list was the basis of the registry, except that on the third and last day applicants for registration were required to appear personally before the board of registry. The acts of 1859, 1872, 1873, and 1880, above cited, with other statutes, were repealed. The act did not prescribe any population limit in villages. Personal registration was not required in any village. By an amendment to this

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act in 1891, chapter 336, the registry was to be completed on the second Saturday before election, in all cases.

In 1892 Governor Flower recommended personal registration throughout the state, which he said was necessary to prevent "false registration in villages and country districts." An attempt was made at this session to pass such a law, but it failed. The legislature of 1892 passed a general election law (chap. 680), under which the registration was to be completed the second Saturday (ten days) before election. In cities the registration was to be personal; in other districts the registry was to be made from the poll lists, except that personal application for registration was required on the last day.

Governor Flower, in 1893, renewed his recommendation for personal registration in country districts, and a bill for this purpose was passed by the assembly, but failed in the senate. The Governor, in 1894, again renewed his recommendation for personal registration throughout the state, urging that there was "no reason why the safeguards which the law throws around the determination of voters in cities should not be extended to the voters of the villages and towns of the state. The requirement of personal annual registration as a necessary preliminary to the exercise of suffrage has been a most effective influence in diminishing fraudulent voting in cities, and the people of towns and villages should no longer be excluded from protection by its advantages." The foregoing summary shows that when the Convention of 1894 took up the subject of registration, personal registration was required in all cities, but not elsewhere, and that Governor Flower had, each year of his administration, recommended personal registration in all parts of the state.

Mr. Holls proposed to amend the registration section so as to require compulsory voting; Mr. Dean, by adding

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"the legislature, at the first session after the adoption of this article, shall provide by law for carrying its provisions into effect, and nothing herein contained shall inhibit the power of the legislature to provide for challenging voters and for punishing for the crime of perjury;" Mr. Lincoln, requiring registration thirty days before election. Mr. Nichols proposed a new § 4, as follows: *"Laws shall be made providing for the registration of all voters in the election district in which they reside,* and for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established; *but personal registration of electors shall not be required at the first meeting of the inspectors of election for registry of voters, except in cities of the state."* Mr. Lauterbach proposed to state the section in the following form: "The legislature shall provide by law for the registration of voters, which registration shall be completed at least four weeks before each general election. In cities and in villages having 5,000 inhabitants or more, according to the last preceding state or United States census, no voter shall be registered except upon personal application to the registering officers, and oath to the necessary qualifications. Provision shall be made by law for a revision of registration, where necessary, prior to each special election." Mr. Bigelow proposed the following § 4: "The legislature shall provide for an annual registration of the names and domicils of all persons entitled to vote at any election of public officers authorized by law to be held in this state." Mr. Foote proposed a plan of registration at primary elections, with penalties for false registration.

The committee on suffrage reported the Nichols amendment, combining with it the time and population limits suggested in Mr. Lauterbach's amendment, as follows:

"Laws shall be made for ascertaining, by proper proofs,

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the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters, which registration shall be completed at least four weeks before each election. In cities and in villages having 5,000 inhabitants or more, according to the last preceding state enumeration of inhabitants, no voter shall be registered except upon personal application; but personal registration shall not be required at the first meeting of the inspectors of election for the registry of voters, except in such cities and villages."

Mr. Nichols made the principal speech in favor of the new section, devoting himself chiefly to the argument that personal registration ought not to be required in rural communities, first, because unnecessary; and next, because burdensome to the people. I have already suggested that the failure to put the constitutional provision into effect after the Convention of 1821 was probably due largely to the fact that the people were so well acquainted with one another that a personal list was unnecessary. On this point Mr. Nichols remarked that "it is a current fact that every man in every country village and town knows his neighbor. He knows his voice, his name, his age, his family, his religious association, and his political affiliation, and if a stranger comes into their midst he is at once recognized." Personal registration in country districts would be burdensome because of the long distance voters would be required to travel to appear personally before the registry boards. Mr. Nichols furnished statistics showing that voters in different counties would be required to travel from five to twenty-five miles to be registered. This, he thought, would be imposing a great hardship on the people, and would, in many cases, amount to disfranchisement. Contrasting country and city conditions, he observed that in cities voters usually had to travel a few blocks, at most, and that they could attend to personal registration without serious inconvenience. Mr.

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Nichols said the provision dispensing with personal registration in country districts on the first day was necessary as a protection against possible action by the legislature; and in this connection referred to the attempt, in 1892, to enact a law requiring personal registration in all parts of the state, which, he said, was supported by Democrats and opposed by Republicans. He also cited the renewal of the effort in 1893, at which time a bill for this purpose was supported and opposed as a party measure; that it passed the assembly, and failed in the senate only by what Mr. Nichols considered the providential illness of a senator. The possibility that a political party might try to gain an advantage by requiring personal registration in communities composed largely of its political opponents was, Mr. Nichols thought, a sufficient reason for including in the Constitution a clear and positive provision permitting nonpersonal registration in such communities at least one day, which would permit the use of poll lists or other means of ascertaining the qualified voters, and their inclusion in a proper registry.

Mr. Barhite proposed to reduce the time limit from four weeks to fourteen days before election, observing that under the first section a voter must reside in an election district thirty days, and if the registration must have been completed four weeks before election, he must have registered within two days after he became a resident of the district. Mr. Bowers suggested eight days and Mr. Jesse Johnson ten days. Mr. Barhite then modified his motion by fixing the time at ten days, and the section was amended accordingly. It will be observed that this limit was included in a statute of 1872, and was then in force under the election law of 1892. Mr. Putnam proposed to strike out the provision requiring a time limit. Mr. Roche proposed the following substitute for the section: "Laws shall be made for the registration of voters,

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and for ascertaining, by proper proof, the citizens who shall be entitled to the right of suffrage hereby established." omitting the provisions relating to time and population limits, and leaving to the legislature the question of determining whether registration should be personal or otherwise. The Roche substitute was lost. The Convention also declined to adopt Mr. McIntyre's suggestion to increase the village population limit from 5,000 to 8,000. The Convention adopted an amendment offered by Mr. A. B. Steele, that personal registration on the first day should not be required of voters not residing in a city or in a village containing 5,000 inhabitants. This was intended specifically to cover cases where an election district includes part of such a village and also outside territory. On Mr. Marshall's motion, registration was not to be required at town and village elections. The Convention rejected Mr. Holcomb's proposition to prohibit the legislature from reducing the number of registration days then authorized by law. The section, modified as above indicated, was adopted by a vote of 103 to 45, and appears in the Constitution in the following form:

"Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. In cities and villages having five thousand inhabitants or more, according to the last preceding state enumeration of inhabitants, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry."

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Thus, after seventy-three years, and after much legislative fluctuation, and numerous executive recommendations, the suggestion of the suffrage committee, in the Convention of 1821, that registration be compulsory, with a time limit before election, was incorporated in the Constitution. It will be observed, as suggested in the Convention, that the section simply put into the Constitution, and made permanent, the provisions of existing statutes, and so deprived the legislature of any power over the subject, except as to town and village elections, at which registration might or might not be made compulsory, in the discretion of the legislature; elsewhere registration was not only compulsory, but was to be personal, except in the smaller communities.

This amendment and several others adopted by the Convention illustrate the process of making additions to the Constitution. A subject, not in itself fundamental, and which might appropriately be left to the legislature, either becomes familiar by operation of a statute which regulates the details of administration and develops into a custom which takes on the character of a right, or is found to be valuable for the purpose of assuring and protecting a fundamental right from changes by the legislature, and it is deemed proper, if not necessary, also to include in the Constitution the incidental right along with the fundamental right to which it relates. The fundamental right now under consideration is the right of the citizen to vote; and the other parts of this article are incidental to that primary right; and if the people could always rely on the wisdom and stability of the legislature, these incidental rights might be omitted from the Constitution. Registration is not primarily a fundamental subject of constitutional cognizance, and might have been omitted had it not been found by experience that the intended result of the elective franchise in ad-

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ministering and preserving republican government was sometimes imperiled and set at naught by illegal votes.

§ 5. *Method of voting.*—In the chapter on the first Constitution I have quoted the provisions for elections by ballot proposed in the first Convention, and have noted the action of the Convention which resulted in postponing consideration of the subject of voting by ballot until after the close of the Revolutionary War; and in the chapter on the second Constitution I have given a sketch of the development of the subject before and in the Convention of 1821, which resulted in the adoption of § 5 of article 2 as it stood prior to the Convention of 1894. Neither the Convention of 1846 nor the Convention of 1867 proposed any change in this section; and the only change made by the Convention of 1894 was for the purpose of permitting the use of voting machines. The ballot machine as a device for voting had been in use a short time in some parts of the state, and many believed that it could be made a satisfactory substitute for the paper ticket for use at elections. The legislature of 1892, by chapter 127, had authorized the use of the "Myers automatic ballot cabinet" at town meetings, and in 1893, by chapter 82, this provision was added to the town law. The legislature of 1894, by chapter 764, extended the field of operation of the ballot machine from town meetings to general elections. In counties where one half or more of the towns had authorized the use of the machine at town meetings the board of supervisors might also authorize its use at all elections held in such towns, and in cities, except New York and Brooklyn, the use of the machine at all elections might be authorized by the common council. This law was approved by the Governor on the 24th of May, at which time the Convention was in session and several amendments to article 2 had already been introduced. Some members of the Conven-

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tion, in view of the provision of the section that all elections shall be by ballot, doubted the power of the legislature to extend the use of the ballot machine to general elections. Perhaps Governor Flower shared this doubt, although he signed the bill, for, according to a statement by Mr. Phipps, in the debate on the amendment, hereafter noted, the Governor, during the preceding winter, had expressed to him the hope that the Convention "would devise some means or plan by which the Executive could constitutionally approve of measures extending the methods of voting."

On the 29th of May, five days after the act of 1894 took effect, Mr. Chipp introduced an amendment to § 5 in the following form: "All elections by the citizens shall be by ballot, or by such other means as may be authorized by the legislature, provided that secrecy in voting be preserved, and the right of suffrage be not restricted." The following amendments to § 5 were also introduced by Mr. Hill, June 7: "All elections by the citizens shall be by ballot, or by the use of a voting apparatus, as prescribed by law, except for such town officers as may by law be directed to be otherwise chosen;" by Mr. Foote, June 15: "All elections by the citizens shall be by ballot, except for such town officers as may by law be directed to be otherwise chosen; it being understood that the term 'ballot' includes any method of voting authorized by law, which shall secure an equal opportunity to freely vote in secrecy." The following amendments not relating to voting machines were also introduced by Mr. Dean, May 22: "All elections by the citizens of this state shall be by ballot, except for such town officers as may by law be directed to be otherwise chosen, but no citizen shall be compelled to use a ballot containing the names of persons for whom he does not desire to vote, nor shall he be compelled to take cognizance of any other ballot than

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the one which he offers at the polling place at which he is legally entitled to vote." This guaranteed to every voter the right to prepare his own ballot. By Mr. Lauterbach, June 26: "All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot. A single ballot containing the names of all candidates nominated for each election district shall be furnished by public authority to the voters at the polls, and marked by each voter in private, and then and there deposited. The word 'elections' in this section includes the decision of questions submitted to the voters as well as the choice of officers by them. The legislature shall enact all necessary laws to enforce this provision, and shall provide by law that persons who, by reason of blindness or other physical disability, are unable to make their ballots as herein required, or to enter the voting booth without assistance, shall have the necessary aid, through election officers belonging to and representing different political parties, provided that such disability shall, when then existing, be specified by the voter under oath at the time of registration."

The committee on suffrage used Mr. Hill's amendment as the basis of its report, combining with it Mr. Chipp's amendment, expressing substantially the same idea with the additional provision relating to secrecy in voting. The new section, as reported by the committee, was stated in the following form:

"All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot or by such other method as may be prescribed by law, provided that secrecy in voting be preserved."

Mr. Hill opened the debate on the amendment in an

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instructive speech, in which he elucidated the meaning of the word "ballot" and expressed doubt whether the use of "mechanical devices, known as voting machines, in general state elections," could be deemed voting by ballot. He emphasized the provision which preserved secrecy in voting. Advocating the use of voting machines, Mr. Hill said: "The inventive talent of the age is being directed toward the perfection, among other things, of such mechanical devices. The results thus far obtained warrant the assumption that, before the lapse of another generation, they will have been so perfected, and so generally adopted throughout the country, as to supersede almost entirely the present cumbersome and expensive method of voting by 'ballot.' Provision should now be made to admit of an adjustment of the manner of our elections to the improved methods of voting thus likely to come into use." Mr. Chipp moved to amend the section, as reported, by substituting the amendment introduced by him. Commenting on this he called attention to the provision in his amendment that the right of suffrage should not be restricted, and said he understood that the Myers machine did not permit an elector to vote for whom he chose, but that he could only vote for the candidates named in the machine; it therefore restricted his choice, and Mr. Chipp thought the legislature should not have power to authorize any method of voting which would restrict freedom of choice by the voter. Mr. Hawley proposed to state the section in the following form: "All elections by the citizens shall be by ballot, except for such officers as may by law be directed to be otherwise chosen." Mr. Lincoln objected to the use of voting machines, saying he had "rather trust a man than a machine." He also thought that the provision relating to secrecy in voting was unnecessary, if not impracticable; that there had not been and could not be absolute

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secrecy in voting, and that if the provision were rigidly enforced many voters would be disfranchised. Mr. Lincoln also thought that the voting machine provision could not be applied in elections for members of Congress, for the reason that the Federal statutes required those officers to be chosen by "written or printed ballot," and that the operation of the machine would not be a compliance with this provision. Mr. Mereness objected to the voting machine amendment, because he said it might authorize the legislature to compel the use of the voting machine by the five thousand election districts in the state, at an expense of some two millions of dollars.

While the amendment was under discussion, Mr. Hill, after consulting with several delegates interested in cognate amendments, moved to amend the section by striking out the last phrase—"secrecy in voting be preserved"—and substituting for it the phrase "an opportunity freely to vote in secrecy be preserved." Mr. Chipp thereupon withdrew his amendment. Mr. Hawley thought the several amendments had made the section obscure, and again urged the adoption of the form proposed by him, already quoted. Mr. Lincoln thought it hardly worth while to mention the word "ballot" in the provision if the legislature might authorize another method of voting; he therefore proposed to state the section in the following form: "All elections by the citizens shall be by such method as may be prescribed by law." "That," he said, "will give the legislature the right to prescribe a ballot," or some other method. "If we are to let down the bars and take away these privileges of an election by ballot, and permit some other method, then we do not need to use both methods in the alternative, and mention both in the provision itself." Mr. Hawley thought this amendment would preclude "the legislature from passing a law which shall allow certain

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officers to be elected by the use of a balloting machine, and certain other officers to be elected by ballot." Mr. Dean said he thought the Convention was "trenching upon very dangerous ground" by undertaking to extend to the legislature the power to discriminate as to, and further to manipulate, the ballot of this state. "In the last ten years we have been going through a process of mechanical reform,—trying to make people good by machinery." Mr. Moore and Mr. Foote objected to Mr. Lincoln's amendment, because it did not provide for secrecy in voting. Mr. Marshall thought the amendment would overturn the established system of voting by ballot, and permit the legislature to re-establish *viva voce* voting, and thus deprive the voter of his right to secret and independent action at the polls. Mr. Doty proposed the section in the following form: "All elections by the citizens, except for such town officers as may be by law directed to be otherwise chosen, shall be by ballot, or by such secret method as may be prescribed by law;" and Mr. Forbes as follows: "All elections shall be by ballot or by other secret method, except for such town officers as may by law be directed to be otherwise chosen."

Without voting on any of the proposed amendments to the section as reported by the committee on suffrage, the whole subject was referred back to that committee for further consideration. The committee reported the section again in its original form, as first reported. When the amendment was taken up again Mr. Dean said he was "entirely opposed to this system of mechanical reform," and that he was "opposed to letting down the bars of the legislature to make another experiment in ballot reform, either by machine or otherwise." Mr. Foote thought the voting machines would reduce frauds at elections by preventing the "stuffing of the ballot box," and also materially diminish the labor and delay of can-

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vassing the result. Mr. Titus said the proposed amendment would make a voter a mere "automaton," and he objected to the use of a machine, which might easily get out of repair, and be unfit for service on election day.

The committee of the whole rejected a motion by Mr. J. I. Green to strike out the last part of the section which permitted methods of voting otherwise than by ballot, and recommended the adoption of the amendment. Mr. Andrew H. Green supported the amendment, and in his remarks quoted from Charles O'Conor, a distinguished member of the Convention of 1846, and whom Mr. Green described as the "ablest lawyer that this country has ever produced, and a statesman of large experience," the opinion that "an accurate register and equally plain and responsible voting, with no complex contrivances between the people, and direct accountability of the chief public officials, at proximate elections, present the true expression of the democratic idea of popular suffrage. The *viva voce* system of voting should be re-established; the voter should qualify his ballot by reading and declaring his vote."

The debate on this amendment was somewhat prolonged, but the issue was a rather narrow one, and I think I have given a fair synopsis of the different views concerning it. The amendment was adopted by a vote of 88 to 57. The legislature, exercising the power conferred on it by this section, which was included in the Constitution of 1894, passed statutes in relation to voting machines in 1895, 1896, 1897, and 1898, and in 1899 the whole subject was revised and included in a new article on voting machines, which was added to the election law.

§ 6. *Bi-partisan election boards.*—Here is a clear constitutional declaration that New York is under party government. Perhaps it is no more under party govern-

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ment now than it was a century ago, but in the early days the fact of the division of the people into opposing political parties was not directly recognized in the statutes. The history of that time shows, however, that political lines were closely drawn, but it was only after years of experience in carrying on the government that the idea began to prevail that election machinery should be so constructed as to insure equal party advantage, so far as concerned the conduct and result of an election, or, at least, that one party should not, by the use of election machinery, obtain any advantage over its opponents. This idea, supposed to have reached a state of practical perfection in recent statutes, which will be hereafter cited, and especially in election laws passed from 1890 to 1894, was, in the latter year, crystallized in the Constitution by the adoption of this section. I think the student of our institutions cannot fail to be interested in a sketch of the chronological development of the policy of bi-partisan representation in the conduct of elections, and while it will not be practicable to cite every statute which bears directly or indirectly on this question, I shall try to analyze briefly the laws which show most clearly the different and advancing stages by which the state adopted the principle of equal representation in election boards by the two principal political parties.

By the first election law (1778, chap. 16) the supervisor, town clerk, and assessors were *ex officio* inspectors of election, except in Albany, where the town clerk was not to be an inspector, and except also in New York, where three inspectors in each ward were appointed by the mayor, recorder, aldermen, assistants, or common council men, assessors, and vestrymen, convened for that purpose. In towns the number of inspectors varied according to the number of assessors, which could not be less than three nor more than nine.

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By the act of 1787 (chap. 15) the foregoing provision relating to inspectors of elections in towns was continued, and in Albany and New York three inspectors were to be chosen for each ward by the mayor, recorder, aldermen, assistants, or common council men, by a plurality of voices. It will be observed that vestrymen were omitted from the appointing board. The act of 1801 (chap. 61) made no change as to towns, but in the cities of New York, Albany, and Schenectady, three inspectors were to be appointed in each ward by the common council. These provisions were continued by the Revised Laws of 1813, by the act of 1822 (chap. 250), which was passed immediately after the adoption of the Constitution of 1821, and also by the Revised Statutes of 1828; except that, in the city of Troy, the inspectors were to be appointed by the common council, and in the village of Brooklyn by the trustees. Under the statutes already cited the inspectors in cities were to be residents of the several wards for which they were chosen, and in Brooklyn they were required to be residents of the election district in which they were to act.

In 1840 a statute was passed (chap. 78) which provided for three commissioners, to be appointed by the governor and senate, who were charged with the duty of dividing the city of New York into election districts, each to be wholly within a ward, and contain, as near as may be, 500 voters. The common council was required to appoint three inspectors for each district. The act also provided for the election thereafter of three commissioners of registry in each ward and three inspectors of election in each district, but no person could vote for more than two candidates for each office. The three persons receiving the highest number of votes were to be declared elected. This is the first statute which authorized the election of inspectors directly by the people,

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and it is the earliest statute I have found which provided for minority representation in election boards. The statute did not specifically require the election of inspectors of different political faith, but it afforded an opportunity for their election by the provision that an elector could not vote for more than two.

In 1841 the plan of dividing New York into election districts was, by chapter 301, extended to other cities, which were to be divided into election districts by the common council. Here we find the first distinct reference to political parties in the provision that three inspectors in each district should be appointed by the common council, and that "one inspector in each board shall belong to a different political party from the other two." After the first appointment three inspectors, residents of the district, were to be annually elected by the people, but no person could vote for more than two.

The plan of electing inspectors in New York was apparently not satisfactory, for the legislature, in 1842, by chapter 56, repealed that part of the act of 1840, chapter 78, which provided for the election of inspectors, and it was made the duty of the common council annually to appoint three inspectors of election for each election district. The statute made no provision for dividing the inspectors between political parties. At the same session, 1842, a general election law was passed (chap. 130) which, for the first time, provided for the election of inspectors in towns. This act provided for the division of towns into election districts, and for the election of three inspectors for each district, but no person could vote for more than two. The two persons receiving the highest number of votes were to be declared elected, and the officers presiding at the election were required to appoint another inspector from the two persons receiving the next highest number of votes. It will be observed

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that under this rule the third inspector might have been fourth in the order of pluralities, but I think that under this law, which continued in force many years, it was the general, if not universal, custom to appoint the minority candidate who received the highest number of votes. In cities the common council was required to appoint three residents of each district to be inspectors of election therein, but there was no obligation to appoint members of different political parties.

In 1859 (chap. 380) the appointment of inspectors in New York was transferred from the common council to the board of supervisors. The inspectors were required to be residents and voters in the district for which they were appointed. In 1860, by chapter 246, the board of supervisors of New York was required to choose by ballot three inspectors of election and three district canvassers for each election district. Such inspectors and canvassers were required to be voters in their respective wards, but were not required to be residents of the election district. This statute also prescribed for the first time the qualification that each inspector and canvasser must be able to read and write. Another change was made in 1865, by chapter 740, which required the board of commissioners of metropolitan police in New York and the board of supervisors of the city of Brooklyn, respectively, to appoint four persons to act as inspectors of registry and of elections in each election district. Each person so appointed was required to be a voter in the assembly district, liable to jury duty in courts of record, and able to read, write, and speak the English language understandingly; but he was not required to be a resident of the election district for which he was appointed. In 1866 (chap. 812) the act of 1865 was amended by requiring the appointing board in New York to examine inspectors in relation to their qualifications before issuing a

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certificate of appointment. Inspectors in New York and Brooklyn might reside in any part of the city, and need not be subject to jury duty in courts of record.

In 1870, by chapter 77, the common council of Albany was required to choose by ballot three inspectors of election in each district, but no member of the council could vote for more than two, and the three persons receiving the highest number of votes were to be appointed. After the first appointment, inspectors in Albany were to be elected by the people by districts in the manner provided by the general law, under which no person could vote for more than two. In 1883 (chap. 298) election inspectors in Albany were required to be appointed by the police commissioners. Three inspectors were to be appointed in each election district, two of whom were to represent the majority and one the minority party in the state or city, and the minority inspector was to be appointed by the minority members of the police board. These provisions were substantially continued by an act passed in 1887, chapter 242, but which modified the act of 1883 by requiring the political status of appointees to be determined according to local issues at the last election of mayor, thus eliminating party divisions on state issues. The method of appointment was again changed in 1892 by chapter 171, which provided for a board of election commissioners, to be composed of the mayor, the president of the common council, and another person "to be selected by those members of the common council of different political faith and opinions on state issues from those of the mayor." These commissioners were to appoint three inspectors in each election district, two of whom were to be of different political faith from their associate, and the minority inspectors were to be appointed by the minority election commissioners.

In 1870 (chap. 138) the experiment of electing in-

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spectors by the people was again tried in New York according to the method which had been established by the general election law of 1842. Each voter was entitled to vote for two persons for the office of inspector, and the two receiving the highest number of votes were to be declared elected, and the mayor was then required to appoint, as a third inspector, the person who received the next highest number of votes, "provided, however, that the person thus appointed shall be from the party in general political opposition on state issues to the party electing the two successful candidates for inspectors of election." Such inspectors elected or appointed must have been residents and voters of the ward, but were not required to be residents of the election district for which they were chosen.

At the same session, by chapter 396, provision was made for the appointment and election of inspectors in Brooklyn. For the purpose of conducting the election for judges of the court of appeals, three inspectors for each district in Brooklyn were to be appointed by the city members of the board of supervisors, "but the political party in the minority of said supervisors shall have the power to name at least one of said inspectors for each election district." Afterwards inspectors were to be elected by the people for each district, but no person could vote for more than two, and the two persons receiving the highest number of votes were to be declared elected; the common council was required to appoint the third inspector from the two persons receiving the next highest number of votes.

The Buffalo charter, revised at the same session (chap. 519), provided for the election of three inspectors in each district, but no person could vote for more than two.

In 1871 (chap. 572) the foregoing New York act of

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1870 was amended by providing for the appointment by the mayor of two poll clerks for each district, "one of whom shall be from the party in general political opposition on state issues to the party electing the two successful candidates for inspectors of election in the election district."

In 1872, by chapter 575, a "board of elections" was provided for the city of Brooklyn, to be composed of three members, one of whom was to be appointed by the mayor and the other two by the comptroller and auditor, "not more than two of whom shall be of the same political party." The member of the board appointed by the mayor was authorized to appoint one person to act as register and inspector, and one canvasser, and the two members of the board appointed by the auditor and comptroller were authorized to appoint two such registers and inspectors and two such canvassers. Such registers and canvassers were required to be residents and voters in the ward containing the election district for which they were appointed; they were also required to be taxpayers, and able to read and write the English language.

At the same session, by chapter 675, the board of police of New York was required to appoint all inspectors and poll clerks. Four inspectors were to be appointed for each district, "two of whom, on state issues, shall be of different political faith and opinions from their associates, and those appointed to represent the party in political minority on state issues in the said city and county to be named solely by such commissioner or such of the commissioners of police in said board as are the representatives of such political minority." The educational qualifications required by previous statutes were continued, and it was specifically provided that an inspector need not be a resident in the election district for which he was appointed. Poll clerks were also required to be appointed from different political parties. These pro-

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visions were substantially continued by the New York consolidation act of 1882, chapter 410.

In 1874, by chapter 117, inspectors of election in Long Island City were to be elected by the people by wards, substantially in the manner already provided in several other cases; namely, each elector was entitled to vote for two inspectors, and the mayor was required to appoint a third inspector, and minority representation was assured by the provision that "two of the inspectors in each ward shall be of the political party in the majority, and the other inspector of the political party in the minority in each ward."

The policy of party representation at elections was further extended by the act to promote honest elections, passed in 1880 (chap. 56), which authorized "every political organization which shall present a candidate for the suffrages of the voters of any election district" to appoint two watchers, who were entitled to be present at and during each election in the room occupied by the inspectors until the votes were canvassed and the returns signed. At the same session the legislature, by chapter 142, provided for registration in towns in counties containing 300,000 inhabitants. In such towns the supervisor, town clerk, and justices of the peace, who constituted a board for this purpose, were authorized to appoint a board of registry, consisting of five persons, to be "selected from the two opposing political parties which cast the greatest number of votes at the then next preceding general election, and not more than three of them shall be at any time taken from or belong to either of said political parties."

For the purpose of equalizing party representation in the board of elections in Brooklyn, the legislature of 1880 (chap. 528) authorized the city comptroller to appoint an additional member of such board, to be of the

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same political faith as the then minority member thereof. At the expiration of the term of office of the board of elections as constituted after such additional appointment, the mayor was to appoint the board, to be composed of four members, "not more than two of whom shall be of the same political party." This board of elections was required to appoint from different political parties two registers, four inspectors, and four canvassers, one half of whom were to be appointed by the members of the board of elections representing the minority party in the city. In 1884, by chapter 519, several Brooklyn statutes already cited were revised, and the method of appointing election officers was substantially continued as prescribed in the act of 1880. The Brooklyn revised charter of 1888 and also the act of 1891, chapter 236, continued this policy of bi-partisan representation.

In 1881, by chapter 47, the principle of the Brooklyn act of 1880 was applied to Troy, under which the police commissioners were to appoint equally from the two principal political parties in the state four inspectors and four poll clerks in each election district, who were to be appointed "on the nomination of the police commissioners, respectively, representing the political party from which said inspectors of election and poll clerks shall be appointed." This act was repealed in 1892 by chapter 10, which required the board of police commissioners in Troy to appoint three inspectors in each district, not more than two of whom should belong to the same political party. Two poll clerks were also to be appointed in each district from the two principal political parties. Chapter 163, passed at the same session, provided for dividing poll clerks between political parties by authorizing the elected inspectors to appoint one clerk and the appointed inspector to appoint another.

In 1887 a new policy concerning the appointment of

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inspectors was inaugurated in the city of New York by chapter 490, which amended the consolidation act on this subject by providing for an additional inspector in certain contingencies. The original statute required the inspectors to be divided equally between the two principal political parties into which the people were divided on state issues. The new act recognized the possibility that, in a local contest, other issues might be presented which would attract more voters than the minority could muster on state issues; therefore it was provided that "if, at the next preceding municipal election, any political party or organization shall have cast for its candidates for any office as many as 50,000 votes or upwards, and the said board of police shall determine that said political party or organization is not entitled to the appointment of at least one of such inspectors in each election district to represent it, then it shall be the duty of said board of police to appoint for each election district in said city and county one further and additional inspector of election, of the political faith or opinion of said political party, and an enrolled member of the organization thereof; and the inspectors of election appointed to represent said political party or organization shall be appointed solely by such commissioner or such of the commissioners of police in said board as the chairman and secretary of the organization of said political party in said city shall designate." This recognized the right of a strong local organization to be represented in the election boards, but attention is especially called to the last clause, which authorized the chairman and secretary of the local organization to name the commissioner or commissioners who should make the appointment of an inspector to represent such organization. We shall see that this rule was carried further by later statutes, finally developing into the provision authorizing political organizations to nominate their own representatives in election boards. This is the

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earliest statute I have found which introduced the idea of control by party committees of the appointment of election officers, where such officers are not chosen directly by the people.

An act passed in 1890 to promote independence of voters (chap. 262) provided for increasing from three inspectors to five, the number then authorized in districts where all or a part of the inspectors were elected by the people, thus giving the majority party three inspectors and the minority party two. The act also provided for ballot clerks, to be equally divided between the same parties. In 1891 (chap. 7) the number of inspectors was again reduced to three in districts included in the act of 1890, and by chapter 296, two ballot clerks were to be appointed in each district in the state, to represent the two principal political parties.

Then came the general election law of 1892, chapter 680, and the town law, chapter 569, which, considered together for this purpose, provided for three inspectors in each election district, except as otherwise provided for particular cities, who, with the poll clerks and ballot clerks, were to represent the two principal parties. In 1893 the law in relation to the appointment of inspectors in the city of New York was again changed. The number of inspectors was reduced to three, who, with two poll clerks and two ballot clerks in each district, were to be divided between the two principal political parties. Appointments were to be made by the board of police, and the policy of party control suggested in the foregoing act of 1887 was here fully established by the provision which authorized the chairman of the executive committee of the general committee of each party entitled to representation in the election boards to "file with the said board of police a list of persons qualified to be such inspectors, poll clerks, and ballot clerks," and appoint-

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ments were to be made from such list, and if such lists were not filed the board of police was required to appoint election officers from the respective political parties, according to their right of representation.

Several statutes on this subject were passed in 1894. Chapter 28 provided for the election of three inspectors in each election district in Rochester, according to the rule established by the general election law of 1842 and the town law of 1892; chapter 61 omitted the president of the common council of Albany from the board of election commissioners, continuing the mayor and the commissioner appointed by members of the common council of the opposite political faith from the mayor. These commissioners were to appoint four inspectors in each election district, to be equally divided between the two principal political parties into which the people of the state were divided on local issues, one half of the inspectors, poll clerks, and ballot clerks were to be appointed by the mayor, and the other half by the other commissioner. Chapter 348 was intended to perfect the policy of bi-partisan representation in election boards by requiring four inspectors in each election district in the state, to be equally divided between the two principal political parties on state and national issues. Brooklyn was not included in this statute, apparently for the reason that the city already had bi-partisan election boards. The act of 1894 also provided for four inspectors in each district in New York, and in all cities except New York and Brooklyn appointments of inspectors, poll clerks, and ballot clerks were to be made by the mayor on the nomination of political committees. Another section of the act continued this provision in relation to New York, but I do not find any statute which then authorized political committees to nominate election officers in Brooklyn. In that city the representatives of the political parties in

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the board of elections controlled the appointments from their respective parties. This secured political control of appointments and was substantially equivalent to nominations by committees. This statute of 1894, and the Brooklyn acts already cited, provided complete bi-partisan representation in local election boards in all parts of the state, and the parties represented had entire control of appointments.

This brings us to the Convention of 1894. When this Convention met on the 8th of May the foregoing act of 1894 had already been approved by the Governor, but it did not take effect until the following first of July. By that statute and acts relating to Brooklyn the legislature established the policy of political control of local election boards by the two principal parties. For more than half a century the people outside the cities, and, occasionally, in some of the cities, had been familiar with the rule of choosing members of different political parties as election officers; and the foregoing sketch shows the fluctuation of opinion on this question in several cities, with an evident intention to provide for representation in election boards by more than one party. The rule in some cases, that one officer or a board of officers, constituting the appointing power, might appoint the representatives of a party to which they did not belong, was objectionable, for it did not give the minority party any voice in selecting its own representatives. Hence the rule authorizing nominations by party committees. Whether this policy would have been permanent if left to the discretion of the legislature, we cannot know, for in the Convention Mr. Lauterbach seized the opportunity to intrench in the Constitution itself the important principle that under a government by party, election machinery should be under the control of the two principal political parties. On the

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26th of June, a few days before the act of 1894 took effect, he introduced the following amendment:

"Boards of election officers shall be elected or appointed, as the legislature by law may direct, provided that each class shall consist of an even number, one half of which shall belong to and represent the political party which, at the last preceding gubernatorial election, cast the greatest number of votes for governor in the state, and one half shall belong to and represent the political party which, at such election, cast the next greatest number of votes for governor of the state."

The amendment was reported favorably by the committee on suffrage. Mr. Lauterbach, in opening the debate, said it seemed to be generally conceded that, to secure purity of elections, "bi-partisan boards of election should be provided for, and the four officers connected with the arrangement of the machinery of elections should represent the parties that control the majority and next to the majority of the votes of the state." He said that under the existing law there was no absolute necessity for the amendment, but it was not certain that the law could be secured "in perpetuity to the people of the state" without an amendment. Mr. Lauterbach offered the following substitute for the original section:

"All laws creating, regulating, or affecting boards or officers charged with the duty of registering votes, or of distributing ballots, or of receiving, recording, or counting votes, at elections, shall secure equal representation of the two political parties which, at the general election preceding that for which such boards or officers are to serve, cast the highest and next highest number of votes. All such boards and officers shall be appointed or elected in such manner and upon the nomination of such representatives of said parties

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respectively as the legislature may direct. The existing laws on this subject shall continue until the legislature shall otherwise provide."

It will be observed that the original amendment applied to "boards of elections," and in this form the section would probably have required equal party representation in boards of elections or similar boards, such as those described, which existed at different times in New York, Brooklyn, Troy, and Albany. In explaining the substitute, Mr. Lauterbach said: "The words 'officers shall distribute ballots' might, perhaps, be held to apply to police superintendents and police commissioners. There is no such intent, and in order to cover that objection, which also appears to be valid, I propose that there be added after the words 'distributing ballots' in the third line, 'at the polls,' so that it shall only apply to the official distributer of ballots who has been designated as a ballot clerk, and who officiates at the polls." Here was a clear expression of an intention not to apply the bi-partisan principle to central boards of elections or police boards or commissioners or other officers who might be charged with the duty of appointing local election officers, and that it was intended to apply only to officers in election districts. This intention seems to have been further manifested by an amendment afterwards adopted at the suggestion of Mr. Bowers, adding the words "to voters" before the words "at the polls."

Mr. Dean objected "to the double-headed board of registration. . . . It is fatal to our system of government, because it leaves no place where the matter can be decided in the event of a discussion and difference of opinion as between parties. There is absolutely no power of decision. This is probably the first time in the history of a constitutional government, when a dignified

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and deliberative body, brought together for the purpose of formulating the fundamental law of the state, has recognized political parties and political committees as the foundation of a system of government." Mr. Dickey thought the section ought not to apply to town meetings, and Mr. Lincoln proposed to except also charter elections in villages. Later, Mr. Lauterbach included both these suggestions in an amendment which was at first stated in the following form: "This section shall not apply to town elections in the several towns of this state in which the electors therein shall vote at one polling place, or to village elections." On Mr. Abbott's motion the exception was applied to all town meetings. Mr. M. E. Lewis suggested that the amendment be stated in the following form: "This section shall not apply to elections for town or village officers." Mr. Carter thought the exception should not exclude elections on village appropriations. Mr. Moore thought the exception should apply to "town meetings" specifically, instead of using the word "elections." At Mr. Cookinham's suggestion the section, by general consent, was made inapplicable to "town meetings or village elections." The Convention declined to approve an amendment offered by Mr. Dean, that the section should not apply "to the election of school district officers." Mr. Bowers moved to strike out the following clause: "All such boards and officers shall be appointed or elected in such manner and upon the nomination of such representatives of said parties respectively as the legislature may direct." He thought it was unnecessary, "as it is purely legislation." He also suggested that under it the legislature might appoint the inspectors for the whole state by name. He thought this subject should be left to the legislature. Mr. Lauterbach thought the clause was necessary for the purpose of protecting the right of a political party to control the appointment of its own rep-

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resentatives on election boards. The motion was rejected. The Convention also rejected a motion by Mr. Roche to apply the exception concerning village elections only to villages of less than 5,000 inhabitants. The section was adopted by a vote of 123 to 9, and will be found in its perfected form in the Constitution of 1894.

The section fixed the right of party representation according to the result at the last general election. This excludes the consideration of political organization, which, in a locality, may poll a larger vote than either of the two principal parties if judged by a state election, and it has happened several times since 1894 that candidates for the office of inspector on a third party ticket have received a larger number of votes than candidates representing one or the other of the two principal parties; but under the operation of the section these third party candidates were not entitled to the office, because such third party was not one of the two principal parties at the last general election.

SUGGESTIONS NOT ADOPTED.

Compulsory voting.—This subject was brought to the attention of the Convention by two amendments, one introduced by Mr. Lauterbach on the 23d of May, by which every person possessing the qualifications prescribed by § 1 was declared to be "entitled, and it shall be his duty, to vote," etc., following the language of the section; and the other was introduced the next day by Mr. Holls in the following form:

"Laws shall be made for ascertaining, by proper proofs, the citizens whose duty it shall be to exercise the right of suffrage hereby established, and providing suitable penalties for the neglect of such duty. Such penalties may include disfranchisement for such period of time as the law may provide."

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This subject was referred to by Governor Morgan in his message of 1860, where, after reviewing the provisions of the registry law of 1859, he said that "every effort should be made to encourage, and perhaps compel, the legal voters to exercise the right of voting, which is at once a privilege and a duty." He thought that for this purpose it might be desirable to make election day a general holiday. This subject was suggested, but not seriously considered, in the Convention of 1867, where Solomon Townsend proposed to amend the suffrage article by requiring the legislature to provide a "penalty for an omission—without proper excuse—to vote." In the Commission of 1872 the committee on suffrage reported adversely an amendment introduced by Mr. Bradley, providing that "the neglect of any qualified elector to vote at any general or municipal election, unless prevented by necessary absence or physical disability, shall be a misdemeanor, punishable by a fine of not less than $10, to be used for the support of the poor." Governor Hill, in 1889, said it seemed reasonably clear that it was "the duty of every citizen to take an interest in public affairs, and to exercise the elective franchise at each general election," and he recommended to the legislature the consideration of the subject of making that duty compulsory by statute. In 1891, following a repetition of the Governor's recommendation, a bill to provide for compulsory voting was introduced in the legislature, but was not passed.

The Holls amendment was reported favorably by the committee on suffrage, and was discussed to some extent in the committee of the whole. Mr. Holls made an interesting and elaborate speech in its favor, urging, among other things, that the elective franchise is not a mere right or privilege, but a trust which it is the duty of the citizen to administer, not alone for his own benefit, but

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for the benefit of the entire community. He referred to several instances of compulsory voting in the early history of the country, prior to the Revolution, and thought the plan was practicable even under more complicated modern conditions. He said that one important result of the policy of compulsory voting would be its tendency to inculcate "by law the idea of duty towards the country and the state." Mr. Smith opposed the amendment, asserting that the right to vote "being the right of a man to defend himself, he must be left to exercise that right of self-defense when he thinks his interests are in jeopardy." Mr. Blake also thought the franchise was "to be exercised or not according to the good will and pleasure of the citizen." The amendment was once considered in committee of the whole, which reported progress and asked leave to sit again. Leave was granted but it was evident that the proposed policy of compulsory voting was not favorably received by the majority of the Convention, for it was not considered again.

Miscellaneous.—Mr. Jesse Johnson introduced an amendment providing for an election commission to be composed of five persons, to be appointed immediately after the 1st of January next succeeding a gubernatorial election. Three of the commissioners were to be appointed by the Governor, and two by the person receiving the next highest number of votes for governor at the last election. It was made the duty of this commission to investigate and report "on all violations of any statute or constitutional provision relating to elections or any abuse of power or privileges relating to the elective franchise," and for this purpose the commission was vested with the power of a judicial tribunal. Mr. Lauterbach introduced an amendment requiring legislation limiting the expenses of candidates, party organizations, or committees, relating to statements of such expenses, and

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guaranteeing fairness in primary elections and conventions. Mr. Goodelle proposed to fix the qualifications for office as follows: "No person shall be elected or appointed or be eligible to any office in this state—civil or military—who is not a citizen of the United States, and who shall not have resided in this state one year next preceding the election or appointment." Mr. Durfee introduced an amendment requiring the legislature to provide for the recognition, registration of names, and numbering of political parties after each election, such numbers to be given in the order of the relative number of votes cast by them, providing for ballots or other suitable means of voting at public expense, reserving to the elector the right to change his ballot by the substitution of other candidates, and incorporating the essential features of recent ballot reform legislation. The committee on judiciary proposed an amendment requiring the legislature to provide for regulating the use of money by candidates for public office to promote either their nomination or election, and prohibiting corporations from using any money or property for political purposes.

Art. III. The Legislature.

A. Legislative Organization.

The Convention of 1894, following the custom of its predecessors, appointed two committees for the consideration of this article,—one on legislative organization, and the other on the powers and duties of the legislature. The first was commonly known as the apportionment committee, and its labors were limited practically to a consideration of the number and distribution of members of the legislature in both branches, Many delegates considered this the most important subject before the Con-

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vention, and in a general governmental sense it must be deemed the most important, because it involved the structure of the lawmaking power. I have already noted the fact that President Choate in his opening address placed reapportionment first in the list of subjects which would require the attention of the Convention. The subject was doubtless given this precedence both on account of its intrinsic importance, and also because of the unsatisfactory results of the apportionment of 1892, and the evident necessity of formulating rules which would prevent a repetition of inequitable apportionments, and insure proportionate representation of population according to strict mathematical computation, so far as consistent with other rules of limitation based on specified territorial divisions. It was an opportune occasion for a fresh study of the subject of apportionment in its various aspects, including a re-examination of the principles of the distribution of legislative representation. The results of this study appear, in part, in the speeches delivered during the debate in the Convention on the apportionment amendments, and also in the amendments themselves, which, while preserving the cardinal principles of representation which had prevailed since the beginning of our legislative history, prescribed rules deemed more clear and equitable for the application of those principles in future apportionments.

In recounting the proceedings of former Conventions, and also of the legislature in relation to apportionment, I have given, perhaps with sufficient detail, the policies adopted and proposed, and, so far as practicable, the reasons on which they were founded. In addition to the history of the subject already given, it seems proper to preface the work of the Convention of 1894 with a sketch of the various apportionments which have been made since the establishment of the first Colonial Assembly.

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This will enable the reader to compare the subject at different periods, and to observe the fluctuations of representation, and the difficulties which have beset the proper arrangement and distribution of legislative power. Tables have, accordingly, been prepared, which place before the reader in a compact form a statement of representative population and apportionments at different periods in all parts of the colony or state. Each Constitutional Convention which has framed and proposed a revised constitution has made a senate apportionment. The Convention of 1801 reconstructed the senate, and in part rearranged the district representation, but without making a full apportionment. It should not be overlooked, however, that the only convention apportionments of the assembly were made by the Convention of 1777 and the Convention of 1894. All the other Conventions imposed on the legislature the duty of making assembly apportionments. The first Convention, 1777, which erected the state government, obviously was required to apportion representation in the legislative department. The Convention of 1894 reconstructed the legislative department, increasing representation, and prescribing new rules of distribution. The Convention, for reasons which will hereafter more fully appear, intending to put the new plan into immediate operation, based on the enumeration of 1892, did not think it necessary to transfer to the legislature the duty of making the first apportionment, but deemed itself justified in first applying the new rules formulated for the guidance of future legislatures. The long period between the first and second convention apportionments of the assembly—from 1777 to 1894—necessarily requires a study of legislative apportionments and incidental legislative proceedings relating to this subject. This leads to the remark that our legislative history has not yet been written. The

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materials for such a history are all about us, and are abundant, rich, and readily accessible. It is to be hoped that some student will soon apply his industry, patient discrimination, and historical imagination in preparing the story of our institutions from the point of view of the lawmaking department. My studies in connection with the present work have discovered numerous interesting and significant events and incidents which, separated from their surroundings, sometimes unrelated and uncongenial, and set in order in their true relation to the course of history, would greatly augment the pride which every loyal citizen now feels in the development of the state, and also in the conspicuous part taken by New York in the affairs of the nation, and her potent, and often controlling, influence exerted in shaping national policies. Many of these incidents arising from legislative action, so far as they relate to the Constitution, appear in this work. Many others of equal importance, but not especially pertinent here, are necessarily omitted; but they afford convincing evidence that laws are of incalculable value in studying the purposes and tendencies of a state, and the customs, hopes, and aspirations of a free people.

Assembly Apportionments during the Colonial Period.

In the chapter on the colonial period I have given an account of the agitation for representative government which resulted in the first assembly of 1683, followed by the revived assembly of 1691, since which time a legislature composed of representatives chosen by the people has almost without interruption constituted an indispensable part of the machinery of government in New York. The Duke of York, then proprietor of the colony, yielding to popular demand, issued instructions to Governor Dongan on the 27th of January, 1683, directing him to

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convene a general assembly of not more than eighteen representatives to be chosen by the freeholders of the colony. The instructions were silent concerning the method of apportioning the representatives among the different parts of the colony. This subject was, therefore, left to the discretion of the governor and council, who, on the 13th of September, 1683, ordered an election of representatives to meet in assembly on the 17th of October following. The colony had not then been divided into counties. Sheriffs were appointed for different localities, with special instructions to appoint a day for holding an election of representatives. This first apportionment combined the ideas of territory and population which have since controlled the distribution of members of the legislature. The different parts of the colony were allotted representatives as follows: New York, 4; each of the three ridings on Long Island, 2; Esopus (Kingston), 2; Albany and Rensselaer, 2; Staten Island, 1; Schenectady and dependencies, 1; Pemaquid and dependencies, 1; Martin's (Martha's) Vineyard, Nantucket, Elizabeth Island, and all other islands from the eastward of Long Island to Nantucket Shoals, 1. The elections were to be conducted by the sheriffs. In the compact communities the representatives were elected by direct vote of the freeholders; but in the more scattered sections the representatives were chosen by a convention of freeholders. Thus, for the Martha's Vineyard group of islands, the sheriff was required to "appoint the freeholders of the said places to meet and choose one out of each island to meet in the most convenient place to choose one representative for themselves in the general assembly." It was also provided that the "freeholders of every town on Long Island choose a committee of four to meet at the sessions house of every riding, then to choose two to be their representatives to appear

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for them at the general assembly." Fisher's, Silvester's, and Gardiner's islands were to elect with the east riding of Long Island, and were, therefore, entitled to be represented in the east riding convention.

Thus was constituted the first assembly of New York. Seventeen of the representatives met on the day appointed, October 17, 1683, and formally inaugurated representative government. As stated in a former chapter, the records of this assembly have not been preserved, so we do not know the names of those who attended, nor the name of the absentee. It seems hardly probable, however, that the representative from Pemaquid could have been present at the opening of the assembly. A sheriff was appointed for Pemaquid, and a writ of election issued to him on the 13th of September,—thirty-four days before the time fixed for the meeting of the assembly. This time seems too short, under conditions then existing, to communicate with that far-away settlement, on the coast of what is now the state of Maine, between the St. Croix and Kennebec rivers, hold an election, and permit a representative to reach New York on the 17th of October. This assembly as its first legislative act, October 30, passed the famous "Charter of Libertyes," which appears at length in another part of this work. Two days later, November 1, it passed an act dividing the colony into twelve counties, as follows: Albany, Cornwall (Pemaquid), Dukes (Martha's Vineyard group), Dutchess, Kings, New York, Orange, Queens, Richmond, Suffolk, Ulster, and Westchester. This was the beginning of county organization in New York. This law was apparently either anticipated by the Charter of Libertyes, or the two bills were considered together, for the charter contains an apportionment of representatives in assembly including the counties above named, except Dutchess and Orange. This apportionment, however, did not in all respects follow county organizations.

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The first apportionment, as already stated, was by executive order. The apportionment provided by the Charter of Libertyes was the first legislative apportionment of New York. It allotted representation among the counties as follows: Albany, 2; "and for Schenectady within said county, 1;" Cornwall, 2; Dukes, 2; Kings, 2; New York, 4; Queens, 2; Richmond, 2; Suffolk, 2; Ulster, 2; Westchester, 2,—23.

I have already shown in a former chapter that this charter never actually became a law, for the reason that the Duke of York, while holding it for consideration, though he had actually signed but had not promulgated it, was unexpectedly called to the throne by the death of Charles II., and that as King, having come into a new relation to the colony, he did not think it proper to approve this law. The apportionment, therefore, stands only as a declaration of policy by the assembly; and it was ignored, at least in form, in subsequent executive orders directing the issue of writs of election of representatives in the general assembly. It should be observed, in connection with this proposed apportionment, that it was not intended to be conclusive on the Duke, for, after allotting the representatives as already indicated, the charter provided for "as many more as His Royal Highness shall think fit to establish." If the Duke had approved the charter, he would have been bound by the apportionment, which would thereby have been given a constitutional effect, reserving, however, to the Duke the right to authorize additional representation in the assembly.

The restored assembly of 1691 re-enacted, in substance, the Charter of Liberties, including the apportionment of members of assembly. The apportionment of 1691 was the same as that of 1683, except that Schenectady and

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Cornwall were omitted, and Renslaerwick, with one member, was added, the total membership of the assembly being fixed at 21. This act also reserved the right to elect as many more representatives "as Their Majesties (William and Mary), their heires and successors, shall think fitt to establish." Another apportionment act was passed in 1702, which, I think, was the last colonial legislative declaration on this subject. This act apportioned 25 members of assembly as follows: New York, 6; "for the city and county of Albany, 5,—that is to say, for the town of Schenectady, Nistigionne, and Half Moon in the said county, 1, for the town of Kinderhook and all that part of the county that lyes to the southward of Renslaerwick in the said county, 1, for the manor of Renslaerwick in the said county, 1, and 2 for the city of Albany aforesaid;" Suffolk, 2; Queens, 2; Kings, 2; Westchester, 2; Ulster, 2; Richmond, 2; and Orange, 2. It will be observed, however, by the assembly schedules hereafter given, that this apportionment was not followed in all cases; from which schedules it seems that the number of members specified in the act was not included in the writs of election issued from time to time, or that the people did not avail themselves of the opportunity to elect to the assembly the number of representatives allowed by the statute.

The absolute right of the people to a representative assembly was not at any time conceded by the Crown. The grant of such an assembly was deemed an act of grace, and not of right; and, while the commissions issued to the colonial governors did usually, if not always, contain directions for an assembly to be chosen by the people, the number was not fixed, and the home government, by grants of land or the erection of distinct communities, exercised the power to provide for representation of these communities in the assembly without any

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statute on that subject. An illustration of this policy appears in the case of Cortlandt manor, in the county of Westchester, which was created by royal grant June 17, 1697, with the provision that after twenty years from the date of the grant, the manor should be entitled to a representative in the assembly. This period expired June 17, 1717, but no representative was chosen until seventeen years afterwards. The council records show that on the 17th of May, 1734, Philip Cortlandt presented a petition to the governor and council for an order directing an election of a representative by the manor. This petition was granted on the 22d of May, and soon afterwards Philip Verplanck was elected to represent the manor in the assembly. The right of the manor to a representative and Mr. Verplanck's title to the seat were duly considered by the assembly, and on the 22d of June, 1734, an act was passed ratifying and confirming his election, and admitting him to the assembly. The assembly, thus augmented, had been chosen in 1728, and continued in existence until 1737, when Cortlandt manor was included in the regular writs of election. So, the manor of Renslaerwick in 1691, and the manor of Livingston in 1716, separately elected representatives; and afterwards these two manors were almost continuously represented in the assembly during the remainder of the colonial period. During the incumbency of Governor Fletcher, 1692–97, a charter was granted by him to the borough or town of Westchester, which was said to contain at that time only twenty houses. Among other important privileges conferred by the charter, the borough was entitled to a representative in the assembly. In 1699 the validity of this charter was questioned by the Lords of Trade, who thought that in granting it Governor Fletcher had exceeded his instructions. Notwithstanding this doubt, the borough or town continued

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to be represented in the assembly, and in 1774 was declared by Governor Tryon to be entitled to choose one member.

It thus appears that during the colonial period there were three, and in some cases four, territorial units of representation, namely, the county, the manor, the borough, and mixed settlements, like Schenectady and its dependencies, in which the township was recognized as a representative unit. Judge Peckham, in *Baird* v. *Kings County*, 138 N. Y. 95, 20 L. R. A. 81, 33 N. E. 827, speaking of the New England plan of town representation in the legislature, said that policy had "never been adopted or practised in this state." This remark is accurate if confined strictly to the state, but, as already shown, colonial legislative representation was of a mixed character; while the county was the general unit of representation, it was not the universal unit.

In the early part of the colonial period the tenure of office of representatives in the assembly was quite uncertain. They were not at first chosen for any fixed time, and during the entire colonial period an assembly was deemed subject to be dissolved by order of the governor and council. A dissolution of the assembly resulted from a transfer of the Crown, and sometimes, but not always, the demise of a colonial governor was deemed to have the same effect. It quite often happened, also, that a governor, on coming to the province, began his official career by dissolving the existing assembly and calling a new one. In addition to these reasons for dissolving an assembly, its refusal or manifest unwillingness to enact financial legislation and make appropriations requested by the governor was deemed a sufficient reason for terminating its existence. Several instances of this kind occurred during the colonial period, two of which are marked exceptions to the general rule of frequent

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assemblies. Thus, in 1726, Governor Burnett dissolved the assembly because it had not "granted His Majesty's revenue in so ample and honorable manner as they had done formerly;" and also stated, as an incidental reason for the dissolution, that the assembly "had subsisted during the term of eleven years." Governor Hunter's second commission (March 17, 1715), issued on the accession of George I., was deemed to terminate the existing assembly, and an order was accordingly made by the Governor and council on the 11th of August, 1715, directing a proclamation dissolving the assembly. A new assembly was called, but did not meet at once. After several prorogations, beginning October 13, 1715, this assembly met and organized on the 5th of June, 1716. It was dissolved August 10, 1726,—eleven years after the dissolution of the previous assembly.

This stands as the Long Assembly of the colonial period, and the term of its existence was only a little shorter than that during which the famous Long Parliament of England was an actual lawmaking body. That Parliament began on the 3d of November, 1640, and it was dispersed by Oliver Cromwell on the 20th of April, 1653. Cromwell treated the dispersal as a complete dissolution, and ordered the selection of other representative bodies, which performed parliamentary functions; but the validity of the dissolution was denied by friends of the Parliament, who asserted that it could not be dissolved except with its own consent. After the lapse of a few months following Cromwell's death, which occurred on the 3d of September, 1658, the Long Parliament was recalled by the army, and reassembled the latter part of April, 1659. It continued in session until the 13th of October, 1659, when it was again dispersed, this time by the army itself. But events were rapidly hastening toward the restoration of Charles II., and the Parliament

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met again on the 26th of December, 1659. It continued in session until the 16th of March, 1660, when it was dissolved by its own vote. This date marks the final dissolution of the Long Parliament. Deducting the time between its dispersal by Cromwell, in April, 1653, and its recall in April, 1659,—six years,—it was in existence as an actual lawmaking body a little more than thirteen years; but its entire history covered nearly twenty years.

Another assembly, which convened in July, 1728, continued in existence until May 3, 1737,—almost nine years. This assembly was also dissolved for its unwillingness to comply with the governor's wishes concerning money bills.

I have already noted in the chapter on the colonial period the general similarity between the legislative system in the colony and the English parliamentary system. The assembly often asserted the powers possessed by the House of Commons, and often manifested its independence by refusing to pass appropriation bills desired by the executive. The governor and council, in their executive capacity, claimed the prerogative exercised by the English Crown, and the assembly was subject to prorogation, as well as dissolution, by executive order. Besides, as already stated, the assembly was not self-perpetuating, and it did not, and could not, construct machinery which would, by its own operation, provide for electing a new assembly, or for filling vacancies. These were subjects within the special and exclusive jurisdiction of the governor and council, who issued proclamations proroguing or dissolving assemblies, and also writs for the election of new ones. There were frequent collisions between the governor and the assembly, in which the assembly might, and usually did, suffer defeat; for the governor could, if he chose, terminate the controversy by dissolving the assembly. This did not always end the

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trouble, for the people often obstinately re-elected to the assembly members who were objectionable to the governor. The records show frequent dissolutions of the assembly, and consequent elections of new assemblies, during the first half of the colonial period. The controversy between the King and Parliament in the early history of that body was often renewed in a modified form in the colony of New York. The governor sometimes desired money bills to provide taxation and appropriations through a term of years. The assembly insisted on annual money bills, believing that in this way taxation and public expenditures could be kept under more watchful control. I have already given the history of the clause inserted in the Constitution of 1846, and since continued, by which appropriations ceased to be available after two years. This embodies the principle for which the colonial statesmen so stoutly contended.

The colonial fathers evidently did not believe in biennial sessions, for in the preamble to an act passed in 1737 (chap. 650), providing for frequent elections and meetings of the assembly, it was declared that "the frequent Electing of the Members that Constitute the General Assembly of this Colony and meeting of the Same in General Assembly not only tends very much to preserve the liberty and safety of the inhabitants of this Colony, but also tends to create a good and lasting harmony and agreement, necessary for the honor and Interest of his Majesty and the Safety and well-being of his Subjects here, to subsist betwixt the governors for the time being and the inhabitants of this colony; and, to establish and preserve the same upon the most solid, firm, and lasting foundation." The act required an annual meeting of the assembly in the city of New York; and, if an assembly were dissolved, that writs of election for a new assembly should be issued within six months after the

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dissolution. The same statute, following an early act of Parliament, fixed the terms of members of assembly at three years. In 1743, by an act which, in the preamble, recited that the parliamentary term in England had been fixed at seven years by a statute passed in 1715, in the first year of the reign of George I., "of glorious memory;" and that the colonial legislature "conceive it their duty, as it is their inclination, to copy after so wise an example," the term of the existing assembly, and of all subsequent assemblies, was limited to seven years; and this term continued during the remainder of the colonial period.

I have already shown that the continuous colonial legislative period began in 1691. The assembly of that year may fairly be deemed a revival of the first assembly, which sat in 1683, 1684, and 1685, but which had been terminated by the Duke of York's accession to the throne of England. Leisler's assembly in 1690, though irregular, should also be included in the legislative history of the colony. The first apportionment, as already stated, was made by the governor and council on the 13th of September, 1683. The last authoritative statement of colonial representation in the assembly that I have found was made by Governor Tryon in a report concerning the affairs of the province of New York, dated June 11, 1774. No colonial assembly was afterwards chosen. We are searching for foundations, and the Governor's statement is so important, not only in relation to the assembly, but in relation to other features of colonial government, that it may profitably be quoted here in full. The Governor, replying to the question, "What is the constitution of the government?" said: "By the Grants of this Province and other Territories to the Duke of York in 166$\frac{3}{4}$ and 1674, the powers of Government were vested in him, and were

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accordingly exercised by his Governors until he ascended the Throne, when his Rights as Proprietor merged in his Crown, and the Province ceased to be a charter Government. From that time it has been a Royal Government, and in its constitution nearly resembles that of Great Britain and the other Royal Governments in America. The Governor is appointed by the King during his Royal Will and pleasure by Letters pattent under the Great Seal of Great Britain with very ample Powers. He has a Council in Imitation of his Majesty's Privy Council. This Board when full consists of Twelve Members who are also appointed by the Crown during Will and Pleasure; any three of whom make a Quorum. The Province enjoys a Legislative Body, which consists of the Governor as the King's Representative; The Council in place of the House of Lords, and the Representatives of the People, who are chosen as in England; Of these the City of New York sends four. All the other Counties (except the New Counties of Charlotte and Gloucester as yet not represented, send Two—The Borough of Westchester, The Township of Schenectady and the three manors of Rensselaerwyck, Livingston and Cortlandt each send one: in the whole forming a Body of Thirty-one Representatives."

The counties entitled to representation at that time were Albany, Cumberland, Dutchess, Kings, New York, Orange, Queens, Richmond, Suffolk, Tryon, Ulster, and Westchester.

It has been difficult to ascertain definitely in all cases the apportionment of members of assembly during the colonial period. The records are often imperfect, and sometimes wholly wanting. During the first ten years of the legislative period, beginning with 1683, there were changes in the boundaries of the province, some parts of it having passed to other jurisdictions. The history of

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these separations is not specially important here; but, among other things, it appears that on the 19th of September, 1686, James II., formerly the Duke of York, by royal order attached Pemaquid to the government of New England, and this settlement thereupon ceased to be a part of the province of New York. Pemaquid was also included in the charter granted to Massachusetts in October, 1691, by which charter Martha's Vineyard and the adjacent islands were restored to that province. These islands had originally been a part of the Massachusetts grant in 1644, but were included in the grant to the Duke of York in 1664. The charter of 1691 went into operation May 14, 1692, a few weeks after Governor Sloughter and his council had issued writs of election for a new assembly in New York, which met on the 9th of April. Dukes county (including Martha's Vineyard) appears in the New York apportionment act of 1691 passed May 13; but I do not find that the county, or that group of islands, had any representative in that assembly. The limits of the original grant to the Duke of York were, by these separations, somewhat restricted; but the remaining territory was more compact, and its government doubtless more conveniently administered. The Lords of Trade, in a communication to the King concerning the American colonies, dated September 8, 1721, say that "the government of New York, in which Long Island is included, is bounded on the southwest by the province of New Jersey, northwest by Delaware river, north by the French settlements on Canada river, east by the colony of Connecticut, and south by the sea."

From various sources of information which have been carefully examined and compared, the following schedules have been compiled, which I think show with substantial accuracy the representatives to which different parts of the colony were entitled at the times stated.

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Colonial Assembly Apportionments.

	1683	1685	1691	1692	1693	1694	1695	1698	1699	1701	1702	1705	1708	1709	1710	1711
Albany	....	....	2	2	2	2	2	2	3	3	3	3	3	3	3	3
Albany & Rensselaerwyck	2	2	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Cortlandt Manor	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Cumberland	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Esopus	2	2	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Kings	....	....	2	2	2	2	2	2	....	2	2	2	2	2	2	2
Livingston Manor	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Long Isl., 3 Ridings, 2 ea.	6	6	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Martha's Vineyard Group	1	1	....	....	....	....	....	....	....	....	....	....	....	....	....	....
New York	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
Orange	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1	1
Orange & Kings	....	....	....	....	....	....	....	....	3	....	....	....	....	....	....	....
Pemaquid	1	1	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Queens	....	....	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Rensselaerwyck Manor	....	....	1	1	1	1	1	1	1	1	2	1	1	1	1	1
Richmond	....	....	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Schenectady	1	1	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Staten Island	1	1	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Suffolk	....	....	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Tryon	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Ulster	....	....	....	....	....	....	2	2	2	2	2	2	2	2	2	2
Ulster & Dutchess	....	....	2	2	2	2	....	....	....	....	....	....	....	....	....	....
Westchester County	....	....	1	1	2	2	2	2	2	2	2	2	2	2	2	2
Westchester Borough	....	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1
Total	18	18	18	18	19	19	19	19	21	21	23	22	22	22	22	22

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	1713	1715	1716	1726	1727	1728 M'ch	1728 July	1737	1739	1743	1745	1748	1750	1752	1759	1761	1768	1769
Albany	3	3	3	2	2	2	3	2	2	2	2	2	2	2	2	2	2	2
Alb'y & Rens'l'r	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Cortlandt Man'r	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1
Cumberland	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	2
Dutchess	1	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Esopus	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Kings	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Livingst'n M'n'r	....	....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Long Island, 3 Ridings, 2 ea.	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Martha's Viney'd Group	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
New York	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
Orange	1	1	2	2	2	2	3	2	2	2	2	2	2	2	2	2	2	2
Orange & Kings	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Pemaquid	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Queens	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Rensselaerwyck	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Richmond	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Schenectady	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Staten Island	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Suffolk	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Tryon	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	2
Ulster	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
" & Dutchess	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Westches'r C'ty	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Westches'r B'gh	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	1	1	1
Total	23	24	26	26	26	26	30	27	27	27	27	27	27	27	27	27	27	31

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Assembly Apportionments under the First Constitution, 1777.

The Constitution of 1777 fixed the minimum number of members of assembly at 70, and authorized a possible increase to 300. They were to be chosen annually by counties, and the Constitution fixed the first apportionment which appears in the following table. A census of assembly electors (owners of freeholds worth £20, and tenants paying an annual rent of 40s.) was to be taken as soon as practicable after seven years from the termination of the Revolutionary War. "And if, on such census, it shall appear that the number of representatives in assembly from said counties is not justly proportioned to the number of electors in the said counties respectively, that the legislature do adjust and apportion the same by that rule." A census was thereafter to be taken once in seven years, "and if it shall thereupon appear that the number of electors in any county shall have increased or diminished one or more seventieth parts of the whole number of electors, which on the said first census shall be found in this state, the number of representatives for such county shall be increased or diminished accordingly,—that is to say, one representative for every seventieth part as aforesaid." The Constitution, § 12, authorized the legislature to erect new counties. The first census under the Constitution was taken in 1790. A census was also taken in 1795, 1801, 1807, and 1814. The following table contains a statement of the number of assembly electors in the several counties as shown by each census.

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Assembly electors, including senate electors, and also owners of real property worth £20, and lessees paying 40s. annual rent.

	1790	1795	1801	1807	1814
Albany	13,119	6,014	3,981	4,944	5,305
Allegany	.....	.....	.....	344	619
Broome	.....	.....	.....	892	1,324
Cayuga	.....	.....	1,872	3,707	5,526
Chautauqua	.....	.....	.....	.....	640
Chenango	.....	.....	3,076	2,744	3,752
Clinton	.....	624	761	1,358	1,283
Columbia	5,568	3,560	3,809	4,525	5,317
Cortland	.....	.....	.....	.....	1,540
Delaware	.....	.....	1,529	2,459	2,810
Dutchess	6,308	6,013	6,077	6,752	6,685
Essex	.....	.....	654	1,241	1,197
Franklin	.....	.....	.....	.....	452
Genesee	.....	.....	.....	1,973	3,985
Greene	.....	.....	1,747	2,105	2,861
Herkimer	.....	4,161	2,405	2,974	3,438
Jefferson	.....	.....	.....	1,988	2,787
Kings	881	607	742	997	2,225
Lewis	.....	.....	.....	1,096	1,184
Madison	.....	.....	.....	2,987	4,012
Montgomery	5,131	3,379	4,253	5,216	6,437
New York	5,091	7,102	8,044	12,354	13,921
Niagara	.....	.....	.....	.....	1,451
Oneida	.....	.....	3,763	5,508	6,847
Onondaga	.....	1,325	1,661	3,692	4,678
Ontario	.....	1,258	2,861	4,889	6,096
Orange	2,674	2,098	3,465	3,815	7,478
Otsego	.....	3,237	3,674	4,860	6,402
Putnam	.....	.....	.....	.....	1,499
Queens	3,109	2,232	2,375	2,707	3,210
Rensselaer	.....	3,590	4,284	4,728	5,924
Richmond	741	488	586	711	824
Rockland	.....	.....	824	984	1,146
St. Lawrence	.....	.....	.....	860	1,254
Saratoga	.....	3,270	3,564	4,426	5,120
Schenectady	.....	.....	.....	.....	1,768
Schoharie	.....	.....	1,770	2,397	4,938
Seneca	.....	.....	.....	1,604	3,270
Steuben	.....	.....	335	920	1,831
Suffolk	3,580	2,609	2,933	3,259	3,709
Sullivan	.....	.....	.....	.....	1,047
Tioga	.....	1,165	1,165	1,089	1,589
Ulster	4,591	4,429	3,000	3,450	4,189
Warren	.....	.....	.....	.....	1,321
Washington	2,372	3,370	4,848	5,038	5,487
Westchester	4,303	3,243	3,680	3,659	4,290
Total	57,468	63,774	85,844	120,277	162,968

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The first apportionment act was passed in 1791, and reapportioned seventy members on the basis of the whole number of assembly electors shown by the census of 1790. According to the Constitution this apportionment was to be the standard by which future apportionments were to be made. The census of 1790 showed a representative population (assembly electors) of 57,468. This number divided by 70, the number of members of assembly, made a ratio of 821. By the Constitution counties were thereafter entitled to an increase of members equal to the number obtained by dividing the increase in the number of assembly electors in the county since 1790 by 821, and the number was to be reduced by the same rule if the census showed a decrease of electors. This rule was not strictly applied by the legislature in making apportionments. The erection of a large number of additional counties under the first Constitution, and the necessary inclusion of these counties in the septennial census and the consequent apportionments, presented problems which seemed to afford a reasonable excuse for a deviation from the strict constitutional rule, and to justify the legislature in making apportionments according to existing conditions, and partly from practical considerations, without resort to a strict arithmetical application of the standard fixed by the census of 1790. The Constitution seems to have prohibited any increase in the assembly as a result of the first census, but the 70 members allowed by the Constitution were to be reapportioned on the basis of that census, which, as already stated, was to be the standard in making future apportionments. The census of 1795 apparently did not authorize an increase of more than 8 members, but the apportionment act of 1796 provided for 38 additional members, making 108 in all. The legislature evidently intended to provide for several counties recently erected, and also to provide for ex-

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pansion and changes incident to the rapidly increasing population; and the apportionment of 1796 seems clearly to have been made without any attempt at a mathematical adherence to the constitutional rule. This number was continued by the apportionment of 1801, which, however, was made before another census had been taken. By implication, the Constitution seems to have restricted the legislature to one apportionment after each census; but the legislature adopted a more liberal construction. The Council of Revision seems to have taken the same view, for, according to the record of its proceedings, the apportionment act of 1801—the second act based on the same census—was, on the report of Judge Radcliff, recommended by the council without objection.

By the apportionment act of 1796 (chap. 19), the members therein specified were to be chosen "until another census shall be taken by the order of the legislature, or other provision be made in the premises;" thus apparently intending to reserve the power to make another apportionment without another census. This reservation was continued in the apportionment acts of 1802 and 1808, but no second apportionment on the same census was made after 1801. The legislature of 1801 made such an apportionment, and afterwards at the same session directed a new census. This census was made the basis of the apportionment of 1802. The legislature of 1801, besides passing an apportionment act, and directing a new census, passed a law recommending a constitutional convention to consider two questions, one relating to the powers of the Council of Appointment, and the other relating to the structure of the legislature. I have given the history of that convention in a previous chapter, but, for the purpose of elucidating the subject now under consideration, it is important to recall the amendment

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recommended, so far as it related to the structure of the assembly. The amendment made two important changes in the previous constitutional provision relating to the assembly. The original provision fixed the minimum number of members at 70, and provided for a possible increase to 300. The amendment fixed the number at 100, and provided that the number should be increased "at the rate of 2 members for every year until the whole number shall amount to 150." The legislature of 1802 was required to apportion the 100 members among the several counties as nearly as may be according to the number of electors shown by the census of 1801. It will be observed that this abrogated the rule in the original provision by which subsequent distributions of representation were to be fixed according to the standard of 1790. The apportionment of 1802 and subsequent apportionments were to be made according to the number of electors as shown by each census. The next census was taken in 1807, and the next apportionment was made in 1808. Six years had then elapsed since the amendment took effect (July 1, 1802), and the legislature accordingly added 12 members,—2 for each year,—making the number 112. Applying the same rule, the legislature of 1815 added 14 members, making the number 126. Under the Constitution another census should have been taken in 1821, and another apportionment would have been made in 1822, by which, according to the rule fixed by the amendment, 14 members would have been added, making an assembly of 140; and, if the provision had not been changed, the maximum of 150 would have been reached in 1826. The legislature of 1821 did not direct a new census, but provided for a convention to revise the Constitution. That convention, instead of continuing the increase of the assembly

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to 150, fixed the number at 128, at which number it remained until increased to 150 by the Constitution of 1894, under which the first election of 150 members was held in November, 1895. The amendment of 1801 also authorized, but did not require, the legislature to allow one member of assembly to each county theretofore erected. This did not entitle any county absolutely to one member, and the legislature was at liberty to arrange representation according to its discretion in counties thereafter erected.

Under the first Constitution a county was not deemed absolutely entitled to a separate representation in the assembly. Thus, in 1791 Clinton county was required to elect with Washington. In 1801 Essex was required to vote with Clinton, and Steuben with Ontario. In 1802 Ontario and Genesee were combined and allotted 3 members, and Oneida and St. Lawrence were combined with 4 members. This was equivalent to an assembly district composed of two counties. In 1808 Clinton and Franklin were together entitled to 1 member, and Steuben and Allegany were also, together, allotted 1 member. In 1815 there were five combinations of this kind, namely, Ulster and Sullivan with 4 members, Washington and Warren with 5 members, Clinton and Franklin with 1 member, Allegany and Steuben with 2 members, and Chautauqua, Cattaraugus, and Niagara with 2 members.

The first Constitution distinctly recognized the county as the only unit of assembly representation; and provision was made for increasing or diminishing the number of representatives from a county according to the changes from time to time in the number of electors. In the chapter on the first Constitution I have noted the action of the Convention of 1777 in rejecting, by a tie vote of 18 to 18, Mr. Jay's motion that Richmond

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county should always have one representative in the assembly, and in also rejecting a motion by Mr. Morris that "no county shall be left without at least one representative." While the first Convention thus refused to guarantee one member to Richmond, the legislature has always allotted one member to it, although under the first Constitution the county was much below the ratio. By the apportionment act of 1791, Richmond was the only county below the ratio, as shown by the census, which was given one member, and Ontario was given one member without any census returns. Richmond, with one member, was also the only county below the ratio in 1796. Schoharie was given one without any census returns. In 1802 Clinton, Essex, Kings, Richmond, Rockland, and Steuben, with one member each, were below the ratio. In 1808 Broome, Kings, Richmond, Rockland, and St. Lawrence, with one member each, were below the ratio. Niagara was given one member without any census returns. In 1814 Essex, Lewis, Richmond, Rockland, and St. Lawrence, with one member each, were below the ratio. It will be observed that the legislature did not apply a uniform rule in relation to counties below the ratio, in some cases allotting members to such counties, and in other cases combining them with others to constitute larger assembly districts, thus producing greater equality of representation. If representation be based only on representative population, either electors or citizens, without regard to territorial units except to preserve county lines, the plan of assembly apportionment authorized by the first Constitution and the amendment of 1801, and applied by the legislature, would clearly produce more equitable results than the arbitrary rule fixed by the Constitution of 1821, which absolutely required an

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allotment of one member to each county theretofore organized, and prohibited the erection of a new county unless its population should entitle it to a member. If the combinations of counties for the purpose of equalizing representation could have been continued in later apportionments, many wide deviations from equality, inevitable under the county unit plan, might have been avoided.

Assembly Apportionments under Second Constitution, 1821.

In the Convention of 1821 the committee on legislative department reported in favor of continuing the assembly according to the plan established by the Convention of 1801, which, as already stated, would soon have resulted in an assembly of 150 members. Erastus Root proposed an assembly of 144 members, to be elected annually, and apportioned according to the number of electors. Each county was to have 1 member, and no county more than 6; "and no new county shall be erected unless it contain 1/144 part of the electors of this state." Commenting on the proposition to give each county one member, Mr. Root thought that no "two counties should be united for electioneering purposes," and he would put it out of the power of a political party in the legislature "to sever counties, or to unite them for political purposes, when their interests for civil purposes are not at all connected." This was a revival of the policy proposed by Mr. Jay and Mr. Morris in the Convention of 1777. Mr. Root's plan to make a county the unit of assembly representation was adopted by the Convention. Mr. Root had proposed a senate of 36 members, which, with the proposed assembly of 144, would have established the two houses in the proportion of 4 to 1. The Convention, on motion of Colonel Young, adopted

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the proportion without increasing the number of senators, which remained at 32, and accordingly established the assembly at four times this number, or 128. The Convention at first provided that the change of 128 members should take effect after the state census of 1825, but this postponement was finally omitted, and the number was established at 128 to take effect on the adoption of the Constitution. On motion of Henry Wheaton, the provision was adopted that the members of assembly "shall be apportioned among the several counties of the state as nearly as may be according to the number of inhabitants in each county, excluding aliens, paupers, and persons of color not taxed, which apportionment shall remain unaltered until the return of another census: Provided that every county heretofore established and separately organized shall be entitled to one member." On Mr. Russell's motion a clause was added that "in future no new county shall be erected, unless its population shall entitle it to a member." The Convention, by a vote of 27 to 76, rejected a proposition that the Convention itself apportion the members of assembly. No state census having been taken in 1821, a provision was adopted requiring the next legislature to apportion the assembly according to the Federal census of 1820. The legislature of 1822, by chapter 209, apportioned the new assembly of 128 members among the several counties according to the schedule included in the table at the end of this section.

The first enumeration under the second Constitution was taken in 1825, and the legislature of 1826 made the first apportionment under the new constitutional rule of representation based on inhabitants, excluding aliens, paupers, and persons of color not taxed. A joint committee of the senate and assembly, appointed to consider

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this subject, reported that, after allowing one member to the counties below the ratio, the number of members to which each county was entitled was ascertained by dividing the representative population by the ratio (11,966), which left 20 members, who were apportioned among the twenty counties having the largest fractions. The committee say of the rule adopted that it "is believed to be more just and equitable than any other that could be acted upon, as well as most consonant to the spirit of the Constitution;" and which it was believed had been "sanctioned by former legislatures when acting upon this subject." Assembly apportionments were also made by the legislature in 1836 and 1846.

The Convention of 1846 did not change the structure of the assembly, and the apportionment of 1846, made before the new Constitution was adopted, was permitted to stand until after the enumeration of 1855. Apportionments were made by the legislature in 1857, 1866, 1879, and 1892.

The following tables show the representative population and assembly apportionments under the second and third Constitutions:

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Table showing representative population under the second and third Constitutions. The representative population under the second Constitution included all the inhabitants, except aliens, paupers, and persons of color not taxed. The representative population under the original Constitution of 1846 was the same, except that paupers were not excluded, and, by the amendment of 1874, the exclusion was limited to aliens only.

	1820	1825	1835	1845	1855	1865	1875	1892
Albany	36,524	40,291	54,855	68,582	82,811	104,216	138,413	156,748
Allegany	9,271	17,995	34,915	39,603	40,788	39,220	41,114	42,644
Broome	14,204	13,700	19,603	25,266	34,228	36,541	46,835	61,591
Cattaraugus	4,084	8,614	24,778	29,767	36,823	41,208	45,771	59,700
Cayuga	38,447	42,094	48,276	48,338	48,488	52,197	58,493	60,579
Chautauqua	12,555	20,355	44,345	45,983	48,540	54,837	60,866	73,884
Chemung	.....	.....	.....	23,282	25,002	29,486	40,423	45,845
Chenango	31,007	33,875	39,336	39,429	38,826	37,689	39,394	37,121
Clinton	11,011	12,895	18,609	27,115	33,985	39,535	46,152	44,518
Columbia	36,383	35,802	38,558	39,786	39,583	42,041	46,318	43,990
Cortland	16,435	20,178	23,972	24,861	23,858	24,260	24,173	27,955
Delaware	25,891	28,754	33,513	36,116	38,066	40,738	41,526	44,985
Dutchess	43,910	43,630	47,484	51,276	52,324	58,872	72,531	75,078
Erie	.....	23,338	51,907	68,671	94,470	134,364	180,703	304,713
Essex	12,591	15,578	19,988	23,451	25,497	26,245	32,368	32,092
Franklin	4,244	7,513	11,438	16,596	21,734	25,302	28,757	37,025
Fulton	.....	.....	.....	18,210	21,620	23,823	29,294	37,285
Genesee	39,788	40,633	57,468	28,140	26,910	28,816	30,595	32,328
Greene	22,144	25,127	28,415	30,271	29,070	30,412	31,927	30,843
Hamilton	.....	.....	.....	1,814	2,371	2,614	3,323	4,784

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Herkimer	30,432	32,439	34,887	36,366	34,531	36,980	40,304	45,769
Jefferson	32,025	40,311	51,162	62,635	59,904	61,453	62,401	66,245
Kings	9,118	12,264	26,508	61,611	147,293	253,718	464,711	868,983
Lewis	9,960	11,438	15,401	19,125	22,454	26,418	28,195	29,414
Livingston	18,253	23,485	30,363	32,270	33,480	35,230	37,183	35,448
Madison	31,949	35,107	39,841	40,021	40,217	40,718	41,156	41,674
Monroe	26,553	37,765	55,008	63,586	73,225	92,346	121,641	181,230
Montgomery	36,548	39,792	46,399	28,425	27,808	30,202	34,112	43,831
New York	107,430	132,706	225,644	295,662	386,325	565,649	909,390	1,423,984
Niagara and Erie	22,838	.....	.....	.....	.....	.....	.....	.....
Niagara	.....	12,704	25,338	31,445	37,638	43,242	47,691	59,161
Oneida	49,675	55,234	72,685	78,696	88,834	96,213	108,540	117,205
Onondaga	41,122	47,717	59,073	67,419	72,745	85,595	106,889	142,058
Ontario	60,616	36,705	39,576	40,717	37,569	40,240	45,403	46,974
Orange	38,944	38,864	41,524	48,741	51,058	62,464	82,259	93,271
Orleans	.....	14,385	22,488	25,443	24,579	26,527	28,719	28,732
Oswego	12,211	17,646	36,670	46,801	61,811	70,395	75,799	69,023
Otsego	44,284	47,285	49,582	49,761	47,937	47,398	49,034	49,862
Putnam	11,014	11,548	11,292	12,842	12,606	13,574	14,811	13,325
Queens	18,260	17,766	21,196	26,837	35,110	49,869	78,047	123,974
Rensselaer	38,884	42,431	52,275	58,671	63,596	79,339	99,965	121,679
Richmond	5,520	5,369	6,974	12,413	15,824	23,798	32,139	46,592
Rockland	8,246	7,616	8,950	12,269	15,651	18,367	25,029	31,325
Saratoga	35,167	35,293	36,503	39,843	43,092	46,587	53,127	54,909
Schenectady	12,126	12,266	15,032	15,800	16,449	19,793	22,096	31,630
Schoharie	22,533	25,284	27,836	31,885	32,254	32,688	32,272	28,668

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Table showing representative population under the second and third Constitutions.—*Continued.*

	1820	1825	1835	1845	1855	1865	1875	1892
Schuyler	.....	.....	.....	.....	18,150	18,075	18,844	16,326
Seneca	23,318	19,845	22,103	24,243	23,128	26,340	26,331	25,928
St. Lawrence	15,025	26,032	39,479	58,626	64,976	72,648	78,082	80,679
Steuben	21,658	28,816	40,828	50,771	59,099	63,728	72,718	81,400
Suffolk	22,429	21,609	25,880	31,820	36,218	39,723	50,340	58,872
Sullivan	8,559	10,023	13,403	18,099	25,787	31,417	34,424	31,438
Tioga	16,776	19,782	33,629	22,039	25,850	27,548	31,316	29,365
Tompkins	20,589	32,654	37,500	37,512	30,198	30,016	32,321	33,159
Ulster	28,709	29,880	37,780	45,629	57,330	69,814	86,113	85,392
Warren	9,327	10,760	11,860	14,711	17,989	20,164	22,807	28,157
Washington	38,194	38,188	37,984	39,078	39,416	42,664	46,374	45,144
Wayne	.....	26,266	36,944	41,194	41,813	45,156	47,626	46,538
Westchester	30,525	30,908	36,014	43,231	62,357	87,276	94,532	129,224
Wyoming	.....	.....	.....	26,288	29,293	28,778	29,632	30,253
Yates	.....	13,093	19,470	20,466	18,828	18,740	19,300	20,316
Total	1,317,632	1,531,648	2,042,541	2,399,548	2,797,416	3,393,306	4,370,649	5,790,865
Ratio	10,294	11,966	15,957	18,746	21,855	26,510	34,145	45,241

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Table showing apportionments of members under the first three Constitutions, and the apportionment made by the Convention of 1894. The ratios appear in the preceding table of representative population.

	1777	1790	1796	1801	1802	1808	1814	1822	1826	1836	1846	1857	1866	1878	1892	1894
Albany	10	7	10	8	6	6	4	3	3	3	4	4	4	4	4	4
Allegany	....	....	....	....	....	....	....	1	1	2	2	2	1	1	1	1
Broome	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1	2
Cattaraugus, Chautauqua, Niagara	....	....	....	....	....	....	2	....	....	....	....	....	....	....	....	....
Cattaraugus	....	....	....	....	....	....	....	1	1	2	2	2	2	2	1	2
Cayuga	....	....	....	1	3	3	4	4	4	3	3	2	2	2	1	2
Charlotte	4	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Chautauqua	....	....	....	....	....	....	....	1	2	3	2	2	2	2	1	2
Chemung	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1	1
Chenango	....	....	....	2	4	3	3	3	3	3	2	2	1	1	1	1
Clinton	....	....	1	....	1	....	....	1	1	1	1	1	1	1	1	1
Clinton and Essex	....	....	....	1	....	....	....	....	....	....	....	....	....	....	....	....
Clinton and Franklin	....	....	....	....	....	1	1	....	....	....	....	....	....	....	....	....
Columbia	....	6	6	6	4	4	4	3	3	3	2	2	2	1	1	1
Cortland	....	....	....	....	....	....	1	2	2	2	1	1	1	1	1	1
Cumberland	3	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Delaware	....	....	....	2	2	2	2	2	2	2	2	2	2	1	1	1
Dutchess	7	7	10	10	7	6	5	4	4	3	3	2	2	2	2	2
Erie	....	....	....	....	....	....	....	1	2	3	4	4	5	5	6	8
Essex	....	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1
Franklin	....	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1
Fulton and Hamilton	....	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1
Genesee	....	....	....	....	....	1	3	4	3	4	2	1	1	1	1	1

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Table showing apportionment of members under the first three Constitutions, and the apportionment made by the Convention of 1894. The ratios appear in the preceding table of representative population.—*Continued.*

	1777	1790	1796	1801	1802	1808	1814	1822	1826	1836	1846	1857	1866	1878	1892	1894
Gloucester	2	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Greene	....	....	....	2	2	2	2	2	2	2	2	1	1	1	1	1
Herkimer	....	....	7	3	3	3	3	3	3	2	2	2	1	1	1	1
Jefferson	....	....	....	....	....	2	2	3	3	3	3	3	2	2	1	2
Kings	2	1	1	1	1	1	1	1	1	2	3	7	9	12	18	21
Lewis	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1	1
Livingston	....	....	....	....	....	....	....	2	2	2	2	2	1	1	1	1
Madison	....	....	....	....	....	3	3	3	3	3	2	2	2	1	1	1
Monroe	....	....	....	....	....	....	....	3	3	3	3	3	3	3	3	4
Montgomery	....	7	6	6	5	5	5	....	....	....	2	1	1	1	1	1
Montgomery, Hamilton	....	....	....	....	....	....	....	4	3	3	....	....	....	....	....	....
New York	9	7	13	13	9	11	11	10	11	13	16	17	21	24	30	35
Niagara	....	....	....	....	....	1	....	1	1	2	2	2	2	2	1	2
Oneida	....	....	....	3	....	5	5	5	5	4	4	4	4	3	2	3
Oneida and St. Lawrence	....	....	....	....	4	....	....	....	....	....	....	....	....	....	....	....
Onondaga	....	....	2	1	2	3	4	4	4	4	4	3	3	3	3	4
Ontario	....	1	2	....	....	5	7	6	3	3	2	2	2	1	1	1
Ontario and Steuben	....	....	....	2	....	....	....	....	....	....	....	....	....	....	....	....
Ontario and Genesee	....	....	....	....	3	....	....	....	....	....	....	....	....	....	....	....
Orange	4	3	3	5	4	4	4	4	3	3	3	2	2	2	2	2
Orleans	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1	1
Oswego	....	....	....	....	....	....	....	1	1	2	2	3	3	2	1	2
Otsego	....	....	5	4	4	4	5	4	4	3	3	2	2	2	1	1
Putnam	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1

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Queens	4	3	4	4	3	3	3	2	1	1	1	2	2	2	3	3	3	3	3	3
Rensselaer	....	5	6	6	5	4	5	4	4	3	3	3	3	3	3	3	3	3	3	3
Richmond	2	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Rockland	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
St. Lawrence	....	....	....	....	....	1	1	1	2	2	3	3	3	3	3	3	3	3	3	2
Saratoga	....	4	5	5	4	4	4	3	3	2	2	2	2	2	2	2	2	2	2	1
Schenectady	....	....	....	....	....	....	2	1	1	1	1	1	1	1	1	1	1	1	1	1
Schoharie	....	....	1	1	2	2	3	2	2	2	2	1	1	1	1	1	1	1	1	1
Schuyler	....	....	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1
Seneca	....	....	....	....	....	1	3	2	2	1	1	1	1	1	1	1	1	1	1	1
Steuben	....	....	....	....	1	....	....	2	2	3	3	3	2	2	2	2	2	2	2	2
Steuben and Allegany	....	....	....	....	....	1	2	....	....	....	....	....	....	....	....	....	....	....	....	....
Suffolk	5	4	4	4	3	3	3	2	2	2	2	2	2	1	1	1	1	1	1	2
Sullivan	....	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1	1
Tioga	....	....	2	1	1	1	1	2	2	1	1	1	1	1	1	1	1	1	1	1
Tompkins	....	....	....	....	....	....	....	2	3	2	2	1	1	1	1	1	1	1	1	1
Tryon	6	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Ulster	6	5	8	4	4	4	....	3	2	2	2	3	3	3	2	2	2	2	2	2
Ulster and Sullivan	....	....	....	....	....	....	4	....	....	....	....	....	....	....	....	....	....	....	....	....
Warren	....	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1	1
Washington	....	....	6	6	6	5	....	4	3	2	2	2	2	2	2	2	2	2	2	1
Washington and Clinton	....	4	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Washington and Warren	....	....	....	....	....	....	5	....	....	....	....	....	....	....	....	....	....	....	....	....
Wayne	....	....	....	....	....	....	....	2	2	2	2	2	2	2	2	2	2	2	1	1
Westchester	6	5	5	5	4	3	3	3	3	2	2	3	3	3	3	3	3	3	3	3
Wyoming	....	....	....	....	....	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1
Yates	....	....	....	....	....	....	....	....	1	1	1	1	1	1	1	1	1	1	1	1
	70	70	108	108	100	112	126	128	128	128	128	128	128	128	128	128	128	128	128	150

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Senate Apportionments under the First Constitution.

The senate as such had no colonial history. In form and structure it was the creation of the Convention of 1777. It has been shown, however, in former chapters, that the senate, so far as relates generally to its powers and functions, is the legitimate successor of the executive council which formed a part of the legislative system during the colonial period. That council possessed, not only executive power in conjunction with the governor, but it also possessed and exercised legislative power, and sustained substantially the same relation to the colonial assembly which the state senate sustains to the assembly under the Constitution. The council was an appointive body. The senate was made elective by and from a specified and limited class of voters. For the purpose of representation, the first Constitution, by § 12, divided the state into 4 great districts, as follows:

Southern district.—New York, Suffolk, Westchester, Kings, Queens, and Richmond,—6 counties with 9 senators.

Middle district.—Dutchess, Ulster, and Orange,—3 counties with 6 senators.

Western district.—Albany and Tryon,—2 counties with 6 senators. Columbia county (taken from Albany) was erected in 1786, and included in the western district; Tryon was changed to Montgomery in 1784. Ontario (taken from Montgomery) was erected in 1789.

Eastern district.—Charlotte, Cumberland, and Gloucester,—3 counties with 3 senators. Charlotte county was changed to Washington in 1784. The counties of Cumberland and Gloucester afterwards became a part of Vermont. Clinton county, comprising a part of the former county of Charlotte, was erected in 1788, and was included in the eastern district.

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The apportionment of senate districts by the Convention of 1777 was probably somewhat arbitrary, for I do not find that the Convention was in possession of any reliable information showing the number of senate electors as defined by the Constitution, namely, owners of freeholds worth £100 above encumbrances. The number of such electors was apparently estimated by the Convention at 24,000, as appears from an amendment offered in the Convention, and noted in the chapter on the first Constitution. According to the first census, taken in 1790, this estimate of 24,000 was too large. That census, taken thirteen years after the Convention, showed that there were in the state, in 1790, 19,369 senate electors, but there were no returns from Clinton county, which was erected in 1788. Five years later, 1795, this county showed only 336 senate electors; the number must, therefore, have been small in 1790.

The Constitution required a census to be taken as soon as practicable after seven years from the close of the Revolutionary War; and a new apportionment, based on such census, was then to be made by the legislature, adjusting the proportion as near as may be to the number of qualified freeholders. The Constitution also provided that, "when the number of electors within any of the said districts shall have increased 1/24 part of the whole number of electors which by the said census shall be found to be in this state, an additional senator shall be chosen by the electors of such district." This provision was evidently not applicable to the first census and legislative apportionment, for the reason that in 1777, when the first senate districts were erected, the number of senate electors was not known, and therefore in 1790, when the first census was taken, it could not be determined that a district was, by operation of the foregoing provision, entitled to an increase of senators. I have

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compiled from the returns the number of senate electors shown by each census under the first Constitution. The number by counties appears in the following table. This statement is interesting, not only because it shows the number of electors on which senate apportionments under the first Constitution were based, but it also shows the development of the state as indicated by the number of large owners of land.

	1790	1795	1801	1807	1814
Albany	3,967	3,264	3,248	3,745	3,069
Allegany	.....	.....	.....	66	135
Broome	.....	.....	.....	483	851
Cayuga	.....	.....	1,718	2,236	3,180
Chautauqua	.....	.....	.....	.....	430
Chenango	.....	.....	2,131	1,570	1,961
Clinton	.....	336	444	688	635
Columbia	2,070	2,534	2,582	2,968	3,232
Cortland	.....	.....	.....	.....	1,042
Delaware	.....	.....	984	1,493	1,752
Dutchess	2,413	3,236	3,648	4,191	3,783
Essex	.....	.....	334	517	480
Franklin	.....	.....	.....	.....	183
Genesee	.....	.....	.....	477	745
Greene	.....	.....	1,215	1,400	1,867
Herkimer	.....	2,478	1,397	1,722	2,020
Jefferson	.....	.....	.....	835	1,039
Kings	357	417	491	584	695
Lewis	.....	.....	.....	574	614
Madison	.....	.....	.....	2,220	2,508
Montgomery	1,479	1,985	2,827	3,512	4,166
New York	1,209	2,144	2,332	3,000	3,141
Niagara	.....	.....	.....	.....	418
Oneida	.....	.....	2,353	3,501	4,036
Onondaga	.....	847	1,060	2,331	2,748
Ontario	.....	1,040	1,691	2,806	4,499
Orange	941	1,392	2,271	2,583	2,754
Otsego	.....	2,038	2,390	3,254	3,746
Putnam	.....	.....	.....	.....	857
Queens	1,274	1,372	1,659	1,891	2,065

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Rensselaer	.....	1,960	2,796	3,103	3,426
Richmond	298	335	417	513	584
Rockland	.....	.....	599	766	838
St. Lawrence	.....	.....	.....	616	788
Saratoga	.....	1,978	2,423	2,997	3,275
Schenectady	.....	.....	.....	.....	994
Schoharie	.....	.....	812	1,468	3,244
Seneca	.....	.....	.....	912	1,768
Steuben	.....	.....	181	250	538
Suffolk	1,511	1,907	2,219	2,610	2,898
Sullivan	.....	.....	.....	.....	643
Tioga	.....	552	644	485	702
Ulster	1,610	2,650	1,889	2,313	2,727
Warren	.....	.....	.....	.....	699
Washington	799	1,886	2,839	3,289	3,434
Westchester	1,441	1,987	2,464	2,657	2,773
Total	19,369	36,338	52,058	70,626	87,982

1791. The legislature, by chapter 4, in obedience to the mandate of the Constitution above cited, divided the state into 4 senate districts as follows:

Southern.—New York, Suffolk, Queens, Kings, Richmond, and Westchester,—6 counties with 8 senators and 6,090 senate electors.

Middle.—Dutchess, Ulster, and Orange,—3 counties with 6 senators and 4,964 senate electors.

Western.—Albany, Saratoga (erected in 1791), Montgomery, and Ontario,—4 counties with 5 senators and 5,446 senate electors.

At the same session, and after the passage of the apportionment act, the counties of Otsego, Herkimer, and Tioga (taken from Montgomery county) were erected and included in the western district. Onondaga, taken from Herkimer county, was erected in 1794, and Schoharie, taken from Albany and Otsego, was erected in 1795.

Eastern.—Columbia, Rensselaer (erected in 1791),

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Washington, and Clinton,—4 counties with 5 senators and 2,869 senate electors.

1796. By chapter 19 the state was divided into the following senate districts, based on the census of 1795:

Southern.—New York, Suffolk, Queens, Kings, Richmond, and Westchester,—6 counties with 9 senators and 8,162 senate electors.

Middle.—Dutchess, Ulster, Orange, and Columbia,—4 counties with 12 senators and 9,812 senate electors.

In 1797 Delaware county was erected from parts of Ulster and Otsego counties, and included in the middle district. In 1798 Rockland county was erected from a part of Orange. In 1800 Greene county was erected from parts of Ulster and Albany, and included in the middle district.

Eastern.—Albany, Rensselaer, Saratoga, Washington, and Clinton,—5 counties with 11 senators and 9,424 senate electors.

In 1799 Essex county was erected from a part of Clinton.

Western.—Montgomery, Schoharie, Otsego, Herkimer, Tioga, Onondaga, and Ontario,—7 counties with 11 senators and 8,940 senate electors.

In 1796 Steuben county was erected from a part of Ontario. In 1798 Chenango county was erected from parts of Herkimer and Tioga, and Oneida from a part of Herkimer. Cayuga was erected from Onondaga in 1799.

On the 3d of April, 1801, the legislature passed an act (chapter 125) containing a description of the senate districts, and including the changes and additions above indicated, resulting from the erection of new counties since the apportionment act of 1796. The act of 1801 also assigned to the several districts the same number of senators assigned in 1796.

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1801. Constitutional amendment.—It has been stated in a previous chapter that the Convention of 1801 was required to consider the provisions of the Constitution relating to the number of senators and members of assembly, with power to reduce and limit their number. At that time (1801) the number of senators had increased to 43. On the 27th of October the Convention adopted an amendment reducing the number to 32, and providing that "the seats of the 11 senators composing the first class, whose term of service will expire" July 1, 1802, should not be filled up; and also providing for equalizing representation in other classes. The amendment also provided that 8 senators should be chosen at the next election in such districts as the legislature should direct, for the purpose of apportioning the whole number of senators amongst the 4 great districts, as nearly as may be according to the number of qualified electors as ascertained by the census of 1801, which 8 senators were to form the first class.

The census of 1801 showed that the senate districts, as described by the act of April 3, contained the following number of electors: Southern district, 9,852; middle district, 13,188; eastern district, 12,084; western district, 17,204. In 1802 the legislature, by chapter 81, in compliance with the amendment of 1801, distributed the 8 senators of the first class by assigning 1 to the southern district, 2 to the middle district, and 5 to the western district. The act did not apportion the other three classes. In 1804 the southern district had 6 senators, the middle district, 8, eastern district, 8, and western district, 10.

During the period between the census of 1801 and the census of 1807 the following counties were erected: 1802, Genesee from a part of Ontario; 1802, St. Lawrence from a part of Clinton; 1804, Seneca from a part of Cayuga;

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1805, Lewis and Jefferson from Oneida; 1806, Madison from a part of Chenango; 1806, Allegany from a part of Genesee; 1806, Broome from a part of Tioga. These new counties were all included in the western district.

1808. The legislature did not make a new senate apportionment, but, by chapter 90, provided that 2 senators in the southern district, 1 in the middle, 1 in the eastern, and 5 in the western district should be chosen at the next general election. The districts prescribed in 1801, with the changes already noted, were continued after the census of 1807, as follows:

Southern.—New York, Suffolk, Queens, Kings, Richmond, and Westchester,—6 counties with 5 senators and 11,255 senate electors.

Middle.—Dutchess, Ulster, Orange, Columbia, Delaware, Rockland, and Greene,—7 counties with 7 senators and 15,714 senate electors.

Franklin was erected in 1808 from a part of Clinton, Schenectady and Sullivan in 1809 from parts of Albany and Ulster respectively, Putnam from a part of Dutchess in 1812, and Warren in 1813 from a part of Washington.

Western.—Montgomery, Schoharie, Otsego, Herkimer, Tioga, Onondaga, Ontario, Oneida, Chenango, Cayuga, Steuben, Seneca, Genesee, St. Lawrence, Lewis, Jefferson, Broome, Madison, Allegany,—19 counties with 12 senators and 29,318 senate electors.

In 1808 Niagara, Chautauqua, and Cattaraugus were erected from Genesee, and Cortland was erected from Onondaga county.

1815. By chapter 208 a new senate apportionment was made, based on the census of 1814, as follows:

Southern.—New York, Kings, Queens, Suffolk, Richmond, Westchester, Putnam, Dutchess, and Rockland,—9 counties with 6 senators and 17,634 senate electors.

Middle.—Orange, Ulster, Sullivan, Delaware, Greene, Schoharie, Columbia, Otsego, Chenango, and Albany,—10 counties with 9 senators and 24,995 senate electors.

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Western.—Oneida, Madison, Onondaga, Cayuga, Seneca, Ontario, Niagara, Genesee, Chautauqua, Allegany, Steuben, Tioga, Cortland, Broome and Cattaraugus,—15 counties with 9 senators and 23,600 senate electors.

In 1816 Oswego was erected from a part of Onondaga and Oneida. In 1817 Tompkins was erected from a part of Seneca and Cayuga. In 1821 Monroe and Livingston were erected from a part of Ontario and Genesee, and Erie was erected from a part of Niagara. Five new counties were thus added to the western district.

Eastern.—Rensselaer, Washington, Warren, Essex, Franklin, Clinton, Saratoga, Schenectady, Montgomery, Herkimer, Lewis, Jefferson, and St. Lawrence,—13 counties with 8 senators and 21,753 senate electors.

In 1816 Hamilton county was erected from a part of Montgomery.

This brings us to the close of the sixth census period under the first Constitution, ending in 1821. Another state census of electors was due that year, but it was not taken, probably for the reason that the project of a new constitutional convention was under consideration, and such a convention was chosen under an act passed by the same legislature which regularly would have ordered a new census. When that convention met the state was divided into 4 senate districts, the southern district containing 9 counties, the middle district 10, the eastern district 14, and the western 20, making 53 counties into which the state was divided when the Convention of 1821 began its labors.

Senate Apportionments under the Second Constitution, 1821.

As an item in the development of the state, it is to be regretted that a census of electors was not taken in 1821. The septennial census of senate electors beginning in

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1790, the last of which was taken in 1814, marked a significant growth in the material prosperity of the state, and at the same rate of increase the owners of large freeholds when the second Constitution was framed must have numbered at least 105,000. The number of owners of small freeholds (£20) and tenants paying 40s. annual rent in 1821 may fairly be estimated at 120,000, making 225,000 persons directly interested in the ownership or control of real property, all of whom were voters.

The Convention of 1821 changed the basis of representation in the legislature from electors to inhabitants, excluding aliens, paupers, and persons of color not taxed; and the Convention also increased the number of senate districts from 4 to 8, without changing the number of senators. I have already given in a former chapter a sketch of the work of the Convention resulting in these important changes. The Convention, after thus altering the basis, and also the territorial extent, of senate representation, deemed it proper to reorganize the senate districts, and provide specifically in the Constitution for the first senate apportionment, though the subject might properly have been delegated to the legislature. The Convention, however, which had assumed the responsibility of changing senate representation, took the more reasonable course of making a direct apportionment, so that the people, when asked to ratify the new Constitution, would be informed of the precise boundaries of the new senate districts. The Convention evidently had no desire to make an apportionment which should long continue in force, for the constitutional apportionment which went into effect in 1822 was to be superseded by a legislative apportionment in 1826, based on a census to be taken in 1825.

No state census having been taken since 1814, the Convention decided to use the Federal census of 1820 for the

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purpose of apportionment. The Federal census grouped the inhabitants of the state under classes designated as free whites, 1,332,744; foreigners not naturalized, 15,-101; slaves 10,089; free blacks 29,278; indented servants 701,—making a total of 1,387,913. The Convention deducted the number of aliens from the number of free whites, leaving 1,317,643 as the basis of senate apportionment. This number divided by 8, the number of senate districts, shows a ratio of 164,705 for each district. The Convention established the following senate districts, which were included in the Constitution:

First district.—Suffolk, Queens, Kings, Richmond, New York,—162,758—1,947.

Second district.—Westchester, Putnam, Rockland, Orange, Dutchess, Ulster, and Sullivan,—169,907+5,202.

Third district.—Greene, Columbia, Albany, Rensselaer, Schoharie, Schenectady,—168,584+3,879.

Fourth district.—Saratoga, Montgomery, Hamilton, Washington, Warren, Clinton, Essex, Franklin, and St. Lawrence,—164,350—355.

Fifth district.—Herkimer, Oneida, Madison, Oswego, Lewis, and Jefferson,—165,352+647.

Sixth district.—Delaware, Otsego, Chenango, Broome, Cortland, Tompkins, Tioga,—169,186+4,481.

Seventh district.—Onondaga, Cayuga, Seneca, Ontario,—163,505—1,200.

In 1823 Yates was erected from a part of Ontario, and Wayne erected from a part of Ontario and Genesee.

Eighth district.—Steuben, Livingston, Monroe, Genesee, Niagara, Erie, Allegany, Cattaraugus, Chautauqua, —155,000—9,705.

In 1824 Orleans was erected from a part of Genesee.

1826. The legislature, by chapter 289, made the first legislative apportionment under the second Constitution,

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based on the new rule of representative population, which, by the state enumeration of 1825, amounted to 1,531,648. The senate ratio by districts was 191,456. The state was divided into eight senate districts, as follows:

First district.—Suffolk, Queens, Kings, Richmond, and New York,—189,714—1,742.

Second district.—Westchester, Putnam, Dutchess, Rockland, Orange, Ulster, Sullivan, and Delaware,—201,223+9,767.

Third district.—Greene, Columbia, Albany, Rensselaer, Schoharie, Schenectady,—181,201—10,255.

Fourth district.—Saratoga, Montgomery, Hamilton, Washington, Warren, Clinton, Essex, Franklin, and St. Lawrence,—186,051—5,405.

Fifth district.—Herkimer, Oneida, Madison, Oswego, Lewis and Jefferson,—192,175+719.

Sixth district.—Otsego, Chenango, Broome, Cortland, Tioga, Tompkins, and Steuben.—196,290+4,834.

In 1836 Chemung was erected from a part of Tioga.

Seventh district.—Onondaga, Cayuga, Seneca, Ontario, Yates, and Wayne,—185,720—5,736.

Eighth district.—Livingston, Monroe, Genesee, Orleans, Niagara, Erie, Allegany, Cattaraugus, Chautauqua,—199,274+7,818.

The arrangement of the districts was the same as under the constitutional apportionment of 1821, except that Delaware was transferred from the sixth district to the second, and Steuben was transferred from the eighth to the sixth. Yates and Wayne, erected after the apportionment of 1821 and placed in the seventh district, were continued in that district by the apportionment of 1826.

1836. The census of 1835 showed a representative population of 2,042,541, which made a senate ratio by districts of 255,318. The legislature of 1836, by chapter 436, divided the state into senate districts, as follows:

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First district.—New York, Richmond, and Kings,—259,126+3,808.

Second district.—Queens, Suffolk, Westchester, Rockland, Putnam, Dutchess, Orange, Sullivan, and Ulster,—243,523—11,795.

Third district.—Albany, Delaware, Greene, Columbia, Rensselaer, Schoharie, Schenectady,—250,484—4,834.

Fourth district.—Saratoga, Montgomery, Hamilton, Washington, Warren, Clinton, Essex, Franklin, St. Lawrence, Herkimer,—257,147+1,829.

Fulton county was erected from a part of Montgomery in 1838.

Fifth district.—Oneida, Madison, Oswego, Lewis, Jefferson, and Otsego,—265,341+10,023.

Sixth district.—Chenango, Broome, Tompkins, Chemung, Tioga, Steuben, Livingston, Allegany, and Cattaraugus,—260,952+5,634.

Seventh district.—Wayne, Ontario, Yates, Seneca, Cayuga, Onondaga, and Cortland,—249,414—5,904.

Eighth district.—Chautauqua, Erie, Genesee, Monroe, Orleans, Niagara,—256,554+1,236.

Wyoming county was erected from a part of Genesee in 1841.

The enumeration taken in 1845 showed a representative population of 2,399,548, which on the basis of eight districts made a senate ratio of 299,943. The question of holding a constitutional convention had been submitted to the people at the November election in 1845, and decided in the affirmative by a large majority; but the legislature of 1846, not being able to anticipate the action of the Convention in relation to the legislature, made an apportionment of the senate and assembly in accordance with the mandate of the Constitution. The assembly apportionment act was passed on the 30th of March, 1846, and on the 22d of April an act was passed

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(chap. 94) fixing this assembly apportionment as the basis of representation in the Convention, which was to be composed of delegates equal in number to the members of assembly, and chosen in like manner. Delegates to the Convention were chosen on the 28th of April, and on the 13th of May the state was divided by the legislature into eight senate districts. Senators were elected under this apportionment in November, 1846, but by § 1 of article 14 of the new Constitution their terms of office, and also the terms of senators previously elected, ended on the 31st of December, 1847, and at the November election in that year senators were first chosen under the new Constitution. The senate apportionment therefore continued in force less than two years, and only one election was held under it.

The following senate districts were established by the legislature of 1846:

First district.—New York, Richmond,—308,075+8,132. Kings county was transferred from the first district to the second.

Second district.—Kings, Queens, Suffolk, Westchester, Rockland, Putnam, Dutchess, Orange, and Sullivan,—306,726+6,783. Ulster county was transferred from the second to the third district.

Third district.—Columbia, Greene, Albany, Rensselaer, Schoharie, Deleware, and Ulster,—310,940+10,997. Schenectady was transferred from the third district to the fourth.

Fourth district.—Saratoga, Washington, Warren, Essex, Clinton, Franklin, St. Lawrence, Fulton, Hamilton, Montgomery, Herkimer, and Schenectady,—320,035+20,092.

Fifth district.—Jefferson, Lewis, Oswego, Oneida, Madison, and Otsego,—297,039—2,904.

Sixth district.—Chenango, Broome, Tompkins, Che-

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mung, Tioga, Steuben, Allegany, Cattaraugus, Livingston,—299,939—4.

Seventh district.—Onondaga, Cayuga, Seneca, Yates, Ontario, Wayne, and Cortland,—267,238—32,705.

Eighth district.—Chautauqua, Erie, Genesee, Wyoming, Monroe, Ontario, and Niagara,—289,555—10,387.

Thus ended, perhaps forever, the apportionment of senators among large districts, for, while the Commission of 1872 proposed a return to large senate districts, that recommendation was not adopted. The reader who has followed senate apportionments to this point cannot have failed to observe the effect of the rapid increase of population in the city of New York, and the resulting amputations of territory for the purpose of equalizing representation. The original southern district in 1777 contained 6 counties. The Convention of 1821, which increased the number of districts from 4 to 8, included 5 counties in the first district, omitting only Westchester from the district as constituted in 1777, from which it appears that during the forty-four years between 1777 and 1821 the population of Manhattan Island, Long Island, and Staten Island had increased so much that this territory was included in 1 district, although the whole number of districts had been doubled, and at the end of the period covered by that Constitution, and at the last legislative apportionment under it in 1846, only 2 counties (New York and Richmond) were included in the first district.

Senate Apportionments under the Third Constitution, 1846.

In the chapter on the Convention of 1846 I have recounted the proceedings which resulted in a change of policy concerning senate districts, and the adoption of a

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single district plan. This change required the erection of separate districts to carry the plan into effect. The number of senators was left at 32, as established by the Convention of 1801. According to the representative population as shown by the enumeration of 1845, the senate district representation was 74,986. The Convention divided the state into senate districts containing a representative population, and showing variations from the ratio as follows:

1. Suffolk,
Richmond,
Queens.
71,070—3,916.

2. Kings.
61,611—13,375.

3, 4, 5, 6. New York.
Total pop. 295,622.
Average, 73,905—4,324.

7. Westchester,
Putnam,
Rockland.
68,342—6,644.

8. Dutchess,
Columbia.
91, 062+17,076.

9. Orange,
Sullivan.
66,840—8,146.

10. Ulster,
Greene.
75,900+914.

11. Albany,
Schenectady.
84,382+9,396.

12. Rensselaer.
58,671—16,315.

13. Washington,
Saratoga.
78,921+3,935.

14. Warren,
Essex,
Clinton.
65,277—9,709.

15. St. Lawrence,
Franklin.
75,222+236.

16. Herkimer,
Hamilton,
Fulton,
Montgomery.
84,815+9,829.

17. Schoharie,
Delaware.
68,001—6,985.

18. Otsego,
Chenango.
89,190+14,204.

19. Oneida.
78,696+3,710

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20. Madison,
Oswego.
86,822+11,836.

21. Jefferson,
Lewis.
81,760+6,774.

22. Onondaga.
67,419—7,567.

23. Cortland,
Broome,
Tioga.
72,166—2,820.

24. Cayuga,
Wayne.
89,532+14,546.

25. Tompkins,
Seneca,
Yates.
82,221+7,235.

26. Steuben,
Chemung.
74,053—933.

27. Monroe.
63,586—11,400.

28. Orleans,
Genesee,
Niagara.
85,028+10,042

29. Ontario,
Livingston.
72,987—1,999.

30. Allegany,
Wyoming.
65,891—9,095.

31. Erie.
68,671—6,315.

32. Chautauqua,
Cattaraugus.
75,750+764.

In 1854 Schuyler county was erected from a part of Tompkins in the 25th district, and from Chemung and Steuben in the 26th district. The new county appears in the next apportionment. The county of New York was to be divided into 4 districts by the board of supervisors. In the apportionments under this Constitution the district figures in counties containing two or more districts have been omitted, for the reason that, for purposes of comparison, the county has been taken as the unit, and the internal district boundaries have not been deemed material.

1857. The enumeration of 1855 showed a representative population of 2,797,416, which made a ratio of 87,419 for each senate district. The apportionment was

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made in 1857 by chapter 339, which divided the state into senate districts as follows:

1. Suffolk,
Queens,
Richmond.
87,152—267.

2, 3 were included in Kings county with an aggregate pop. of 147,293, or an average of 73,646. This shows a deficiency of 13,773, or an aggregate for the county of 27,546.

4, 5, 6, and 7 were included in New York with an aggregate pop. of 386,325, or an average of 96,581. This shows an excess of 9,162, or an aggregate for the county of 36,648.

8. Westchester,
Putnam, Rockland.
90,614+3,195.

9. Orange,
Sullivan.
76,845—10,574.

10. Ulster,
Greene.
86,400—1,019.

11. Dutchess,
Columbia.
91,907+4,488.

12. Rensselaer,
Washington.
103,012+15,593.

13. Albany.
92,911+5,492.

14. Delaware,
Schoharie,
Schenectady.
86,769—650.

15. Montgomery,
Fulton,
Saratoga,
Hamilton.
94,891+7,472.

16. Warren,
Essex,
Clinton.
77,471—9,948.

17. St. Lawrence,
Franklin.
86,710—709.

18. Jefferson,
Lewis.
82,358—5,061.

19. Oneida.
88,358+939.

20. Herkimer,
Otsego.
82,468—4,951.

21. Oswego.
61,811—25,608.

22. Onondaga.
72,745—14,674.

23. Madison,
Chenango,
Cortland.
102,901+15,482.

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24. Tompkins,
Tioga,
Broome.
90,276+2,857.

25. Wayne,
Cayuga.
90,301+2,882.

26. Ontario,
Yates,
Seneca.
79,525—7,894.

27. Chemung,
Schuyler,
Steuben.
102,251+14,832.

28. Monroe.
73,225—14,194.

29. Niagara,
Orleans,
Genesee.
89,127+1,708.

30. Wyoming,
Livingston,
Allegany.
103,561+16,142.

31. Erie.
94,470+7,051.

32. Chautauqua,
Cattaraugus.
85,363—2,056.

1866. The enumeration made in 1865 showed a representative population of 3,393,306, which gave a senate ratio of 106,041. The legislature of 1866, by chapter 805, established the following senate districts:

1. Suffolk,
Queens,
Richmond.
113,390+7,349.

2, 3 were included in Kings county with an aggregate pop. of 253,718, or an average of 126,859. This shows an average excess of 20,818, or an aggregate for the county of 41,636.

4, 5, 6, 7, and 8 were included in New York with an aggregate pop. of 565,649, or an average of 113,130. This shows an average excess of 7,089, or an aggregate for the county of 35,445.

9. Westchester,
Putnam,
Rockland.
119,217+13,176.

10. Orange,
Sullivan.
93,881—12,160.

11. Dutchess,
Columbia.
100,913—5,128.

12. Rensselaer,
Washington.
122,003+15,962.

13. Albany.
104,216—1,825.

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14. Greene,
Ulster.
100,226—5,815.

15. Saratoga,
Montgomery,
Fulton,
Hamilton,
Schenectady.
123,019+16,978.

16. Warren,
Essex,
Clinton.
85,944—20,097.

17. St. Lawrence,
Franklin.
97,950—8,091.

18. Jefferson,
Lewis.
87,871—18,170.

19. Oneida.
96,213—9,828.

20. Herkimer,
Otsego.
84,378—21,663.

21. Oswego,
Madison.
111,113+5,072.

22. Onondaga,
Cortland.
109,855+3,814.

23. Chenango,
Delaware,
Schoharie.
111,115+5,074.

24. Broome,
Tioga,
Tompkins.
94,105—11,936.

25. Cayuga,
Wayne.
97,353—8,688.

26. Ontario,
Yates,
Seneca.
85,320—20,721.

27. Chemung,
Schuyler,
Steuben.
111,289+5,248.

28. Monroe.
92,346—13,695.

29. Niagara,
Orleans,
Genesee.
98,585—7,456.

30. Wyoming,
Livingston,
Allegany.
103,228—2,813.

31. Erie.
134,364+28,323.

32. Chautauqua,
Cattaraugus.
96,045—9,996.

1879. The state enumeration of 1875 showed a representative population of 4,370,679, which gave a senate

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ratio of 136,583. The legislature of 1879, by chapter 208, established the following senate districts:

1. Queens,
Suffolk.
128,387—8,196.

2, 3, and 4 were included in Kings county with an aggregate pop. of 464,711, or an average of 154,903. This shows an average excess of 18,320, or an aggregate for the county of 54,960.

5, 6, 7, 8, 9, 10, and 11 were composed of New York, 909,390, and the county of Richmond, 32,139, making a total representative pop. in the seven districts of 941,529, or an average of 134,504. This shows an average deficiency of 2,079, or a total deficiency of 14,553.

12. Westchester,
Rockland.
119,561—17,022.

13. Orange,
Sullivan.
116,683—19,900.

14. Ulster,
Schoharie,
Greene.
150,312+13,729.

15. Dutchess,
Columbia,
Putnam.
133,660—2,923.

16. Rensselaer,
Washington.
146,339+9,756.

17. Albany.
138,413+1,830.

18. Saratoga,
Fulton,
Hamilton,
Montgomery,
Schenectady.
141,952+5,369.

19. Clinton,
Essex,
Warren.
101,327—35,256.

20. St. Lawrence,
Franklin,
Lewis.
135,034—1,549.

21. Oswego,
Jefferson.
138,200+1,617.

22. Oneida.
108,540—28,043.

23. Madison,
Otsego,
Herkimer.
130,494—6,089.

24. Delaware,
Chenango,
Broome.
127,755—8,828.

25. Onondaga,
Cortland.
131,062—5,521.

26. Cayuga,
Seneca,
Tompkins,
Tioga.
148,461+11,878.

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27. Chemung,
Steuben,
Allegany.
154,255+17,672.

28. Wayne,
Ontario,
Schuyler,
Yates.
131,173—5,410.

29. Monroe,
Orleans.
150,360+13,777.

30. Wyoming,
Genesee,
Livingston,
Niagara.
145,101+8,518.

31. Erie.
180,703+44,120.

32. Cattaraugus,
Chautauqua.
106,637—29,946.

We note here the first departure from the policy of maintaining the integrity of county organization in the formation of senate districts. Richmond was included with a part of New York in forming the fifth district. The Constitution provided that no county should be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators. The provision was reported in this form by the committee on the legislative department in the Convention of 1846, and I do not find that it received any attention during the discussion of the article. It does not appear, therefore, whether it was intended to prohibit the formation of senate districts composed of parts of two or more counties, or whether it was intended to authorize such districts in cases where an unrepresented fraction in a county entitled to two or more members would justify the inclusion of another county in an additional district for the purpose of providing for such unrepresented fraction. The provision prohibiting a division of a county in the formation of a senate district was contained in the Constitution of 1821, which provided for eight districts, and the exception relating to a division of a county was added on the adoption of the single district plan.

It will be observed that the apportionment of 1892 cre-

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ated two districts from parts of two or more counties. Whatever may have been the proper construction of this provision, the question cannot arise under the Constitution of 1894, which specifically provides that a county shall not be divided in the formation of senate districts, "except to make two or more senate districts wholly in such county."

1892. I have already, in this chapter, called attention to the differences of opinion between the governor and the legislature concerning an enumeration which, under the Constitution, should have been taken in 1885, but which, because of disagreements concerning the scope of the enumeration, was postponed from year to year, and was not taken until February, 1892. That enumeration showed a representative population of 5,790,865, which made a senate ratio of 180,964. The legislature of 1892, at an extraordinary session held immediately after the close of the regular session, passed an apportionment act, chapter 307, by which the state was divided into senate districts, as follows:

1. Queens,
Suffolk.
182,846+1,882.

2, 3, 4, 5, and 6 were composed of Kings county, 868,983, and Richmond county, 46,592, making a total representative population in the five districts of 915,575, or an average of 183,115. This shows an average excess of 2,151, or a total excess of 10,755.

7, 8, 9, 10, 11, 12, 13, 14, and 15 were composed of New York, 1,423,984, and Putnam, 13,325, and Westchester, 129,224; making a total representative pop. of 1,566,533, or an average of 170,059. This shows an average deficiency of 6,905, or a total deficiency of 62,145.

16. Rockland,
Orange,
Dutchess.
199,674+18,710.

17. Sullivan,
Ulster,
Greene,
Schoharie.
176,341—4,623.

18. Rensselaer,
Columbia.
165,669—15,295.

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19. Albany.
156,748—24,216.

20. Saratoga,
Montgomery,
Herkimer,
Schenectady.
176,139—4,825.

21. Essex,
Clinton,
Franklin,
Washington,
Warren,
Fulton,
Hamilton.
229,005+48,041.

22. St. Lawrence,
Jefferson,
Oswego.
215,947+34,983.

23. Oneida,
Otsego,
Lewis.
196,481+15,517.

24. Onondaga,
Madison.
183,732+2,768.

25. Delaware,
Broome,
Cortland,
Chenango,
Tioga.
201,017+20,053.

26. Cayuga,
Wayne,
Tompkins,
Ontario,
Yates.
207,566+26,602.

27. Chemung,
Schuyler,
Seneca,
Steuben.
169,499—11,465.

28. Monroe.
181,230+266.

29. Niagara,
Orleans,
Livingston,
Wyoming,
Genesee.
185,922+4,958.

30 and 31 were included in Erie, with an aggregate pop. of 304,713, or an average pop. of 152,356. This shows an average deficiency of 28,608, or a total deficiency of 57,216.

32. Chautauqua,
Cattaraugus,
Allegany.
176,228—4,736.

It is a fact, which should not be overlooked in considering the action of the Convention of 1894 in increasing the number of senators, that, under the third Constitution, senate representation in the group of counties of which New York is the commercial and political center had doubled,—that is, the counties of Rockland, Put-

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nam, Westchester, New York, Richmond, Kings, Queens, and Suffolk had 7 senators by the convention apportionment of 1846, and by the legislative apportionment of 1892 the same territory, omitting Rockland, had 15 senators. The same territory in 1821, omitting Putnam and Westchester, had 4 senators. These facts show how senate representation was gradually concentrated in New York and vicinity,—substantially in what has since become Greater New York,—which had resulted in drawing representation away from other parts of the state, thereby necessarily enlarging the territorial representation outside of the New York district, in order to equalize representation by population. As a consequence, the senate districts in the southeastern part of the state were becoming smaller, and the senate districts in other parts of the state were becoming correspondingly larger. A striking instance of this change appears in the fourteenth district as established in 1846, which included the counties of Warren, Essex, and Clinton, and which counties in 1892 were included in the twenty-first district along with Franklin, Washington, Fulton, and Hamilton, making 7 counties, containing more than 8,000 square miles,—as many as the average number of counties allotted, in 1821, to the eight senate districts under the second Constitution. Eight senators had been drawn from other parts of the state to New York, which change necessarily increased the size of the outside districts. Thus, in addition to the twenty-first district, which contained 7 counties, 3 others—the twenty-fifth, twenty-sixth, and twenty-ninth—contained 5 counties each; 3 districts—the seventeenth, twentieth, and twenty-seventh—contained 4 counties each; 4 districts—the sixteenth, twenty-second, twenty-third, and thirty-second—contained 3 counties each; 3 districts—the first, eighteenth, and twenty-fourth—contained 2 counties.

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each. This was a significant territorial change from the first apportionment under the single district plan made by the Convention of 1846; but the resulting small urban districts and large rural districts were the inevitable consequence of an unequal increase in population as between the city and the country, and if the number of senators had not been changed, the relative representation between urban and rural districts would have been still more marked under subsequent enumerations.

The Apportionment of 1892.

When the Convention of 1894 was chosen, and when it assembled, a reapportionment of the legislature was a subject which provoked animated, and even intense, discussion, which almost inevitably assumed a partisan character. This discussion grew out of the apportionment act of 1892, which many persons thought unjust and inequitable because it deprived certain counties of the representation in the assembly to which they were deemed fairly entitled under the Constitution. This reapportionment should have come regularly in 1886, for, under the Constitution, an enumeration of the inhabitants of the state should have been taken in 1885, and a reapportionment of the legislature should have been made at the next session. I have already considered the differences between the Governor and the legislature, which prevented an enumeration and a consequent reapportionment, and the postponement of both until 1892, when the Governor and the legislature were in political accord for the first time in many years.

The enumeration of February, 1892, not only showed a large increase of population since the enumeration of 1875, on which the existing apportionment was based, but it also showed a marked change in the relative position of several counties in respect to population, which

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would necessarily affect any apportionment based on the new enumeration. It was inevitable that in reapportioning 128 members of assembly some counties would gain and others lose in representation. The readjustment of these gains and losses on the most equitable basis was the problem involved in the apportionment of 1892. In studying that act and its results, it is well to bear in mind that at that time the Constitution did not prescribe a definite method of apportioning members of the legislature. We shall presently have occasion to consider the rules prescribed by the Constitution of 1894. Assuming that those rules are just and equitable, they may be taken as the standard by which to test the character of the apportionment act of 1892.

Under the Constitution of 1894 the first operation in apportioning members of assembly is to ascertain the ratio, which is found by dividing the number of inhabitants of the state, excluding aliens, by the number of members of assembly. Then, for the purpose of the apportionment, the counties are divided into three groups: First, those counties which have less than the ratio and one half over; second, those counties which have a ratio and a half or more, to each of which two members are apportioned; and third, the counties which have a citizen population exceeding two full ratios, among which counties are to be distributed the members of assembly not apportioned under the previous rules. These three rules necessarily require three mathematical operations in making the apportionment, and consequently divide the counties into three groups, namely, group A, including counties which have only one member, group B, including counties which have two members, and group C, including counties which have more than two members. An apportionment in 1892 according to these rules would

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have produced results somewhat different from those stated in the act.

The citizen population according to the enumeration of February, 1892, was 5,790,865, and the ratio of apportionment of members of assembly was 45,241; a ratio and a half was 67,862. Each county whose citizen population was less than this number (counting Fulton and Hamilton as one) was entitled to only one member. This group included the counties of Allegany, Broome, Cattaraugus, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Ontario, Orleans, Otsego, Putnam, Richmond, Rockland, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Suffolk, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne, Wyoming, Yates. This disposed of 42 members of assembly. All the other counties were to be given 2 members each; these constituted group B as follows: Albany, Chautauqua, Dutchess, Erie, Kings, Monroe, New York, Oneida, Onondaga, Orange, Oswego, Queens, Rensselaer, St. Lawrence, Steuben, Ulster, and Westchester. This disposed of 34 more members, making 76 in the first two groups; this left 52 for group C. The counties with a citizen population exceeding two full ratios (90,482) were entitled to 52 members, not included in the first two groups. The third group, C, included the following counties, which were also in group B: Albany, Erie, Kings, Monroe, New York, Oneida, Onondaga, Orange, Queens, Rensselaer, Westchester. The aggregate excess of citizen population of these 11 counties over the two ratios was 2,667,747. Fifty-two members were to be apportioned among these counties on this excess; but it is manifest that the first ratio, 45,241, could not be used for this purpose. A new ratio must,

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therefore, be obtained, which is found by dividing this excess by 52, which gives 51,302, the new ratio for the 11 counties. An apportionment of the 52 members among these 11 counties according to this ratio, after apportioning to the largest remainders as required by the Constitution, would have given Albany 1, Erie 4, Kings 15, Monroe 2, New York 26, Onondaga 1, Queens 1, Rensselaer 1, and Westchester 1. Oneida and Orange were not entitled to any increase. Two members, already apportioned in group B, should be added to each of the 9 counties which receive an increase in group C, with the following result: Albany 3, Erie 6, Kings 17, Monroe 4, New York 28, Onondaga 3, Queens 3, Rensselaer 3, and Westchester 3,—making 70 members in group C. Group B, 2 members only, including Chautauqua, Dutchess, Oneida, Orange, Oswego, St. Lawrence, Steuben, and Ulster, had 16 members; group A, 1 each, as already noted, had 42, making 128 in the three groups.

I think this must have been the indisputable result of an apportionment in 1892, if the rules of the new Constitution had been applied. It thus appears that by the act of 1892, 4 members were erroneously apportioned; Albany, entitled to 3, received 4; Kings, entitled to 17, received 18; and New York, entitled to 28, received 30; while, on the other hand, Chautauqua, Monroe, Oswego, and St. Lawrence should each have received an additional member, and should have had the four members erroneously apportioned to Albany, Kings, and New York. But, aside from a consideration of the foregoing rules of apportionment, the large discrepancies in the 7 counties last named appear from mere inspection. Thus, Monroe, with a population of 181,230, was given 3 members, making an average representation of 60,410, while Albany, with 156,748, was given 4 members, mak-

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ing an average of 39,187. Chautauqua (73,884), Oswego (69,023), and St. Lawrence (80,679) were given only 1 member each. Kings (868,983) was given 18 members, making an average representation of 48,276, and New York (1,423,984) was given 30 members, making an average of 47,466. It seems clear that there was good reason to complain of the apportionment of 1892, especially as to Chautauqua, Monroe, Oswego, and St. Lawrence; and I think it must be conceded that, if the apportionment had been made according to the rules of the new Constitution, no county would have gained by it except these four.

The Convention of 1894 could easily have rectified the errors in the apportionment of 1892, with the result which I have pointed out; but it became apparent early in the deliberations of the Convention that an additional problem must be considered, namely, whether the membership of the assembly should not be increased for the purpose of reducing, to some extent, the discrepancies between counties which must inevitably exist on an apportionment of 128 members by any process likely to be adopted. I have already called attention to a fact well known to all students of our political system,—that legislative representation based on locality, and also on population, will inevitably produce inequalities. If more representatives are to be allotted than will be sufficient to give each locality one, it is the duty of constitution makers to fix the excess at a number which will provide a legislative body large enough for reasonable representation, and at the same time reduce to its lowest practicable limit the discrepancy necessarily resulting from this excess of members above the number of local units. An examination of the foregoing apportionment of 1892 as worked out in the three groups, and also as stated in the act itself, shows large, and I think unreasonable, dis-

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crepancies, which it was the duty of the Convention of 1894 to reduce so far as practicable and consistent with a moderate increase of membership in the assembly. Thus, the excess of citizen population in counties above the ratio (45,241) amounted to 462,098, which, according to this ratio, was not represented. The counties below the ratio show a deficiency of 462,010, and, on a basis of possible equality, these counties were over represented to this extent. Again, the 29 counties below the ratio (counting Fulton and Hamilton as one), with 1 member each, have an average representation of 31,536, and the 13 counties above the ratio with 1 member each have an average of 54,049. But the counties of Chautauqua, Dutchess, Oswego, St. Lawrence, Steuben, and Ulster were, according to the corrected apportionment, also over-represented, each having 2 members with less than two ratios, and Queens, Rensselaer, and Westchester were also over-represented, each county having 3 members with less than three ratios. Adding these 9 to the smaller counties we have 50 members, with an average population of 35,097. The other 78 members represented an average population of 51,871. The 13 counties with a population above the ratio and less than a ratio and a half,—Allegany, Cattaraugus, Cayuga, Chemung, Herkimer, Jefferson, Niagara, Ontario, Otsego, Richmond, Saratoga, Suffolk, and Wayne,—with 1 member each, had an aggregate excess of 114,504 above the ratio. The counties in group C show an aggregate excess of 347,594 above the general ratio,—enough for almost 8 members. It is clear that, if population is to be considered at all in a scheme of representation, there should be greater equality than was possible under the act of 1892.

In previous chapters I have called attention to the efforts in other conventions to reduce the inequalities of

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representation by increasing the number of members of assembly, including the proposition in the Commission of 1872 to create an assembly composed of 256 members. Constitution makers have, from the beginning, appreciated the difficulties attending district representation based partly on population. The subject was, therefore, not new in the Convention of 1894, and the majority of the members of that Convention believed that simply correcting the errors in the apportionment of 1892 would not solve the problem, and would not wholly relieve the situation.

In *People ex rel. Carter* v. *Rice,* 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921, the validity of the apportionment act of 1892 was challenged on the ground of inequality of assembly representation. The boards of supervisors of Monroe and Oneida counties refused to divide their counties into assembly districts as required by the Constitution and the act, and the court was asked for an order requiring the secretary of state to issue election notices under the apportionment law of 1879, and enjoining him from taking any proceedings under the act of 1892. The court decided that in making a legislative apportionment the legislature was vested with discretion, was not bound by mere numbers, and that the exercise of this discretion could not be reviewed by the courts, "unless it is plainly and grossly abused;" that the phrase "as nearly as may be" did not mean as nearly as a mathematical process could be followed. "It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall in good faith be made." Speaking of senate districts, Judge Peckham said that "the union of different counties in the state for the purpose of making up a senatorial district which must consist of contiguous territory, and in regard to which counties cannot be divided,

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necessarily results in inequalities which can in no possible way be avoided," and that it would "pass the wit of man to make such an alteration of the senate districts for this state that may not be the subject of adverse criticism and of alleged possible improvement." Judge Gray, in an opinion sustaining the act, conceded that "adherence to a simple mathematical system of distribution of members among the counties in the order of their excesses of population over the ratio is the better rule; but deviations may be demanded by public exigencies. Some consideration must be had of the difficulties which environ the passage of an act of apportionment, in the conflicting claims and demands of representatives; some latitude of action must be permitted in considerations which pertain to the geographical situation and necessities of counties, and some allowance must be made for active opposition engendered by political feeling. As the bill was reported an exact mathematical apportionment appeared, but to secure the passage of the act some changes were made by the legislature."

Judge Gray's last remark, relating to changes in the apportionment bill made necessary in order to secure its passage, was further explained in the Convention of 1894 by Mr. Bush, who, then a member of the assembly, had charge of the apportionment bill of 1892. He said the Democratic party in that legislature had a majority of 2 in the assembly and 1 in the senate, that the bill in its original form was mathematically correct, and gave to every county the representation in the assembly to which it was entitled, by dividing the representative population by the ratio and distributing the remaining number of members among the counties having the largest remainders in their numerical order. This distribution gave Albany county 3 members; but a certain faction of the Democratic party in that county had 4 members of

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the assembly. Mr. Bush said these men refused to support the apportionment bill unless it gave Albany 4 members, and this, in substance, was the reason why Albany county, instead of Monroe, was allowed 4 members. It was a political exigency to which the party leaders were compelled to yield from force of circumstances, and not because of any intention to make an unfair apportionment.

Judge Andrews, in a dissenting opinion, gives the results of an apportionment based on a strict mathematical computation, and shows that by this rule Monroe, St. Lawrence, and Chautauqua, with remainders aggregating 91,718, were each entitled to an additional member, but which, on remainders aggregating 53,919, were given to New York, Albany, and Rensselaer. According to the first print of the apportionment bill of 1892, Albany was given 4 members, which it retained, Steuben 1, Dutchess 1, Kings 19, and New York 31. The only changes in the bill were made by taking 1 member from each of the counties of Kings and New York and adding 1 each to Steuben and Dutchess. It seems clear from the first print of the bill that Mr. Bush's remarks must apply to the original proposition before the bill was introduced, and that the demand of the Albany faction must have been made and conceded before the bill was presented to the legislature. It seems equally clear that the original apportionment was made by dividing the citizen population of each county by the ratio, 45,241. According to this computation, New York was entitled to 31, Kings to 19, with a large remainder in each instance. The computation stated in the opinion of Judge Andrews is based on another method, namely, that 29 members were first allotted to the counties below the ratio, and that the remaining 99 members were apportioned among the counties above the original ratio, according to

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a new ratio, which was ascertained by dividing the aggregate citizen population of these counties by 99. This new ratio was 48,800. By this ratio New York was entitled to 29 members and a small remainder, and Kings was entitled to 17 with a large remainder. Monroe was given but 3 members in the first print of the bill. Judge Andrews thought the allotment of members to counties with small remainders, instead of to counties with larger remainders, was a plain violation of the constitutional rule that an apportionment should be made as "nearly as may be" according to representative population; and that the rule was not discretionary. "The discretion of the legislature, if any, in apportioning members, ends where certainty begins; and that point was reached when the counties having the largest remainders were ascertained."

The validity of the act was sustained by a divided court, five judges declaring it constitutional, while two thought it was unconstitutional.

It ought to be said, however, that the majority of the court did not attempt to justify an apportionment containing the discrepancies indicated by Judge Andrews, but sustained it as an exercise of discretion with which the court could not interfere. In addition to this consideration, there were practical reasons which contributed to the conclusion that the act ought not to be set aside. Judge Peckham said that all the counties, except Monroe and Oneida, had acquiesced in the statute, and had made the local apportionments of members of assembly as required by it; that "the greatest confusion and disorder would result from holding" the act invalid; and "whether any members of assembly could actually be elected under any other law at this late day (October 13, 1892) is quite problematical." If the act of 1892 had been declared invalid, elections must, apparently, have been held

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under the act of 1879, which Judge Peckham said "would work still greater injustice than has ever been suggested against the act of 1892;" and he pointed out that Governor Robinson refused to approve the apportionment act of 1879 because of its inequalities. "If," said Judge Peckham, "the act of 1892 is void, the act of 1879 is also plainly void, and no election of members of assembly should be tolerated under it." Judge Andrews concurred in condemning the act of 1879, but thought its objectionable character was irrelevant in considering the act of 1892.

The opinion of the majority of the court was expressed in the statement by Judge Peckham, that "we are compelled to the conclusion that this act of 1892 successfully withstands all assaults upon it, and is a valid and effective law." Reading all the opinions written in the case, and examining the circumstances attending the passage of the act, it seems clear that, while the apportionment was sustained, it was not approved. The majority of the court felt compelled to sustain the act because it was within the discretion of the legislature, and therefore beyond judicial control; but it should not be forgotten that the probable public inconvenience which would result from setting aside the act was deemed a sufficient practical reason for the judgment of the court sustaining it,—especially in the absence of a clear constitutional mandate. Judge Andrews, considering the practical effect of an adverse decision, said that, while he did not fail to "appreciate that holding the apportionment act void would produce temporary inconvenience, the evils which might flow from this were not to be compared with the public injury which would result from sanctioning a disregard of one of the vital principles of representative government."

The apportionment act of 1892 was again considered

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by the court of appeals in *Baird* v. *Kings County,* 138 N. Y. 95, 20 L. R. A. 81, 33 N. E. 827, involving the validity of an apportionment under the act made by the supervisors of Kings county. Judge Peckham also wrote the prevailing opinion in this case, and, speaking of the *Carter Case,* 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921, said it was not intended by that decision to intimate "that in no case could the action of the legislature be reviewed by the courts, but that cases might easily be imagined where the action of the legislature" would exhibit a gross and intentional violation of the Constitution, and then the court might interfere and restrain or prevent the abuse of legislative discretion. Holding that it was the duty of the board of supervisors, in forming assembly districts, to seek equality of population so far as practicable, and subject to the constitutional qualifications that a town could not be divided, and that the district must be composed of convenient and contiguous territory, the court said it did not intend to hold "that every trifling deviation from equality of population would justify or warrant an application to the court for redress;" but the deviation from the standard must be "grave, palpable, and unreasonable." Tried by this rule, the assembly apportionment of Kings county, then in review, was condemned as invalid, and the supervisors were directed to make a new apportionment.

The apportionment act of 1892 was of short duration, and passed out of our constitutional history on the 1st of January, 1895. Like many other events which have been noticed in these studies, it was a history-making statute, and was the immediate occasion of important constitutional changes. The incidents connected with the organization of the senate of 1892 and the apportionment law enacted by that legislature were among the most important and significant causes contributing to

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the political revolution of 1893, when the state officers and members of the Constitutional Convention of 1894 were chosen. Only one election of senators (1893) was held under the apportionment act of 1892, the next election (1895) was held under the Constitution of 1894.

The Apportionment of 1894.

We come now to the Convention of 1894, by which, for the first time since the Convention of 1801, the legislature was reconstructed in both branches, and by which new principles of apportionment were established. The Convention of 1894 inherited a long and interesting parliamentary history, which,—not to mention its English ancestry,—beginning with the Dongan assembly of 1683, had continued from that time almost without interruption. I have already briefly told the story of the assembly during the colonial period, and have related some of the more important incidents connected with its inception, organization, continuance, and final absorption, in 1777, by the new state under a real constitutional government. We have studied the fluctuating structure of the colonial legislature, and have observed its mixed character,—partly appointive and partly elective, with no part of it absolutely guaranteed to the people beyond the reach of royal interference; and have not failed to consider the struggle between royal prerogative and parliamentary privilege in which the colonists so persistently asserted the principles, and so tenaciously clung to the policies, pertaining to free representative government. It was the seed time of free institutions in New York, and its fruit abundantly appears in our constitutional and legislative history.

I have already pointed out that, during the colonial period, the number and distribution of members of as-

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sembly were subjects of executive discretion or royal grant; and the table of colonial assembly apportionments shows the variations in membership of the several assemblies prior to the Revolution. The Convention of 1777 was necessarily charged with the duty of organizing a legislative department, and each subsequent constitutional convention, and also the Commission of 1872, recommended some change in the legislature, and seriously considered changes much more radical than those finally adopted. In addition to the alterations thus made or proposed, constitutional amendments on this subject have frequently been suggested in the legislature itself. A study of the legislature as described in the preceding pages must, I think, convince every reader that the statesmen who from time to time have been in control of public affairs have treated the legislative department with great moderation, and have applied to it the most conservative principles of representative government. This conservatism is strikingly illustrated in the organization of the senate, which, beginning with 24 members in 1777, increased to 43 members in 1801, and was then reduced to 32, at which number it remained until the election of 1895, a period of ninety-four years; and almost as significantly in the organization of the assembly, which, originally established at 70, increased to 108 in 1801, was reduced to 100 in 1802, gradually increased to 126 in 1815, and was permanently fixed by the Constitution of 1821 at 128, at which number it remained until the election of 1895. Each Convention has been required to confront conditions peculiar to the time, and which could not be repeated, and solve problems in many, if not most, cases not familiar to its predecessors. The possible reorganization of the legislature is only one element of the problem. So, coming down from the colonial foretime through two

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hundred and eleven years, the problem of organizing the legislative body which was presented to Governor Dongan and his council in 1683 was again presented to the Convention of 1894, and that Convention did not hesitate to meet and solve the problem according to its best judgment, and to express that judgment in the positive provisions of the Constitution.

President Choate appointed the following committee on legislative organization: Tracy C. Becker (chairman), Charles Z. Lincoln, Milo M. Acker, Elon R. Brown, William D. Dickey, Abram C. Crosby, John C. Davies, Elihu Root, Charles B. Morton, John G. Schumaker, John D. Crimmins, Leonard A. Giegerich, George H. Bush, John H. Peck, William Church Osborn, and William Sullivan.

The committee did not begin the formal consideration of the subject of legislative organization until the lapse of several weeks after the opening of the Convention. In the meantime the subject was considered informally, and there was much discussion concerning the questions which were presented by the apportionment of 1892 and the correction of its inequalities. The discussion took a range wider than the act of 1892, and a conviction soon became manifest that the Convention would not perform its whole duty by simply correcting the errors in the apportionment of 1892, but that it ought seriously to consider the question of reconstructing the legislature and increasing its membership, for the purpose of reducing inequalities of representation which were inevitable on any possible apportionment of the existing number of members. Besides numerous informal suggestions, the subject was presented in several amendments, which showed a wide diversity of opinion concerning principles, and also relating to details in administering the proposed provisions.

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On the 22d of May Mr. Vedder introduced the amendment which had been introduced by him in the legislature of 1891, providing for a senate of not less than 32 members, and an assembly of not less than 128 members, to be apportioned among fixed districts according to changes of population. I have given a synopsis of this amendment in a previous chapter, and have made some observations on the possible results of an apportionment made according to the rules proposed by it. The next day, the 23d, Mr. Lauterbach introduced an amendment, which was important, not only on account of the fact that it proposed a senate of 70 members and an assembly of 225, but also because it proposed a scheme of fixed ratios in determining representation in both houses, on the principle, but in a different way, suggested by Mr. Bradley in the Commission of 1872. The senate ratio was to be determined by dividing the citizen population after each enumeration by 70. Every county and senatorial district having a population equal to one half of such ratio should be entitled to one senator, and should have two senators if it had a ratio and three fourths, and should have three senators if it had three full ratios; "and so on, requiring after the first two an entire ratio for each additional senator." The assembly ratio was also to be determined in the same manner, namely, by dividing the citizen population by 225. Every county (Fulton and Hamilton forming one for this purpose) was entitled to one member; each county "containing said ratio and one half over" should have two members; representation above two members was to be apportioned by the same rule prescribed as to the senate, namely, after the first two members representation was to be based on full ratios only. The amendment prohibited, during a decennial period, any change in the boundaries of a county which would affect its right of representation. Under this amendment,

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the apportionment was not to be made by the legislature, but by a bi-partisan "board of apportionment" composed of the governor, secretary of state, and two citizens to be appointed by the governor. The board was to be equally divided between the two principal political parties. An apportionment of senators and members of assembly was to be made by this board after each decennial enumeration, and at least six months before the election to be held in the next ensuing year. This board was also charged with the duty of dividing counties and senatorial districts which were entitled to more than one senator or member of assembly; and, in making such division, town and other local boundaries were to be disregarded. This board was also required to apportion representatives in Congress. The amendment also provided that "the duties of the board of apportionment may be enforced by the supreme court by appropriate remedy at the suit of any citizen, under such regulations as the legislature shall by law prescribe." The first election of senators under this amendment was to be held in 1895, and the senators then elected were to hold office three years; and, beginning in 1898, the senators were to be chosen for terms of two years. This change in the senatorial term was included in the amendment finally adopted.

On the 23d of May Mr. Cookinham offered an amendment in relation to apportionment of senators and members of assembly, evidently intended to prevent a repetition of the apportionment of 1892. The amendment provided, among other things, that, if a county were entitled to more than one senate district, the difference in population between any two districts in such county should not exceed 5,000. The amendment did not fix the number of senators, but proposed an assembly of 200 members. Probably having in mind the counties of Monroe and Albany under the apportionment of 1892,

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Mr. Cookinham proposed that no county which had less inhabitants should have more members of assembly than any other county which had more inhabitants. A town was not to be divided in forming an assembly district; and in a county entitled to two or more members, the difference in population between any two districts should not exceed 2,500, "unless such division of said county into assembly districts cannot be made without the division of a town." The amendment also provided that decennial enumerations should be taken under the direction of the secretary of state by enumerators to be appointed in each county equally from the two principal political parties. Mr. Cookinham afterwards, on the 29th of May, introduced another amendment providing for 50 senators and 200 members of assembly.

On the 22d of May Mr. Jacobs proposed a senate to be composed of 19 members elected on a general state ticket, but no elector could vote for more than 11. The senators were to hold office three years, and receive an annual salary of $3,000. Mr. Dean, on the 31st of May, proposed a senate of 32 members, to be apportioned on citizen population according to a ratio to be ascertained by dividing the population by 32; and the districts were to be formed by "grouping the counties in such manner that a contiguous territory shall approximate with the greatest degree of accuracy the ratio of representation thus established;" and the same principle was to be applied in counties entitled to more than one senator. He also proposed an assembly of 128 members, to be apportioned, first, by giving each county 1, except Hamilton, which, for this purpose, was united with Fulton; second, by giving to counties above the ratio the number of members to which they would be entitled according to the ratio; and third, by giving the "surplus members" to the counties having the largest final fraction above

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the ratio. This provided for two groups, following the rule adopted by the legislature of 1826, and differing as to the method of ascertaining the ratio for the larger counties from the plan apparently adopted in 1892 as suggested in the opinion of Judge Andrews in the *Carter Case*, 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921.

Mr. Towns, on the 15th of June, proposed a senate of 160 members, to be elected from 32 senate districts,—5 from each,—and to be nominated by popular vote at a primary election. Mr. Porter, on the 15th of June, proposed a senate of 60 members, to be elected from 20 districts, 3 from each; and no elector could vote for more than 2. Senate districts were to be formed according to a ratio to be ascertained by dividing the citizen population by 60; and "no district shall contain less than two and three fifths of the ratio, or more than three and two fifths of the ratio." Mr. Porter also proposed an assembly of 180 members. Each senate district was to be divided into three assembly districts according to the assembly ratio, which was to be ascertained by dividing the citizen population by 180. This would make 60 assembly districts, each of which was to elect 3 members of assembly; but no more than 2 could represent the same political party. Mr. Porter also proposed that the first enumeration under the Constitution be taken in 1905. This was the date finally fixed in the new Constitution.

Mr. Davies, on the 5th of July, proposed a senate of 50 members and an assembly of 150 members, but without any provision relating to apportionment. Mr. Bigelow, on the 10th of July, proposed a senate of 35 members, to be chosen from 5 districts, 7 from each. He also proposed an assembly of 140 members, to be chosen from 20 districts, 7 from each. Mr. Bigelow also proposed cumulative voting for members of the legislature. On the 13th of July Mr. Peck proposed a senate of 32 mem-

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bers, to be elected from single districts, which might be changed after each enumeration according to specified fractions of increase in population. He also proposed an assembly to be composed of not more than 128 members, to be apportioned among the several towns and wards of the state. County lines might be ignored in forming a district; but a town or ward could not be divided. I have already noted that the committee on apportionment in the Convention of 1846 proposed to prohibit the division of a ward in forming an assembly district, but that the Convention limited the restriction to towns. On the 25th of May Mr. Mantanye proposed a senate of at least 32 members, chosen for four years, and an assembly of at least 129, to be chosen for two years. Mr. Veeder proposed to vest in the court of appeals power to enforce the provisions of the Constitution relative to apportionment of senators.

It will be observed that nearly all the amendments proposed to increase the membership of the legislature, and that several, particularly those submitted by Mr. Lauterbach, Mr. Cookinham, Mr. Dean, and Mr. Porter, proposed to fix the rules of apportionment according to arithmetical computations. Mr. Lauterbach proposed to divide the senate and assembly districts into three groups according to representative population. The group plan, with modifications hereafter noted, was adopted as to assembly apportionments; but a different rule was established as to senate apportionments. Mr. Cookinham proposed to reduce to a fixed limit the possible disproportion between senate and assembly districts. The principle of this plan was adopted by making a town or a city block the limit of disproportion without reference to population. Mr. Porter's plan of combination senate districts also prescribed population limits in arranging the districts in each group. I have already pointed out that, prior

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to the Constitution of 1821, a county was not absolutely entitled to a member of assembly; and that counties were sometimes combined to form assembly districts. The possibility of apparent injustice in representation based on territorial limits and a fixed ratio could thus sometimes be avoided; and the rules for apportionment prescribed by the Constitution of 1777 and the amendments of 1801 were given a very liberal and flexible construction. The legislature of 1826, applying for the first time the constitutional provision for an apportionment based on a state enumeration of representative inhabitants under the county unit plan, adopted the simple rule of allotting to each county one member, and apportioning the additional members according to the general ratio, distributing further unassigned members in the numerical order of the remainders. This rule was not always followed in later apportionments. Mr. Stetson, a delegate from Clinton county in the Convention of 1846, offered an amendment intended to reduce the inequalities in representation between the larger and the smaller counties, by providing that, after assigning one member to each county, "the residue of the members after that shall be apportioned so that the fraction of a smaller county shall always be entitled to a member in preference to the number equal to the first ratio in a larger county, whenever the fraction of the smaller county is larger in proportion to its whole representative population than the fraction of the larger county would be to its whole representative population if the whole number of the remainder of members were continued to be apportioned according to said first ratio." This plan was illustrated by the suggestion that Clinton county with one member and 9,000 over, should be entitled to an additional member, instead of giving it to New York, which had 15 members and a fraction of 10,000. Mr. Stetson said that the "counties

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in the interior have 50 per cent fractions, or two thirds of the fractions over the ratio on which they were entitled to one member; and those two thirds over the one member go unrepresented; while New York has 15 members on full ratios, and a sixteenth member on a small fraction. . . . . The fraction, therefore, must fall somewhere. And, on the principle that we are not to disturb county lines, the greater number of representatives in the large counties have the fewest numbers of fractional representation. He wanted the country to have the benefit of this accumulation of fractions, which is now monopolized by the city of New York. . . . At present a county has but one member, with a large unrepresented fraction; that county is to stand thus, whilst New York city is to be left without any fraction, but to have one more than she is entitled to. . . . He felt no jealousy towards New York city; but it was too true that her increasing population was rapidly absorbing the whole representative population of the state." Mr. Stetson's plan was not adopted, but its principle was applied in the amendment of 1894. Mr. Stetson's suggestion that a county with 50 per cent excess of the ratio ought to have an additional member was doubtless the source of the plan proposed in the Commission of 1872 by Mr. Bradley,—that a county should be given another member on an excess of 50 per cent, which was afterwards increased to 55 per cent; but the plan was not adopted by the commission. This rule of giving an additional member on a 50 per cent excess was included in Mr. Lauterbach's plan already mentioned, and in the plan finally adopted by the Convention.

In addition to the foregoing amendments, Mr. Elon R. Brown submitted to the committee on legislative organization a plan which was made the basis of the committee's deliberations in connection with other amend-

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ments already noted, and, with modifications, was finally adopted. Mr. Brown's plan was considered in detail by the committee before it was formally introduced. It was framed on a proposed senate of 50 members and an assembly of 150 members. It provided for apportioning members of assembly in three groups, and imposed limitations on the disproportion allowable between senate and assembly districts in the same county. In the latter part of July the Brown plan, with some modifications, was tentatively approved by a majority of the general committee, and Mr. Brown was requested to introduce it in the Convention. Mr. Brown and Mr. Lincoln were appointed a subcommittee to complete the amendment. The amendment was introduced on the 9th of August. It provided for assembly apportionment as follows:

"The quotient, from dividing the total population, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment; which shall be made as follows:

"First. One member of assembly shall be apportioned to every county (including Fulton and Hamilton) containing less than the ratio and one half over.

"Second. Two members shall be appointed* to every county (including Fulton and Hamilton) contaening such ratio and one half over, but less than twice said ratio and one half over.

"Third. The total population (excluding aliens) of the remaining counties of the state shall be divided by the number of the remaining members of assembly, and the quotient shall be the ratio for the apportionment of said remaining members. Members apportioned on less than the ratio shall go to the counties having the highest remainders, in the order thereof respectively. No county shall, in any case, have more members of assembly than a county having a greater population."

Comparing these rules with those suggested by Mr.

*So in the document; probably should be "apportioned."

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Lauterbach and others, it will be seen that all the plans agreed in giving each county except Hamilton one member. The Lauterbach plan and the orignal Bradley plan of 1872 and Mr. Brown's plan proposed to give an additional member to a county containing a ratio and a half. Mr. Lauterbach's plan assigned additional members above 2 on full ratios only. According to the Brown amendment as originally recommended by the committee, the residue of members above 2 in any county was to be allotted according to representative population exceeding two ratios and a half, according to a new ratio to be ascertained by dividing the total representative population of the remaining counties by the number of the remaining members of assembly. Afterwards the Convention adopted an important modification of the rule relating to the third group. Several questions relating to the organization of the senate and assembly were left undecided by the committee in the first presentation of the amendment; thus, the official terms of senators and members of assembly were not fixed, and the question of annual or biennial sessions was stated in an alternative suggestion. It will be remembered that the apportionment of 1892 was made at an extraordinary session of the legislature. The amendment required apportionments to be made at a regular session. The amendment apportioned members of assembly among the several counties and regulated the formation of assembly districts by local authorities. An assembly district was required to be wholly within one senate district. "In counties having more than one senate district the same number of assembly districts shall be put in each senate district so far as possible, and a less number shall be put in the smallest senate districts." Neither a town nor a city block could be divided in forming a senate or assembly district, and the limit of disproportion between the ad-

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joining senate and assembly districts could not exceed one adjoining town or block. "Towns or blocks which, from their location, may be included in either of two districts, shall be put in the district where it will be most nearly equal." The amendment divided the state into 50 senate districts. It provided for a decennial enumeration, to be first taken in 1905. A county could not be divided in forming a senate district, except to form two or more districts wholly within the county. "An additional senator shall not be apportioned to any county on less than one half the ratio; and, if any county be entitled to three senators, an additional senator shall not be apportioned to such county on less than the full ratio." The amendment also provided for a judicial review of apportionments.

The committee on legislative organization continued its consideration of the apportionment amendments, and on the 27th of August made a formal report, which provided for the reorganization of the senate and assembly by increasing the number of each as already indicated, and prescribing rules intended to secure more exact apportionments. The report states that, in preparing their proposed amendment, the committee have received much valuable assistance from the amendments above cited, and have embodied "the salient features of Mr. Brown's proposed amendment."

The amendment as reported fixed the terms of senators and members of assembly at two years. The extension of the terms of members of assembly was proposed in view of the intended separation of state from municipal elections, by requiring municipal elections to be held in the odd-numbered years and state elections in the even-numbered years. The Convention did not approve this proposed extension, but continued the term at one year.

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The amendment as reported continued the plan of assembly apportionment as already outlined.

I have already commented on the transfer of senate representation from the country to the city, and from the smaller to the larger counties; and have shown that the growing disproportion between large and small communities could not be prevented without increasing the number of senators. On this subject the committee say that "our proposed number of 50 senators will substantially restore to the people approximately the same representation that they had under the Constitution of 1846, the additional 18 senators going to the great centers of population." The committee submitted schedules showing the proposed senate and assembly apportionments, with the classification of counties among the groups required by the rules prescribed in relation to the assembly. The debate on the apportionment amendment began on the 4th of September, and continued without material interruption until the 7th, when the amendment was sent to the committee on revision. There was further consideration of the subject on the 11th and 13th. It will be impracticable to give even a synopsis of the debate. There was much repetition, and many arguments were presented on the same points. The two principal questions related to the increase of the senate and assembly and the rules regulating apportionments. The partisan possibilities of the amendment were freely discussed, and delegates did not hesitate to say that the apportionment proposed, or an apportionment under the existing Constitution, would give certain districts to one party, and other districts to another party, as if the question related only to partisan advantage. Mr. Dean and Mr. Blake deprecated this aspect of the discussion, and Mr. Cassidy's remark, that "partisanship is transitory," found significant illustration in the first few years following the Convention by the re-

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markable political changes in localities which were theretofore supposed to be firmly devoted to a particular party. These changes show how futile is any attempt to make permanent the domination of any political party by using temporary party power in enacting laws or framing constitutional provisions, with the expectation that they will secure any lasting party advantage. The people are greater than any party.

The apportionment of 1892 was frequently referred to in the course of the debate. Its inequalities, and the possibilities under the existing Constitution as shown by a decision in the *Carter Case,* 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921, were considered a sufficient reason for including in the Constitution rules which would make impossible a repetition of that statute. Judge Gray, in the *Carter Case,* said he did not think the legislature was to act as a "mechanical contrivance" in the distribution of members of assembly, but that something was "confided to the wisdom and judgment of the legislative body in performing this constitutional duty." That remark, though perhaps accurate in construing the Constitution of 1846, could not be applied under the Constitution of 1894, for the Convention, in framing the apportionment rules, did make the legislature a "mechanical contrivance" in the distribution of representation, and left little room for the exercise of legislative discretion.

Mr. Becker, chairman of the committee, in opening the debate, said that a "system of safeguards and checks should be devised" to prevent a repetition of the act of 1892, and that the increase of nearly 5,000,000 in the population of the state since the assembly was fixed at 128, and a much larger increase since the Convention of 1801 fixed the number of senators at 32, made an increase in the legislature necessary in order to equalize representation.

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Mr. Brown reviewed the history of apportionment under the various Constitutions, and pointed out the increase in population with the relative change of local representation by reason of the change and concentration of population in the larger communities, and the necessity of an increase in the legislature for the purpose of restoring the equilibrium of representation. He also said that eleven senate districts created by the Constitution of 1846 were identical with eleven of the districts proposed by the committee. The significance of this comparison is manifest when we recall the fact that the first apportionment was made on the basis of 32 senators, and the second on the basis of 50. The restoration of these eleven districts with identical boundaries on an increase of 18 senators shows how marked had been the movement of population toward the larger communities. Of eleven other districts containing two or more counties, five districts each contained two counties that were united in 1846. He said the additional 18 senators were given to four of the larger counties, namely, 9 to New York, 6 to Kings, 2 to Erie, and 1 to Monroe. Speaking of assembly apportionments, Mr. Brown said there were 13 counties "standing in a group, having approximately a population of from 60,000 to 90,000 inhabitants, most of them falling below two ratios, although above a ratio and a half,—counties which in population, in material wealth, in everything that would go to require representation and to deserve equal representation in the popular houses, are equal one to another, and may be fairly said to need two members of assembly." One object of the apportionment rules was to provide for this group of intermediate counties, which, under the former Constitution, must have remained with the smaller counties entitled to one member. A moderate increase in the number of members of assembly made it possible to increase repre-

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sentation from these middle counties, without injustice either to the larger or the smaller counties. Mr. Brown said the apportionment rules were not framed for the purpose of gaining party advantage, but to prevent parties from using apportionment "for party ends." Whatever might be the changes of political power, the proposed apportionment would "give the counties of this state a firm, a stable, and an equitable representation in both houses of the legislature." Like the increase in the senate, Mr. Brown said the increase in the assembly had also gone to the larger counties. The proposed increase of the legislature would substantially restore to the rural portions of the state the representation they had enjoyed for half a century, and prevent an undue representation in the great cities which did not have unrepresented fractions, as against the great counties of the state which have unrepresented fractians.

Mr. Lincoln considered the duty of the Convention in relation to the lawmaking branch of the government, and said that the great question before the Convention, "and a great question in organizing any government, certainly any representative government, is the question of the distribution of power." He reviewed the theory of representative government and the principles on which it had been constructed, called attention to the development of legislative organization in New York, and gave a summary of apportionments under the Federal Constitution, showing the population, number, and members of the House of Representatives, and the ratio at each apportionment. He called attention to the Federal apportionment act of 1850, which provided for a ratio by dividing the population by the number of members of Congress, who were to be distributed among the states according to this ratio, and the residue of members, if any, were to be allotted to the states having the largest remainders. He

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pointed out that under the Federal apportionment of 1891 five states—Delaware, Montana, Wyoming, Idaho, and Nevada—were below the congressional ratio, yet each had a representative and two senators. Referring to the assembly rules, Mr. Lincoln said that "the crowning feature of this scheme is that we devise an intermediate ratio." He said that 36 counties having 1 member showed an average of 36,280. The counties with only 2 members each have an average ratio of 35,572, and the larger counties with more than 2 members showed a ratio of 40,566. He said the general ratio was 38,606, and that the proposed apportionment reaches "a degree of equality that was never before reached in any scheme of apportionment presented to any constitutional convention or any people involving the question of county and state units." He said that after several experimental apportionments, based on different numbers, the number 150 was settled upon as the most equitable and just for all the counties of the state, and as providing the most nearly equal results in representation. He said the large intermediate counties could not receive additional representation by the new rule on the basis of 128 members. He reviewed the provisions relating to senate apportionments, and thought a moderate increase in the senate was justified by the large increase of population. Referring to the new provision prohibiting the division of a county in forming senate districts, and citing the two instances in the act of 1892 by which the northern part of New York was placed in a district with Westchester and Putnam, and a part of Kings was placed in a district with Richmond, which insured an entire representation to New York and Kings without fractions, Mr. Lincoln quoted from the Constitutions of other states provisions intended to prohibit the division of counties in the formation of senate districts.

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Mr. Gilbert thought the cities had too much "preponderance in the legislature," that numbers were not the only things to be considered in making a just and right apportionment, "territory has something to do with it." "I cannot," he said, "look with complacency upon the fact that a little territory in the southern part of the state is likely to have in the near future a preponderance in the legislation of this state." Mr. Barrow, commenting on the increase in city representation, said: "The time is coming very speedily, and perhaps it will have arrived when an enumeration shall be taken in 1905, when Brooklyn and New York will be entitled to senators who will be a majority of all the senators of the state, and when that time comes New York, or Greater New York, will be able to dominate the state. The fact that it will have the power to do so will raise a serious question of representation. The question will then come whether, under this system of ours, we have not absolutely disfranchised the state of New York outside of the great city." He thought the Convention might well have provided for such a contingency. Mr. Root, referring to the action of the Convention of 1846 establishing thirty-two senate districts, said that "since that time increase in population has occurred in the great cities, and the effect of reapportionment, with the number remaining at 32 and giving new senators to the great cities, is to take away senators from the country; so that the country districts have been continually enlarging, until they have reached a point where a senator cannot properly represent the whole people of his district. The main object of fixing 50 as the number of senators is to bring the senatorial districts, widely extending, as they are, in the country, back substantially where they were with 32 under the apportionment of 1846. So that the evil arising from the continual enlargement of the districts, because of the

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continual sending of new senators to the cities, will be removed by the increase of number." I have already quoted Mr. Brown's statement that, under the new apportionment, eleven senate districts were identical with eleven under the convention apportionment of 1846. Mr. Root said that fixing the number of senators at 50 puts "the senatorial districts in such a position that they can be well represented, each one by a senator; and it puts the senate at such a point that it can properly perform the peculiar functions imposed upon it by our system of government, functions calling for great consideration and requiring in their deliberations a small body of men." Mr. Cookinham said that three considerations should prevail in forming senate districts, namely, population, proximity of the counties to each other, and the means of communication between them; the proposed senate apportionment was as fair as could be made; and he challenged the opposition to show how counties could be combined to a better advantage.

Mr. Choate said it was not true that "direct population, popular count, man for man, has ever been in this state the basis of representation in the legislature." "We are a representative government, so far as its legislative body and the dealing out of legislative powers are concerned." He said that for the great officers of the state and the highest court "we vote man by man, and the majority rules;" but this had not been, and could not be, the rule in electing members of the legislature. Representation must be by districts or counties, or some other form of territorial division. Mr. Choate quoted from several state Constitutions rules respecting the ratio of representation based on population, with the general result that large communities received less proportionate representation than smaller communities. These examples fully justified the committee in proposing three

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groups of counties in apportioning members of assembly, and especially in providing for increased representation in the middle class of counties.

Mr. Bush, opposing the amendment, considered it from a political point of view, and suggested a senate of 40 members, saying that an apportionment on this basis would divide the senate districts equally between the two political parties; that 60 would give the senate to the Democrats, and that, under existing political conditions, an apportionment of 50 senators would give the Republicans 28 or 29 districts, and the Democrats 21 or 22 districts. "Now you know why they take 50 in preference to any other divisor." Mr. Osborn said that each of the proposed rules of assembly apportionment was "calculated to be one step away from popular representation, and one step toward political representation." He said there was no political or commercial necessity for making a second class of counties, and it was "stepping directly away from the idea that the rule of population should govern." "That a satisfactory, fair, and popular system of representation" was to give each county a member, and then divide the remaining members among the remaining counties according to their population in mathematical order. Mr. Osborn said there was not a line in the amendment which had been prepared with the idea of securing popular representation. "The whole object of it is to maintain the present balance and preponderance of the rural counties of this state against the city." He said that under the proposed apportionment the Democrats could not get, without a tidal wave, more than 71 members of assembly, nor more than 21 senators. Mr. William Sullivan said that "an increased population simply requires an increase of the ratio," and that the proposed amendment discriminated unfairly and unjustly against urban districts in favor of rural districts. Mr.

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Bowers said that the people expected from the Convention a "set of rules for the guidance of the next apportionment, and not partisan work." If the apportionment of 1892 was wrong, it did not justify a greater wrong. Mr. Nicoll said the design of the proposed apportionment was to secure to the Republican party the control of the legislative branch of government for at least half a generation. This design was manifest in the unnecessary increase of the senate and assembly, in the postponement of the census so that the results of the apportionment might be retained for the next ten years, in the minus ratios in the Republican districts and the plus ratios in Democratic districts, in the discrimination between the city and the country as to senatorial representation, in the "ingenious classification and division of counties for the purpose of maintaining the prestige of the agricultural districts, and subordinating the population to territorial representation," and "in the barefaced carving out of Republican districts in the hearts of Democratic cities, in New York, in Brooklyn, and in Buffalo."

During the debate, and immediately following it, several amendments were offered for the purpose of modifying the provision included in the report of the committee. It seemed clear that the Convention was unwilling to accept the proposed extension of the term of members of assembly, and Mr. Becker's motion, made at the opening of the debate, to fix the term at one year, was subsequently adopted. Mr. Vedder presented in a modified form the plan included in his amendment already noted, and which had also been offered by him in the senate in 1891. The senate districts as organized by the Constitution were not to be changed, except that new districts might be formed within such original districts when warranted by an increase of population equal to a ratio to be ascertained by dividing the citizen population by 50. Mr.

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Vedder also proposed a similar amendment as to the assembly. These amendments were not adopted. Mr. Mantanye proposed biennial sessions for the legislature, but the suggestion was not adopted. Mr. Mulqueen offered an amendment fixing the number of senators at 32 and the number of members at 128, and requiring an enumeration in 1895, and directing the succeeding legislature to make an apportionment. Mr. Lincoln, for the purpose of moving the election of senators into the even years, offered the following amendment to § 2, which was adopted:

"The senate shall consist of 50 members. The senators elected in the year 1895 shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of 150 members, who shall be chosen for one year."

The Convention rejected a motion by Mr. Bowers to substitute 128 for 150 as the number of members of assembly, also motions by Mr. Blake and Mr. Cochran to fix the number of senate districts at 32.

Mr. Becker, for the purpose of limiting senatorial representation in certain counties, offered the following amendment, which was adopted in committee of the whole:

"Every county having four or more senators shall have a full ratio for each senator, and no city or county shall have more than one third of all the senators, unless the counties of New York and Kings, or the cities of New York and Brooklyn are consolidated, in which cases the city or county so formed shall not have more than one half of all the senators. The ratio for apportioning senators shall always be obtained by dividing the population, excluding aliens, by 50 members, except that, if any county having three or more

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senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county, and the whole number of such senators shall be increased to that extent."

Afterwards in convention, on Mr. Lincoln's motion, the provision relating to the limitation of senatorial representation was stated in the following form:

"Every county having four or more senators shall have a full ratio for each senator. No county shall have more than one third of all the senators, and no two counties or the territory thereof, as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one half of all the senators. The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by 50, and the senate shall always be composed of fifty members, except that, if any county having three or more senators at the time of the apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators."

Mr. Lincoln, in explanation of the substitute, said it was thought, on further deliberation, that the form of the Becker amendment was such that it might possibly embarrass the union of New York and Brooklyn in Greater New York; that there was no desire on the part of anyone to embarrass those great cities in their proceedings for further greatness; that the amendment simply expressed in form the ideas presented by several members "relating to the share in the ultimate representation in the legislature that should be given to the large cities." In connection with the senate amendment, the Convention also adopted the following amendment of-

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fered by Mr. Lincoln in relation to assembly apportionments:

"One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one half over; two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios, according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall go to the counties having the highest remainders in the order thereof respectively. No county shall in any case have more members of assembly than a county having a greater number of inhabitants."

It will be observed that this amendment changed the rules relating to the second and third ratios. The provision, as reported and considered in committee of the whole, required two members to be apportioned to every county having one ratio and a half, and less than two ratios and a half; followed by the requirement that "the total population (excluding aliens) of the remaining counties of the state shall be divided by the number of the remaining members of assembly, and the quotient shall be the ratio for the apportionment of said remaining members." Mr. Lincoln's substitute required an apportionment of two members to each county with a ratio and a half, or more. Originally the third ratio was ascertained by dividing the aggregate citizen population of counties having two ratios and a half, or more, by the number of members remaining after apportioning the first and second groups. By the substitute the aggregate citizen population above two ratios is to be divided by the number of members not apportioned in the first and second groups, and the quotient will be the new ratio. The third group is to be apportioned on this new ratio,

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distributing remainders according to the rule, and the number of members thus apportioned is to be augmented by the two already apportioned in the second group. This final number is to constitute the completed third group, leaving in the second group the counties having only two members. A county may have more than two full ratios; but the excess may not be large enough to entitle it to an additional member on the ratio for the third group. Such a county will, therefore, remain in the second group, though, for purposes of computation, its excess has been used in apportioning the third group.

The new constitutional rules relating to assembly apportionments may be stated as follows:

Divide the aggregate citizen population of the state by 150; the quotient will be the general ratio.

First. Apportion one member to each county (including Fulton and Hamilton as one) containing less than a ratio and a half. These will constitute the first group.

Second. Apportion two members to each county containing a ratio and a half, or more. These will constitute the second group until modified by the third group.

Third. Ascertain the aggregate citizen population above two full ratios, and divide this aggregate by the number of members not included in the first and second groups; the quotient will be the ratio for the apportionment of such remaining members. Apportion these members by this ratio to the counties having more than two original ratios, using the highest final remainders in the order thereof respectively. Add to the number of members apportioned to each county on the new ratio the two members primarily apportioned to such counties in the second group. The result will constitute the completed third group. As finally constituted, the first group will be composed of counties having less than an original ratio and a half with one member each; the second group

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will be composed of counties with two members each, including counties with an original ratio and a half, or more, to which an additional member has not been apportioned on the ratio for the third group; and the third group will be composed of counties having more than two members.

On the third reading, Mr. Dean again offered the amendment previously introduced by him and already noticed, providing for a senate of 32 members and an assembly of 128 members, with regulations intended to prevent inequalities in apportionments; but the majority of the Convention had determined to increase the membership of the legislature, and Mr. Dean's amendment was lost by a vote of 53 to 94.

The Convention rejected a motion by Mr. Mereness to reduce the salary of members of the legislature from $1,500 to $1,200, also a motion by Mr. Tibbetts to "strike out all matters relating to apportionment so far as it actually apportions the senate and assembly districts, and report a general proposition to prevent unequal and unjust apportionments; also giving the legislature power to increase the membership of the senate and assembly."

The consideration of the apportionment amendment was concluded on the 13th of September, and it was adopted by a vote of 96 to 60.

B. MISCELLANEOUS PROVISIONS.

Temporary president of the senate, § 10.—The first Constitution clothed the senate with power to choose a temporary president whenever the lieutenant governor was administering the government, or was "unable to attend as president of the senate." By the section as originally proposed in the Convention of 1777 the power of the senate to choose a temporary president was limited to cases in which the lieutenant governor was administer-

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ing the government. The Convention added the clause last quoted, relating to cases where the lieutenant governor was unable to attend as president. The temporary president was required to be a senator, and was authorized in the case mentioned to exercise the office of the president of the senate *pro hac vice*. This provision relating to the power of the senate to choose a temporary president was continued in the second and third Constitutions without material change. The Convention of 1894 deemed it important to amplify the provision, and define more clearly the powers of the temporary president. For this purpose Mr. Vedder introduced an amendment to § 10, providing that "the senate shall choose a temporary president to preside in case of the absence or impeachment of the lieutenant governor, or when he shall not attend as president, or shall act as governor." This provision imposed on the senate the duty of choosing a president, who was to be a regular and permanent officer of the senate, although designated as "temporary president;" and the power to elect such an officer was not limited to cases where the lieutenant governor did not attend, or was acting as governor. This was an important departure from the original policy, which authorized the senate, from time to time as occasion required, to choose a temporary president to exercise the office for the time being only. Under the amendment, taken in connection with other provisions of the Constitution, the senate would have two presidents, first, the lieutenant governor elected by the people, and second, the temporary president chosen by the senate from its own members. Both of these presidents, the regular and the temporary, in the order named, might become governor.

Mr. Vedder, in committee of the whole, speaking from long experience in the senate, said, in explanation of the amendment, that under the existing Constitution a tem-

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porary president could not be elected while the lieutenant governor was in the chair; that to authorize such an election a lieutenant governor must vacate the chair, or, being in the senate chamber, refuse to take his seat. In either case the chair was deemed vacant, and the senate could elect a temporary president. He said it was the practice for the lieutenant governor to vacate the chair on an agreed occasion; and the senate thereupon elected a temporary president. The lieutenant governor remained in the chamber, but, not being in the chair, he was, by a senatorial fiction, deemed not to "attend" within the meaning of the Constitution; this by construction created a vacancy, which was filled by the election of a temporary president. This little piece of acting, repeated through many years, became a fixed custom in the senate. Mr. Vedder thought the senate should have power to elect a temporary president at any time, without resorting to a forced construction of the Constitution, and without being subject to the will of the lieutenant governor, who might refuse to permit the election of a temporary president.

The provisions of the former Constitution specifying the cases in which the temporary president might act were retained, with the additional provision that he might also act in case of the absence or impeachment of the lieutenant governor. Mr. Vedder said that under the existing Constitution articles of impeachment might be presented by the assembly against the lieutenant governor, and he could still preside in the senate, and "act as presiding officer of the senate, sitting upon the trial of his own case as a high court of impeachment." He thought that no officer should perform his functions after he had been impeached. Judge Countryman thought the amendment did not accomplish the purpose for which it was designed. He referred to an incident which occurred in the senate at the

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session of 1894, when the lieutenant governor, while sitting in his chair, refused to put a motion, and thus sought to prevent a vote of the senate upon a question on which the majority of the senate were against him; and thought this proposed amendment should cover the case, not only of the absence of the lieutenant governor, but of his refusal to act. He said the lieutenant governor was "merely the presiding officer of the senate, and not a member of that body as a legislative body. He is there merely to obey its orders, to put such motions as he is asked to put while sitting in the chair." Referring again to the incident of 1894, which related to a contested seat, he said the "presiding officer of the senate refused to allow that body, in its own right and in its own behalf, to determine a question of a quasi judicial character, as to who were, and who were not, members of that body; thus completely obstructing any decision by the senate in reference to a question which was specially committed to it by the Constitution." Judge Countryman also thought the lieutenant governor should not be permitted to preside during the consideration of articles of impeachment against himself. On Judge Countryman's motion, the words "refuse to act" were substituted for the words "not attend;" so that the temporary president might exercise the duties of the office whenever the lieutenant governor should refuse to act as president, although in the chair.

Mr. Hawley objected to the amendment for the reason that it would give a hostile assembly, by preferring articles of impeachment against the lieutenant governor, power to compel him to vacate his seat as president of the senate, and permit the election of a political opponent to preside over that body. Mr. Alvord said that, under the existing Constitution, a lieutenant governor had not only the right to preside in the senate upon his own impeachment, but he had a right, by statute and constitutional

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law, to act as a judge of the high court of impeachment. Mr. Bush objected to Judge Countryman's amendment, and said it was fraught with great danger. He thought it would destroy the functions of the lieutenant governor as presiding officer of the senate, and that he was already liable to impeachment for a violation of his official duty. The amendment proposed to add a new remedy which would enable the majority to declare that the lieutenant governor had refused to act, and thus set him aside as presiding officer. Mr. Bush said such action by the senate would destroy the dignity of the position of lieutenant governor, bring the entire proceedings of the senate into contempt, and be "one source of constant regret in that body." It may be added here that since the adoption of the Constitution of 1894 the lieutenant governor has been in political accord with the majority in the senate; and consequently there has been no occasion to apply the amendment in the manner which Mr. Bush deemed possible; but it is not to be believed that a political majority in the senate will attempt to oust a lieutenant governor from the chair by any false pretense that he has refused to perform his duty as presiding officer.

Mr. Lincoln, referring to the suggestions concerning the right of the lieutenant governor to preside after presentation of articles of impeachment against him by the assembly, called attention to the provisions of the Code of Criminal Procedure relating to impeachment trials, from which it appeared that the lieutenant governor was authorized to preside on such a trial, except in the case of his own impeachment, or the impeachment of the governor. The Code further provides that when articles of impeachment are preferred against any officer he shall cease to perform the functions of his office until the question of the impeachment is disposed of by the court; and it provides, further, that when the assembly prefers arti-

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cles of impeachment against the lieutenant governor it is the duty of that body to notify the senate at once, so that it may select a president *pro tem.* Referring to Mr. Hawley's suggestion that under the amendment a hostile assembly might, by impeachment, deprive the senate of its regular presiding officer, Mr. Lincoln said that under the existing Constitution such a result would immediately follow the presentation of articles of impeachment against the lieutenant governor. The amendment therefore simply put into the Constitution a statutory provision which had been in force many years.

The amendment was adopted by a vote of 115 to 30.

Consideration and passage of bills, § 15.—In previous chapters I have noticed the proceedings in the Convention of 1867 and the Commission of 1872 relating to amendments intended to require more thorough consideration of bills by the legislature, and imposing specified periods of delay between the introduction and passage of bills. Thus, in the Convention of 1867 one delegate proposed that a bill should not be put on its final passage until five days, and another ten days, after its introduction. It was also proposed that no bill should be passed without consideration in committee of the whole, and that it should lie over one day after a report by that committee. It was also proposed that no bill be introduced during the last five days of the session. The Commission of 1872 recommended a provision requiring every bill to be read twice section by section; that every bill should have three readings, no two of which should be on the same day; and that every bill should be printed and distributed among the members at least one day before the vote on its final passage. These provisions were rejected by the legislature. The Convention of 1894 resumed consideration of this subject, and adopted important amendments to § 15

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relating to the passage of bills. Mr. Vedder proposed to state the section in the following form:

"No bill shall be passed until it has been printed, and been upon the desks of the members at least one calendar legislative day prior to its final passage, unless the governor, or the acting governor, shall certify to the necessity of its immediate passage, under his hand and seal of the state; nor also unless, by the assent of a majority of the members elected to each branch of the legislature; and, upon the last reading of a bill, no amendment thereof shall be allowed; and the question upon its final passage shall be taken immediately thereafter and without debate, and the yeas and nays entered on the journal."

Mr. Vedder, discussing the amendment, said that, under the existing Constitution, a bill could be amended on third reading, and passed without being printed; and the whole character of the bill might be changed without the knowledge of the legislature. The proposed amendment made it imperative that "every bill must have been printed and upon the desks of the members at least one calendar legislative day before it can be voted upon or before it can be passed, and on its third reading no amendment can be made to it, nor can any debate be had." Every member could know the precise character of the bill, for he would have it before him in printed form. Mr. Vedder said that apparently insignificant amendments were frequently made on the third reading of bills, which were afterwards sent to the engrossing room, where further changes were sometimes made; it thus often happened that the bill which went to the governor was quite different from the bill on which the legislature voted. Such results would be prevented by the proposed amendment. Mr. Bush thought some method should be adopted "by which every bill should be on the members' desks

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subject to their inspection, as it is finally passed, and not have an amendment proposed just as the vote is to be taken." Mr. Andrew H. Green suggested that, if a bill were challenged concerning the validy of its passage it would be difficult to prove that it had been on the desks of the members one calendar day; and he thought the matter should be left to legislative discretion, rather than include it in the Constitution. Mr. Green also objected to the provision prohibiting debate after the last reading of the bill. He thought that after perfecting a measure members should not be compelled to vote immediately, without a discussion of its merits. Mr. Spencer inquired whether, in the judgment of the general committee, the new provision requiring the printed bill to be on the desks of the members one calendar day before passage would be deemed directory or mandatory; if directory, he thought the proposed amendment would fail to accomplish the object intended. Mr. Vedder, replying to Mr. Spencer, expressed the opinion that the provisions of the amendment were mandatory. Mr. Bowers thought the amendment was incomplete, because, while it prohibited the passage of the bill until it had been printed and on the desks of the members one calendar legislative day, there was no prohibition against its being passed in some amended form. He therefore moved to amend by inserting the phrase "in the form in which passed," so that the proviso would read, "no bill shall be passed until it has been printed in the form in which passed," etc. The phrase suggested by Mr. Bowers was included in the section as adopted, changed to read, "in its final form:" thus requiring a bill to be reprinted after every amendment. Mr. Bowers also concurred in Mr. Green's objection to the prohibition against debate on a bill after its last reading, and moved to strike it out. Mr. Bowers also said that the suggestion "that the courts will construe this as merely

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directory is a good one;" he therefore moved to amend the section by adding at the end the provision that "a bill passed in violation of these provisions shall be void."

Mr. Root offered the following substitute for the section as proposed by Mr. Vedder:

"No bill shall be passed, unless by the assent of a majority of all the members elected to each branch of the legislature; and the question upon the final passage shall be taken immediately upon its last reading, and the ayes and nays entered upon the journal. No bill shall be passed until it has been printed and upon the desks of all the members of each house in its final form at least three calendar legislative days before its final passage, unless the governor, or the acting governor, shall have certified, under his hand and the seal of the state, that a public emergency demands its immediate passage.

"No bill shall be amended upon its last reading; and no bill shall be presented to the governor for his approval, unless the presiding officer of each house shall have first certified that in the passage thereof the provisions of this section shall have been obeyed."

It will be observed that this substitute required a delay of three days, instead of one day, before a bill could be passed after it had been perfected and made ready for passage, and that the bill at that time should be "in its final form," following the suggestion made by Mr. Bowers; that a bill could be passed without such delay, and without being printed, on the governor's certificate that a "public emergency demands its immediate passage;" and also that the governor could not acquire jurisdiction to consider a bill without the certificate of the presiding officer of each house that the provisions of the section had been obeyed. Mr. Root, discussing the proposed extension of time from one day to three days, said: "One day

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gives no opportunity for members to hear from their constituents, and no opportunity for the publicity which we designed to secure by this provision, to receive its due effect in carrying of information to constituents and notices from constituents back to their representatives." If a delay of only one day were required, the people of the state could not know what was being done; but a delay of three days would give the press an opportunity to communicate the bill to the people, who would then have time to express their opinions concerning the measure. He thought the public interests would not suffer by a delay of three days; but, if the "interests of the state" should demand its immediate passage, it might be passed at once on the governor's certificate that there is an "emergency." Mr. Root thought the last clause of the substitute relating to the certificate by the presiding officer of each house was the most simple and effective way to make certain that the provisions of the proposed bill were observed by the legislature, by imposing on the presiding officers the duty of certifying to the performance of the requirements of the section before the governor could be called on to act upon the bill.

At this stage of the debate, Mr. Vedder offered a very important amendment, which was included in the section as adopted, namely, adding to the provision that a bill should not be passed unless printed, etc., the further provision that it should not become a law. This suggestion was based on the opinion expressed by former Justice Charles Daniels of the supreme court in response to a letter from Mr. Vedder. Judge Daniels thought the prohibition that a bill should not be passed without conforming to certain requirements was addressed only to the legislature, and that, while the members of the legislature, in passing a bill contrary to the prohibition, would violate their official oaths, the law would, nevertheless, be valid.

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Mr. Vedder therefore thought the prohibition should be extended beyond the provision addressed directly to the legislature; and a clause was added that a bill should not become a law without positive compliance with the provisions of the prohibition relating to the printing of bills and the subsequent delay in their final consideration by the legislature. This new prohibition affected the ultimate constitutional status of the bill so that the approval of the governor could not overcome the necessity of compliance with the preliminary requirements of the section. The governor's signature can add no vitality to a bill defective because not printed or on the desks of the members three days before passage, except in the case of an executive certificate of necessity, which relates to another aspect of the subject; nor can a bill thus defective become a law by the failure of the governor to sign it within the constitutional ten days, or by its passage over a veto by the constitutional two-thirds vote.

Mr. Root concurred in Mr. Vedder's amendment. Mr. Vedder strenuously objected to the provision in Mr. Root's substitute requiring a certificate by the presiding officers of the senate and assembly as a prerequisite to the governor's action on a bill. He said the "presiding officer of either house may prevent the passage of a bill by refusing to certify to it." He thought the Convention did not desire to place the power of legislation absolutely in the hands of the presiding officer of either house. He said that, if a presiding officer should refuse to certify to the passage of the bill, the only remedy was impeachment, and the bill could not be presented to the governor without this certificate: therefore, the governor could not act, and the proposed legislation might be defeated. After considerable debate, all amendments, including the original proposition, were referred back to the committee on legislative powers and duties. The committee, after

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further consideration, reported the amendment in the following form:

"No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members at least one calendar legislative day prior to its final passage, unless the governor, or the acting governor, shall have certified to the necessity of its immediate passage under his hand and the seal of the state; nor shall any bill be passed or become a law except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill no amendment shall be allowed; and the question upon its final passage shall be taken immediately thereafter and without debate, and the yeas and nays entered on the journal."

Mr. Maybee moved to strike out the clause, "nor become a law," and add a provision that "any bill passed otherwise than as above provided shall be void." The motion was lost. Mr. Foote offered the following substitute for the first part of the section: "No bill shall be passed in either house of the legislature on the day of its introduction in said house in the form as proposed, unless the governor certifies to the necessity of its immediate consideration." Mr. Foote thought this would prevent "hasty action," which was the principal object sought by the Vedder amendment, and that it would avoid the difficulty incident to proving whether a bill had actually been on the desks of all the members during the time required by the section. On Mr. Durfee's motion the phrase "in its final form" was added, which had been already suggested by Mr. Bowers, and included in the Root substitute. On Mr. Burr's motion, the time that a printed bill was required to be on the desks of the members before passage was extended from one day to three days, as suggested in Mr. Root's substitute; also, on his motion, the

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words "without debate" were stricken out. Mr. Spencer proposed to amend the section by adding the last clause of the Root substitute, requiring a certificate of the presiding officer of each house before a bill could be considered by the governor. Mr. Dean opposed the Spencer amendment on the ground that it vested in the presiding officers of the two houses the veto power. Either of these officers, by refusing to make the certificate, might, in effect, veto a bill, and prevent its being presented to the governor; and he thought such a power was entirely "inconsistent with our system of government." The amendment was also opposed by Mr. Maybee, Mr. Gilbert, Mr. Vedder, Mr. Crosby, Mr. Mantanye, and Mr. Moore, and rejected in committee of the whole.

This substantially closed the debate, and the section was adopted by a vote of 107 to 9. It accomplished a radical reform in legislative procedure, and its effects have been sensibly felt in all legislation enacted since the new Constitution went into operation. There has been no practical difficulty in administering the provisions relating to printed bills and the required delay of three days. The presiding officers certify that bills are "duly passed," which is construed to include an observance of all the provisions of the section. The rule requiring bills to be printed, and to be on the desks of members three days before passage, may be, and has sometimes been, waived in particular cases by the governor's certificate authorized by the section and commonly known as an "emergency message," in which, after stating that it appears to his satisfaction "that public interest requires it," the governor certifies to the "necessity of the immediate passage" of a specified bill. It is obvious that the power to waive the printing of a bill and the requirement that it be on the desks of members three days before final passage should exist and be vested in some high state authority outside

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the legislature. The governor, as the chief executive of the state, and also because of his relations to the law-making power, was deemed the proper officer on whom to devolve the responsibility of determining in a particular instance the propriety of waiving the constitutional provision requiring a bill to be printed, and a delay of three days before its final passage. This special executive authority may be used, not only in proper cases during the session, but may become necessary immediately before final adjournment. Under the three days rule a bill introduced or amended during the last three days of the session cannot be passed without the governor's certificate of necessity. Some financial bills are almost invariably postponed until near the close of the session, and these necessarily require such a certificate. The certificate may also properly be used at an extraordinary session, for at such a session the legislature has no jurisdiction of any measure not recommended by the governor, and usually the purpose of the session is understood before it convenes. A rigid application of the three days rule would often require the legislature to remain in extraordinary session longer than might be necessary for the orderly transaction of its business. An extraordinary session of the legislature was held in 1898, and another in 1899, and six certificates of necessity were issued during each session.

Much the larger proportion of all the certificates under this constitutional provision were issued during the last three days of the regular session. Governor Morton, who went into office with the new Constitution on the 1st of January, 1895, gave this provision a strict construction, following Mr. Root's suggestion in the Convention, that a certificate of necessity should be granted only in a real "public emergency," and declined to issue any such certificates until near the close of the session. In examining

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the practical operation of this provision, I have eliminated certificates issued during the last three days of a session. The result shows that prior to the last three days none were issued by Governor Morton in 1895 and 1896; that Governor Black in 1897 issued three, and in 1898 two; that Governor Roosevelt issued three in 1899, and eleven in 1900; that Governor Odell issued thirteen in 1901, seven in 1902, three in 1903, and twelve in 1904; and that four were issued by Governor Higgins in 1905.

It is manifest that this new executive authority has, in the main, been used with due moderation. Instances will doubtless be very rare in which there is a real public necessity for the passage of a bill in less than three days from the time of its introduction, except as exigencies may arise incident to the final adjournment. The real purpose of the three-days rule was to compel legislative deliberation, and, as stated by Mr. Root, give the public an opportunity to become acquainted with the terms of a proposed measure. An indiscriminate or frequent waiver of the rule by the executive would nullify the primary object of the new provision; and it seems perfectly clear that the three-days delay should not be waived simply to promote the convenience of the legislature, or to expedite party measures, or to prevent discussion in or out of the legislature.

Prohibiting "riders" on appropriation bills, § 22.—On the 22d of May Mr. McMillan proposed the following addition to § 16:

"No provision or enactment shall be embraced in the annual appropriation or supply bill, excepting such as shall relate specifically to some particular appropriation in the bill; and such provision or enactment shall be limited in its operation to such appropriation."

The committee on legislative powers and duties re-

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ported the amendment favorably, continuing it as a part of § 16.

Mr. McMillan, discussing the amendment, said it was intended to prevent tacking special provisions on appropriation bills. He said the appropriation bill of 1894 contained not less than eleven special provisions, which were not indexed, and which could be found only by an examination of the bill, that some of them went so far as to provide for misdemeanors, and that such special provisions usually would not be separately enacted, but by being included in an appropriation bill; and, not being a part of a provision for a specific item, the governor could not veto such an obnoxious provision without vetoing the entire bill. Mr. McMillan said the practice had become an abuse in Congress and in the state legislature, and that it ought to be prevented by constitutional prohibition. After a few verbal changes suggested by Mr. Hawley, the amendment was adopted, and appears as § 22. The provision recalls an amendment proposed by a committee in the Convention of 1867, intended to give the governor power to veto separate and distinct parts of any bill. Such a constitutional provision would have made the McMillan amendment unnecessary, for the governor could then have vetoed the objectionable special provisions without disturbing other parts of the bill. An examination of the laws passed since this provision was included in the Constitution will show that the legislature has not given it a strict construction. Appropriation bills quite often go to the governor after the legislature adjourns, and he is, therefore, unable to eliminate provisions which could be fairly classed as "riders," but must approve them or veto the whole bill. I have already expressed my views in favor of a constitutional provision giving the governor power to veto separate parts of any bill after the adjournment of the legislature.

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Regulating prison labor, § 29.—The following amendment was adopted:

"The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails, and reformatories in the state; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail, or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry, or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given, or sold to any person, firm, association, or corporation. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institution owned or managed and controlled by the state, or any political division thereof."

The legislature of 1778, which enacted the first laws under a constitutional government, found time in the midst of the Revolutionary War to mitigate to some extent the severity of the English criminal law, which, by the adoption of the Constitution, had become one of the inheritances of the new state. On the 30th of March an act was passed with a preamble reciting, among other things, that the method of executing the death penalty in cases of high treason and petit treason was, by the common law, "marked by circumstances of savage cruelty, unnecessary for the purposes of public justice, and manifestly repugnant to that spirit of humanity which should ever distinguish a free, a civilized, and a Christian people." The act substituted death by hanging for other methods then in use. It also abrogated the rule declaring that a person should be deemed guilty who, on being arraigned for

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treason or felony, should stand mute, or refuse to plead; and also in such cases abolished torture for the purpose of compelling the defendant to plead. Such standing mute or refusal to plead was to be deemed a plea of not guilty, and the defendant was tried accordingly.

Ten years later (1788) a statute was passed in relation to felonies, from which it seems clear that the statesmen of that period were not yet liberated from the influence of tradition, experience, and education by which they had become familiar with a harsh and rigorous system of administering criminal law. This act imposed the death penalty in a dozen cases, including treason, murder, arson, burglary, robbery (robbing a church being made a special offense), mayhem, forgery, counterfeiting, and other crimes of a serious character. The punishment of other felonies was left to the discretion of the trial judge, "not extending to life or limb," but which might include imprisonment for life; and for a second offense these felonies were punishable with death. Governor George Clinton, in his message of 1803, very properly characterized punishments under this law as "sanguinary." It was a harsh Criminal Code, and, if it could ever have been justified in any nation, it was clearly out of place in a new state composed of the elements which, during a century and a half, had been forming a society fit to become a great commonwealth founded on a free and rational government. Happily this law was not long permitted to exist.

Governor Jay, in his first message (January, 1796), remarked, with his usual caution, that "it continues to be worthy of consideration how far the severe penalties prescribed by our laws in particular cases admit of mitigation; and whether certain establishments for confining, employing, and reforming criminals will not immediately become indispensable." Both of these suggestions were

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adopted by the legislature, and included in a statute passed on the 26th of March, which modified the criminal law, and provided for the erection of two state prisons, one at Albany and one in New York. The preamble, stating a principle then apparently new, but which has since been universally accepted, declared that "the dictates of humanity and the principles of justice require that the punishment of crimes shall be proportioned to the different degrees of guilt of the offender." The death penalty prescribed by the act of 1788 was abolished in all cases except treason, murder (including accessories), and stealing from a church; but punishments were still severe, for other felonies which had before been punishable with death were now punishable with life imprisonment.

Governor Jay's second suggestion relating to penal institutions was, so far as I have been able to discover, the origin of the state prison system in New York. It is not my purpose to give a history of that system; some features of it have been noticed in other parts of this work,—especially those relating to the offices of inspector and superintendent. The state prison commission, created by the Constitution of 1894, will receive attention in a later part of this chapter. It seems proper here to recount briefly the development of the system of prison labor which culminated in the foregoing amendment adopted by the Convention of 1894, and which went into full operation on the 1st day of January, 1897, a century after the inauguration of the system by Governor Jay and the legislature in 1796.

The statute clothed the trial judge with a discretion to impose imprisonment only, or that the defendant "be kept in the said prison at hard labor, or in solitude, or both." Each state prison was to be under the immediate supervision of a board of not more than seven inspectors, to be appointed by the governor and confirmed

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by the Council of Appointment. The inspectors were authorized "to purchase clothing, bedding, provisions, tools, implements, and raw or other materials on which to employ the convicts." The inspectors were required to keep accounts of the articles so purchased, and of the avails of articles manufactured by convicts. A separate account was to be kept with each convict, in which he was to be charged "with the expense of prosecution, clothing, bedding, and subsistence, and with a due proportion of the expense of the raw materials and implements upon which and with which such convict may be employed." He was to be credited with the avails of his labor; "and, if such credit shall exceed the debit side of the account, it shall be in the discretion of the inspectors, when such convict is discharged, to give him or her a part or the whole of such excess, and, if the whole is not given, to carry the residue to the credit of the state, together with the whole of such excess if any convict is sentenced to imprisonment for life, and does not obtain his discharge by a pardon from the executive." All the convicts, so far as practicable, were to be kept at hard labor, and instruction was to be furnished if needed to enable them properly to perform the labor required.

The act of 1798 (chap. 56), modifying to some extent the act of 1796, authorized the inspectors to "employ any of the convicts in the said prison in such manner, and accredit them for their labor in such sums, as they shall deem just and right." The state prison law of 1801 (chap. 121) re-enacted in substance the provisions of the act of 1796 relating to the employment of convicts, purchase of materials, accounts, and payment to the convicts of a share of the avails of their labor. This act required boots and shoes made by convicts to be branded with the words "state prison."

The salutary effect of a modification of the rigors of

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the Criminal Code was noted by Governor Clinton in his message of 1803. He observed that, while an increase in crime might naturally be expected from the rapid increase in population, there had been, on the contrary, a marked decrease, which, he said, "demonstrates the wisdom of the alterations made in our Criminal Code by the rejection of sanguinary punishments, and the substitution of a system more congenial with the mild spirit of our free government." That system was represented in its operation by the state prison in New York, which had been erected under the authority of the act of 1796. Governor Lewis, in 1804, commended the prison to the consideration of the legislature, remarking that "an institution so honorable to the justice and humanity of the government will, it is confidently hoped, continue to enjoy" its patronage.

It seems clear that almost from the inception of the convict labor system it was regarded as in competition with outside or free labor. One effect of this competition appears in the provision already cited in the act of 1801 requiring boots and shoes made in the state prison to be branded as prison-made goods, thus placing them on the market as a distinct class, and not to be intermingled with and sold as the products of free labor. The effort to restrain competition was again manifested in the act of 1804 (chap. 89), which prohibited the employment of more than one eighth of the convicts in the state prison in the business of shoemaking; but which one eighth was not to include women, or men who had learned the trade before commitment.

Governor Tompkins, in his message of November, 1808, commenting on an act passed at the preceding session (April 8), and which, among other things, made the burning of an "inhabited dwelling house" a capital offense, and authorized whipping for petit larceny, said

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that "the spirit of freedom, the dictates of humanity, and the principles of Christianity require that the awful penalty of death should be inflicted as seldom as possible. . . . Besides, by substituting imprisonment at hard labor, society is relieved from the painful responsibilty of sending one of its members suddenly, and perhaps unprepared, to the tribunal of his God. The fruits of his labor inure to the benefit of the community or his family." The Governor further remarked that the regimen and discipline of the prison, "united with the religious exercises," afford "at least a glimmering hope" of the ultimate reformation of the offender. I may also observe, though the subject is not specially pertinent here, that the Governor unsparingly condemned whipping for petit larceny in a convincing argument, pervaded by humane and patriotic sentiments. Governor Tompkins, in his message of November 5, 1816, called attention to the overcrowded condition of the state prison in New York, and suggested that it might be wise to employ a part of the convicts in "building the new prison at Auburn" (which had been established by an act passed at the preceding session, April 12, 1816), also "erecting fortifications, opening and repairing great roads, constructing canals, or in making other improvements." The legislature seems to have given the Governor's suggestions immediate attention, for, on the 12th of November, an act was passed authorizing the employment of convicts "upon any of the public avenues, roads, streets, or other works" in the city of New York, and also on other public works in the counties of Richmond and Kings.

An important change relative to the policy of the state in the employment of convict labor was made by another statute passed at the same session (April 15, 1817), which, after October 31, 1817, prohibited the purchase of any materials "to be wrought or worked up for sale

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by the convicts confined in the state prison on account of the state;" but, after using state materials then on hand, convicts were to be "solely employed in manufacturing and making up such materials as may be brought to the said prison by or for individuals or companies to whom such materials may belong, to be manufactured at fixed prices for the labor bestowed upon them, to be paid by the owner of the goods to the agent of the said prison for the use of this state." This seems to have been an abandonment of the state-account plan, and a substitution of the piece-price system.

I have already quoted from the act of 1796 the provision continued in the act of 1801, by which a separate account was to be kept with each prisoner, in which he was to be charged with the expense of his prosecution, clothing, bedding, and subsistence, and his proportion of the raw materials used in manufactures. This form of account was changed by the act of 1817, which, after reciting, by way of preamble, that "it is believed that a habit of industry is the best preventive of vice,—to encourage which habit in the criminals in the state prison, whom the state are desirous of reforming, it may be useful to allow them a reasonable portion of the fruits of their labor, to be set apart and secured for them or their families,"—it was provided that after October 31, 1817, a separate account should be kept with each prisoner, charging him with the "cost of clothing, provisions, and hospital expenses, and allowing credit for what has been earned" by him. He was no longer to be charged with the expense of his prosecution. The account was to be closed quarterly, and by good behavior the prisoner was entitled to have 20 per cent of the quarterly balance set apart and invested for his benefit in United States stocks, and on the expiration of his term the accumulated amount was to be paid to him, or, in case of his death in prison,

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such amount should be paid to his family. By this plan the prisoner was given a direct interest in his labor, and was rewarded for good behavior. A further encouragement to industry and good conduct was offered by the provision that a person sentenced for a term not less than five years might receive a commutation of one fourth of the term by continued good behavior and earning $15 or more per annum under the 20 per cent section. The canal commissioners were, by the same act, authorized to contract for the employment of convicts on the canals to be constructed under the act of 1816, which inaugurated the great canal system described in previous chapters of this work. The act of 1817 also provided that, if the number of convicts in the state prisons at any time exceeded 450, such excess might be employed under the direction of the governor in such manner and on such terms and conditions as he might deem proper.

Governor DeWitt Clinton, in his message of January, 1818, said the system of criminal jurisprudence which was adopted in 1796 had not realized the expectations of benevolence, that the prisons had then cost $976,157.44, and he made the discouraging admission that the "efficacy of this system in reforming offenders has not stood the test of experiment." After stating that from lack of reliable information he was unable to compare the present system with the former code in relation to the number of convictions and the increase or decrease of crime, he said, "with inexpressible regret," that he was "induced to believe that in this momentous respect it has not answered our wishes." He thought the penitentiary system had not been subjected to a fair experiment, that its failure was largely due to errors in administration; but that, under proper management, it would "answer all the ends of criminal justice without imposing any great burden on the state." He said the prison buildings afforded inade-

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quate accommodations, and there was a constant loss in prison manufactures.

The plan stated in the act of 1817, by which prisoners were given a 20 per cent interest in the avails of their labor, and also a commutation for good behavior, was given only a short trial, for the sections relating to these subjects were repealed on the 20th of April, 1818. This repeal was apparently due to the fact that there was an inadequate supply of outside materials on which prisoners could be employed, and the prison authorities were again authorized to purchase materials for prison manufactures. The same act prescribed the territory from which prisoners were to be sent to Auburn, and required them to be there kept at hard labor on public works. Governor Clinton's observations on this subject in his message of 1819 were of the same general character. He said there were then confined in the New York prison 603 convicts, and in the Auburn prison 131,—734 in all, and of whom 582 were under conviction for grand larceny, counterfeiting and uttering bank notes.

An act passed in 1819 authorized the supervisors to permit the keepers of county penal institutions to contract for the labor of convicts therein to be performed on the "public avenues, highways, roads, streets, or other works" in such county, or in any adjoining county. An act passed in 1820 initiated a movement for the purchase of marble quarries in Westchester county, to be operated by convict labor from the New York prison. The policy of paying convicts a part of their earnings was revived by an act passed in 1821, which directed the agent to "credit annually on the books of the prison one half of the net earnings of every convict over and above the regular task which he was daily to perform," which was to be paid to the convict on his discharge. By the same statute the agent was prohibited from recommending to

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pardon a convict who, being in good health and able to perform his allotted task, had failed to earn an average of $.25 a day during the preceding year. The same statute authorized contracts for convict labor for fixed terms, which could not exceed three years without the consent of the legislature.

The plan initiated by the act of 1817, of allowing the convict 20 per cent of his net earnings, which was repealed in 1818, was revived on a small scale by an act passed in 1824, which authorized the agent of either state prison to pay a convict, on his discharge, a sum not exceeding $3. The repeated references by governors in their messages to the condition of the penitentiary system, and the need of changes for the purpose of its improvement, led the legislature, in 1824, to create a commission to examine the whole subject of prisons, prison management, and the Criminal Code, and report to the next legislature. This commission reported to the legislature of 1825, and made several recommendations not especially pertinent here. The report states that "at present the largest source of income is from the labor of convicts, done for account of individuals, and on raw materials and articles brought into and worked up in the prison workshops, and charged to the employers or contractors by the piece." This seems to have been the plan contemplated by the act of 1817. At that time (1825) 267 prisoners were employed at Auburn and 575 in New York. The commission recommended that thereafter shoes worn "by the convicts be made entirely of wood in the manner in common use by laboring people of France and other countries on the continent of Europe." The report contained some general observations on the kind of profitable labor for convicts, but evidently did not materially aid in the solution of the problems which then confronted prison authorities.

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Governor Clinton, in 1826, congratulated the legislature on the prosperity of the New York prison, saying that it was practically self-supporting. In the same message he informed the legislature that a considerable portion of the work of the new prison at Sing Sing was being performed by convicts. In 1828 Governor Clinton, observing that "Howard, the apostle of benevolence, looked forward with more hope than with expectation, to the period when the management of prisons should arrive at such perfection that their profits should defray their expenditures," said he had the "satisfaction to announce that this desirable condition is in a state of rapid approximation with us."

The policy of the state concerning prison labor was clearly declared in that part of the Revised Statutes relating to crimes and their punishment which was passed December 10, 1828, and in which it was provided that "whenever the inspectors of either prison shall so direct, it shall be the duty of the agent of such prison to make contracts from time to time for the labor of the convicts confined therein, or of any of the said convicts, with such persons and upon such terms as may be deemed by the said agents most beneficial to this state;" and that "it shall be the duty of the agents to use their best endeavors to defray all the expenses of the said prisons by the labor of the prisoners." Here we find an imperative command and a settled purpose to make the prisons self-sustaining so far as practicable; and apparently this result was to be accomplished without reference to its possible effect on outside labor. Relief from taxation was the primary object.

In 1830 Governor Throop, continuing the consideration of the subject, referred "with great satisfaction to the high state of improvement, and prosperous condition, of our state prisons. . . . The convicts are employed

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during the day at all the various mechanical arts, and each man may be put to that business which suits his capacity, his health, and former habits of life. . . . The experience of the prison at Auburn shows, what has been reasonably doubted heretofore, that the labor of the convicts may be made to supply the expenses of the establishment. During the last three or four years the earnings of the convicts have produced a surplus, after paying for the supplies and government of the prison; and it is fair to infer that hereafter the funds of the state will be relieved from that hitherto most oppressive burden." In 1831 mechanics in the city of New York protested to the legislature against marble cutting and iron industries carried on at Sing Sing, claiming that outside labor was injuriously affected by convict labor in these cases.

In 1833 Governor Marcy, commenting on the prison system, said that among other results anticipated from its operation, and which to a considerable degree had been realized, was "the relief of the public, to a great extent, from the onerous burden of supporting those who, by a violation of the laws, should forfeit the rights and privileges belonging to obedient citizens, and render themselves unworthy, as well as unsafe, members of society."

In 1832 the assembly appointed a committee to visit and inspect the prisons, and report concerning their management. The creation of the committee was the result of a debate on a proposed appropriation for the prison at Mount Pleasant, which was opposed, apparently, because the institution did not show the same profits in its management as the Auburn prison. The committee, in its report submitted to the legislature of 1833, considered the subject of prison administration with much detail. The management at Auburn was highly commended, and the committee adverted with great satisfaction to the

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prosperous condition of that institution. The opinion was expressed that, if the Mount Pleasant prison could be conducted in substantially the same manner, equally satisfactory results might be produced, and both prisons might be substantially self-supporting. Commenting on the results at Auburn, the committee say that "the history of the world has not, until within a very few years, presented so imposing a moral spectacle;" that until recently "the idea of realizing from the labor of those who had, by offending against the laws, been cut off from society, a sufficient amount to sustain the expenses of their confinement, was regarded as a dream of the speculative visionary." This gratifying result tended, however, to produce an outside condition which did not fail to attract the serious attention of the committee. I have already noted two statutes which were apparently intended to reduce the competition between convict labor and free labor, namely, the act requiring certain prison-made goods to be branded as such, and the act limiting the number of convicts who might be employed in the same business. The effect of this competition was evidently becoming serious, and beginning with the report of this committee (1833), there was an almost continuous agitation against convict labor,—at least so far as it affected outside industries,—culminating in the constitutional amendment of 1894. This committee could not overlook this question. It says it is "aware that much complaint has been made by mechanics against the course pursued by the state of putting the labor of convicts in competition with the honest laborer, who toils for the support of his family." The committee admitted that the complaints were in some instances well founded, but was not ready to recommend a departure from the policy which had produced such beneficial results for the state. It expressed the belief that what had been done at Auburn

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might with equally good management be done at Mount Pleasant, and thus enable the people of the state, to a greater degree, to relieve themselves "from the burthens imposed upon the community by the depredations of offenders."

The success attained by our prison system was the subject of special comment by Governor Marcy in his message of 1834, who said that the "penitentiary establishments are objects of great public interest, and must ever draw towards them the anxious regards of the legislature. The improvements by this state in prison discipline have been imitated by other states, and have attracted the attention of several governments in Europe. The commissioners sent from abroad to examine our penitentiaries and ascertain their practical operation have bestowed on both high commendation." The Governor said that by the operation of the penitentiary establishments we had been enabled to ameliorate our Criminal Code, and "in a great measure to relieve the people from a heavy annual burden for the support of convicts." He gave the financial results of the preceding fiscal year at both prisons (Mount Pleasant and Auburn), and said they showed a surplus of $11,880.31 over ordinary expenditures. The Governor said there were then 1,505 convicts in both prisons.

Nothing was said by the Governor concerning competition between convict labor and free labor, which had been briefly noticed by the assembly committee in its report presented the previous year; but it seems that early in 1834 there was a general movement throughout the state for legislation intended to prevent or reduce this competition. A large number of petitions, in which more than 20,000 persons joined, were presented to the legislature, many of them from different parts of the state on the same printed form indicating a general concert of

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action. Other petitions were also presented, together with resolutions and proceedings of local meetings called to consider the subject of convict labor. The petitions stated, among other things, that by reason of convict labor prices of manufactured articles had been so reduced as to leave "little or no competition among the honest, industrious classes of our citizens who have not forfeited their liberty by the commission of any crime." They further say that the honest mechanic ought to be favored, rather than the criminal; that the system of convict labor "not only tends to injure the business of the honest and industrious mechanic, but it compels him to compete with thieves and felons of every grade;" that the system is "entirely at variance with the genius and spirit of our free institutions;" and that the state, by the employment of convicts supported by the taxpayers, could manufacture at small expense, and consequently sell at a low price, thereby obtaining a monopoly against which outside industries could not successfully compete.

The subject was considered in both branches of the legislature. In the senate the committee on state prisons was directed to inquire into the expediency of so regulating prison labor that the same may not interfere with the free labor of mechanics and artisans. This committee introduced a short bill requiring the prison authorities, whenever offering convict labor by contract, to give notice, by publication and otherwise, to mechanics or others desiring such labor, and to conclude only such contracts as shall "best promote the discipline of the prison, shall afford the greatest amount of income to the state, and shall be deemed the least likely to compete injuriously with the mechanics of the same." The bill was accompanied by a report in which the committee substantially approved the existing system, asserting that there was little, if any, real competition with outside mechanics

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growing out of the operations of the prisons; that convict labor was sold for the highest price obtainable, and that the risks of the business were such that contractors could not ordinarily afford to sell under the market, and that they therefore obtained no real monopoly; that the markets were not overstocked by reason of prison labor, and that the depression in prices was not due to such a cause; that there was no competition between convicts and free mechanics, because the convict was a "slave of the state," and had no control over his own labor, and that the existing system of prison labor was not oppressive to outside mechanics, or injurious to society. The bill was not passed. In the assembly the subject was referred to a select committee of eight, one from each senate district, under a resolution adopted February 1st, which required the committee "to inquire into the expediency of discontinuing the manufacturing in the prisons of such articles as tend to bring the labor of convicts into general competition with that of the mechanics and citizens of the country." This committee gave the subject careful consideration, and on the 31st of March made a very able report, discussing the question from various points of view, including the reformation of the offender, his subsequent relations to society, the effect of prison labor on outside industries, the right of the state to be reimbursed by the convict's labor for the public expense caused by him, the competition which this policy of prison self-support produced between convict labor and free labor, and the possibility of employing convicts in branches of industry which would obviate, or at least reduce, competition with outside mechanics. The committee expressed the opinion that mechanical trades should not be taught in the prisons, and, among other remedies, suggested the establishment, through arrangements with the general government, of a penal colony in some "dis-

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tant region remote from civilized settlements." The committee thought the subject should receive more attention than could be given to it during a legislative session, and therefore recommended a commission, which was subsequently created at the same session and directed to inquire into prison management and the employment of convicts, and report concerning improvements, if any, in relation to these subjects, and "as to the expediency of teaching mechanical trades to the convicts; also whether any, and if any what, mechanical trade carried on in either of the said prisons ought to be discontinued by reason of its injurious competition with the labor of mechanics or artisans out of the prisons or for other causes." The legislature thus recognized the importance of the complaints made by mechanics against convict labor, and, by instituting this inquiry, conceded that the state might, in justice to its free and taxpaying citizens, be required to modify a penal system, which, though profitable in itself, might be deemed unprofitable when applied to the whole body of the people. This investigation may be considered the direct beginning of an agitation which continued substantially unabated for sixty years until 1894, when the people, ratifying the action of the constitutional convention, adopted a plan of prison labor which it was believed reduced to the minimum the evil effect of competition between convict labor and free labor.

The year 1835 was an important one in the development of the subject of convict labor and its relation to outside industries. Governor Marcy, in his message at the opening of the legislature, after speaking of the general condition of the penitentiary system, said that "one of the desirable objects which we have aimed at has been to make the avails of the labor of convicts defray all the expenses of these establishments. In order to produce

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such a result, various kinds of mechanical business have been introduced into them. The earnings of the convicts during the last two years have been more than sufficient to pay the ordinary expenses of the prisons, and to furnish the means of enlarging them and adding to their accommodations." I have already alluded to the surplus in 1833. The Governor said the prisons had earned, in 1834, $26,891.52 over ordinary expenditures, and $6,716.41 over all expenses, ordinary and extraordinary. This presented a situation which might well make the legislature hesitate before changing a system which had produced such satisfactory results, and again imposing on the taxpayers the burden of maintaining the prisons; but the complaints which had been presented to the legislature of 1834 could not be ignored. The Governor, continuing his observations, said that, "if a regard to the interests of a numerous portion of our fellow citizens should not require a different direction to be given to this labor, the prisons would cease to be a charge upon the treasury, and probably become a source of revenue to the state; but it never can comport with just and fair legislation to produce such a result by directing this labor in such a manner as to cause it to operate oppressively upon any particular branches of industry. It is an essential principle of our government that burdens and benefits are to be shared equally by all. . . . The mechanics in almost every section of the state have considered their interests injuriously affected by the manner in which the labor performed in the prisons is brought into competition with others." The Governor expressed the hope that the legislature would grant to outside mechanics "such protection as they may properly claim from a government founded on the principle of equal rights and common privileges. No considerations connected merely with the income of the prisons should be permitted

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to interpose any obstacle to removing all just grounds of complaints;" and he thought the object might be attained "without abandoning the present system of discipline, or defeating the main ends for which our penitentiaries were established." He said the instruction of convicts in mechanical trades which they were enabled to pursue after their discharge, thus bringing them into association with other mechanics, with the possible demoralizing effects of such "vicious companionship," constituted a grievance which deserved the attention of the legislature.

A few days later the commission appointed by the Governor under the act of 1834 presented the results of its examination of the prison system in a report filled with valuable information, interesting alike to the statesman and the student of sociology. The report says that prison discipline is based on the "principle of solitary confinement with labor and instruction." This was known as the Auburn plan, and had been adopted in eleven states, and also in upper and lower Canada. "This state has had the honor of bringing to a high degree of perfection a penitentiary system which, though not new in principle. was little known or practised, but which, from its practical results here, has excited the attention and admiration of philanthropists and statesmen both in this country and in Europe. By its great advantages in economy of expense, and in its salutary effects upon convicts, it has produced an entire reformation in the prison discipline of the United States, if not in the world." Referring to the "excited state of attention of a large and respectable portion of our fellow citizens" which had been given to the subject of convict labor by petitions to the legislature of 1834 and otherwise, the commissioners say that the evils complained of in relation to mechanical labor in state prisons consist in bringing prison products into an unfair competition with outside manufactures,

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seriously affecting the business and employment of master mechanics and journeymen; and in degrading mechanical trades in public estimation by teaching them to convicts, by which "a class of bad men are turned out to seek in the shops of honest citizens employment in the business they had learned in the prisons," thus exposing mechanics to the association of convicts. The commissioners denied that trades were degraded in public estimation by being taught in the prisons, but conceded that the other grounds of complaint were well founded, and should receive legislative attention. The commissioners thought that "common humanity" required the employment of convicts for the preservation of their lives, bodily health, and sanity, and that "common justice requires that convicts should contribute by their labor to their own support;" but that the employment of convicts on public works was impracticable to any useful extent. They said that the chief burden of previous efforts relating to prison management had been to make the prisons productive, and to relieve the people from taxation for their maintenance; that this "grand desideratum" had at last been reached, that the result was worth all it had cost, and the policy "ought not now to be lightly abandoned." The commissioners say that the existing condition which had given rise to the complaints by outside mechanics was largely the result of the contract system established under the Revised Statutes and prior laws. The Revised Statutes authorized contracts for indefinite periods on terms to be prescribed by the prison agent, and without limiting the number of convicts to be employed in any particular industry. The same statutes also imposed on the prison authorities the imperative duty to make the prisons self-sustaining so far as practicable. Long contracts were made because deemed of greater advantage to the state, and were specially desired by contractors, who were

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thereby enabled to use their capital with greater profit and more certainty, as well as to secure greater proficiency in the convicts thus employed. The commissioners believed that the existing complaints would not have been heard if early regulations had been prescribed by the legislature, or adopted by the agents, restricting the employment of convicts to the manufacture of products with which the country was chiefly supplied by importation, limiting the number to be employed in each industry, and requiring contracts for convict labor to be let to the highest bidder after due public notice, "so as to allow full and free competition, and to produce such prices that the contractors could not afford to undersell the market." The commission expressed the opinion that the extent of the effect of the competition was greatly overestimated, and some statistics were given in support of this view. It appeared that 1,311 convicts were then employed in 32 distinct industries. The commissioners ascertained by inquiry that there were at that time about 125,000 mechanics in the state, that, comparing the changes in prison population by discharge at Auburn with the changes in the number of outside mechanics by death or otherwise to keep the number up to 125,000, it appeared that of every 5,000 new mechanics, thus added to the total number, not more than 18 learned their trade in Auburn prison. The whole number instructed in both prisons was less than 300. There was an average annual discharge of 55 convicts thus instructed, which made a proportion of 55 to 125,000, or 55 to every 5,000 new mechanics. The commissioners say that "these proportions are so small that the injurious influence upon mechanics as a whole must be imperceptible in practice, and only to be ascertained by examination." It will be observed that this comparison related only to the number of mechanics; the report was significantly silent on the

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question of competition resulting from differences in prices. It was doubtless difficult, if not impracticable, to obtain reliable statistics on this point; but the effect of this feature of the competition was evidently appreciated by the commission, and a remedy was intended in the suggestion that contracts be let under regulations which would make it impracticable for contractors to undersell the market or establish a price which would, in effect, give them a monopoly in the industry. The commission, after discussing and approving the objection that the evils of convict labor were largely increased by teaching convicts trades which they did not know before, said that this ought to be abandoned, which would require the agents to introduce "new kinds of business from foreign countries, and teach convicts trades in those branches only." The commissioners say that, if this suggestion were adopted, no just cause of complaint could be made by persons afterwards embarking in the same business. "They will have gone into it under an existing state of things which they will have no right to ask the public to change for their special benefit." The commission especially recommended that the manufacture of silk be introduced into the state prisons, and submitted a communication from former Chief Justice Ambrose Spencer urging the adoption of the new industry, and containing an interesting statement of facts concerning the possibilities of silk manufacture in this country. Judge Spencer recommended the purchase of tracts of land near each prison on which to plant mulberry trees, and also suggested that the farms connected with county poor-houses be used for the same purpose,—the inmates could feed the silk worms and raise cocoons for use in the prisons.

I have already quoted the provisions of the Revised Statutes relating to contracts for convict labor, and have

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noted the fact that contracts were usually made for a long term. The issue raised by the petitions for a modification of the labor system was complicated by these long contracts. The commission of 1834 thought the contractors had acquired vested rights under these contracts which could not be disturbed by the legislature. The question was referred by the assembly of 1835 to Attorney General Greene C. Bronson, who reported that in his opinion the contracts could not be modified or annulled without the consent of both parties. As most of the contracts would continue four or five years longer, and as two of them might not necessarily terminate before 1843, it was apparent that the existing system could not immediately be changed.

The assembly of 1835, like its predecessor, referred the subject to a select committee of eight, one from each senate district. Six members of the committee joined in a report recommending a bill intended to relieve the situation so far as practicable under the existing contract system, which could not be immediately abrogated. The report stated that numerous petitions had again been presented to the legislature of 1835; and a modification of the labor system was strenuously urged by a large number of mechanics. The committee said two methods of relief had been suggested, namely, transportation, and solitary confinement without labor. The committee said transportation would be unprofitable, that it had been recently condemned in England, and that it would be impracticable without important constitutional changes. Solitary confinement without labor was deemed wholly inadmissible because it would "generally destroy health, break down the mental faculties, and soon result in idiocy or death." The committee approved the recommendations of the commission appointed in 1834, and especially commended it in relation to the manufacture of silk, ex-

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pressing the opinion that our soil and climate were well adapted to this industry. The recommendations of the majority of the committee resulted in the enactment of a law reorganizing to some extent the administration of the prisons, and stating in statute form the conclusions reached by the commission of 1834. The act required a two months' publication of a notice of an intended contract, stating the term of the proposed contract, not exceeding five years, and the number of convicts who might be employed thereon. No mechanical trade could thereafter be taught in the state prisons, except the making of those articles of which the chief supply for the consumption of the country was imported from foreign countries, and except for the purpose of enabling the state to complete its obligations under existing contracts. In the manufacture of articles not so supplied by importation, only convicts could be employed who had learned a trade before going to prison. Foreign artisans might be employed as instructors in the manufacture of foreign products. The prison inspectors were as soon as practicable to begin the manufacture of silk in the prisons, and for this purpose mulberry trees were to be planted on prison property, and also on county poor farms. It was made the duty of the inspectors, whenever practicable, to procure a modification or cancelation of existing contracts so as to conform the labor system to the principles stated in the act.

Governor Marcy, in 1836, reported that the prisons still showed a gratifying surplus over expenses, but expressed the opinion that the immediate effect of the operation of the law of 1835 would be a loss of revenue, which, combined with the expense incident to the introduction of silk manufacture, would probably require appropriations for the maintenance of the prisons. He said the prison authorities had already begun the cultivation of

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the mulberry, and then had about 1,500 trees growing on state property. It would be unprofitable to follow in detail year by year the agitation against convict labor. The subject required almost continuous legislative attention, and was almost invariably noticed in the regular executive messages. Numerous petitions were presented to the legislature, which received special consideration by committees and commissions. The action of the legislature in 1834 and 1835 evinced an intention to modify the prison-labor system, if possible, in accordance with the demands of outside mechanics; and the statutes and other public records show frequent attempts in the same direction. A few incidents in the development of the subject will now be noticed.

It will be remembered that by the act of 1835 convicts to be employed in manufacturing products not supplied by importation were limited to those "who had learned a trade before coming to prison." An assembly committee in 1840 reported that this had been construed by prison authorities to mean that, if a convict had learned any trade before his conviction, he might be taught any other trade in prison. The committee thought the provision was intended to limit a convict to labor in a trade which he had already learned. This construction doubtless prompted the legislature, in 1842, to enact a statute requiring the court to ascertain the trade of each person sentenced to a state prison, and prohibiting his employment except in a trade learned previous to his conviction, or in the manufacture of foreign products.

The project to establish silk manufacture in the prisons was evidently not very encouraging, though Governor Seward, in 1842, said the efforts in that direction were not "altogether unsuccessful." He said the act of 1841, offering a bounty to citizens generally for cocoons or reeled silk, had apparently been well received in different

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parts of the state. He mentioned several counties where the new industry had been initiated, and where bounties had been paid. At the legislative session of 1842 the assembly committee on state prisons, acting on numerous petitions, gave the subject of prison labor very careful and extended consideration, and presented a comprehensive report which will amply repay perusal by every student of this subject. The limits of this article will not permit even a synopsis of this interesting document. The result of the committee's deliberations was the enactment of the law, already cited, relative to the employment of convicts at specified trades, and the creation of a commission to ascertain whether it would be practicable to carry on mining or smelting operations upon state lands, and, if not, whether lands for that purpose could be purchased at a reasonable price, and whether convict labor could be profitably employed in such operations.

Governor Bouck, in 1843, referred to the complaints against convict labor, and said it was proper to "encourage the industry and enterprise of the citizen mechanic, and so to direct the labor of convicts as not to come in competition with them; but humanity requires that these unfortunate beings should be engaged in some exercise conducive to health; and it is also essential that the labor should be rendered productive. . . . If it should be found that convicts can be safely and beneficially employed in the mining districts, it may be proper to convert most of their labor to that object."

The assembly committee on state prisons at the session of 1843, acting on the report of the commission of 1842 and on petitions relating to the subject of prison labor, recommended the establishment of a new prison north of Albany "for the purpose of employing the state-prison convicts in mining and the manufacture of iron, together

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with the manufacture of such articles from iron as are principally imported from foreign countries." This bill was passed at the next session, 1844, at which time Governor Bouck in his annual message said it was "supposed by the mechanics that the plan of employing convicts in the mining districts of the state is practicable; and it is the relief they now desire." Under this act, the new prison was located and erected at Dannemora, and by the terms of the act was called Clinton prison. Governor Morgan, in 1860, said the location of the prison was "an error."

The prison law was revised in 1847 (chap. 460), and the principal provisions already noted in relation to prison labor were continued. Governor Hunt, in 1852, referred to the complaints by mechanics against prison labor, and said that the "leading motive in the establishment of the Clinton prison was to withdraw a large class of prisoners from mechanical employments;" but that purpose had been only partially fulfilled.

Governor Seymour, in 1853, said the Clinton prison had been expensive, and was regarded as an unsuccessful experiment; but it was hoped that, with additional machinery and appliances, and with a better market, the prison would soon be self-sustaining. I have already noted the policy inaugurated in the early statutes, of allowing to a prisoner a share of his earnings, to be paid on his discharge. Governor Seymour, in 1854, recommended a revival of this policy, and suggested "the propriety of allowing to convicts, as a reward for industry and good conduct, some portion of their earnings for the benefit of themselves or their families. This would be calculated to animate them with hope, to create habits of foresight and prudence, and, by enabling them to assist their families, would cultivate the better instincts of their nature. It would also give them, at the expiration of

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their terms of imprisonment, some means of support until they could overcome the difficulties of obtaining employment." Governor Morgan approved this suggestion in 1862. An act passed in 1862 inaugurated the scheme of commutations for good behavior, and also authorized each convict to receive, on his discharge, not more than $10, to be paid from fees charged to visitors to the state prisons and penitentiaries. It will be remembered that the commutation policy had been initiated in 1817, but the provision authorizing it was repealed the next year.

The change of policy produced by the acts of 1835 and 1842 had resulted in a financial loss in prison operation. This deficiency, added to the expenditure incident to the establishment of the Clinton prison, made necessary large annual appropriations for prison maintenance. The legislature of 1866 decided to change the policy of 1835, and accordingly passed an act authorizing the prison inspectors to employ convicts at the prisons where they were confined, and not elsewhere, "in such manner and in such branches of industry, and at such kinds of labor," as, in their judgment, would be most advantageous to the interest of the state. The prison authorities were vested with power to carry on any industry they might select, and purchase and use all needed machinery and appliances for that purpose. An act passed in 1868 (chap. 633) abrogated a printing contract made at Sing Sing, and prohibited its renewal, or the making of any contract for printing in any of its branches in any state prison.

Governor Hoffman, in his message of 1869, said the prisons had not for several years been self-supporting. He said the existing contract system was unwise, that it affected the discipline of the institutions, and did not produce satisfactory pecuniary results. He said "the labor of the convicts should be directed and employed

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entirely by the prison superintendents, and the products of such labor should be sold by them for the benefit of the state. This system would remove many existing causes of complaint in regard to convict labor, and result in material advantage to the public." In 1870 he said the contract system then in existence was vicious, and should be abandoned. The assembly at the same session passed a bill which abolished the contract system of convict labor in all state prisons, penitentiaries, and reformatories, and prohibited the manufacture in penal institutions of any articles except those imported from foreign countries, but, under specified alternative conditions, permitted the manufacture of such home products as would least conflict with outside industries, and prohibited the sale of prison-made goods below the market price. The senate committee on prisons admitted that the contract system was vicious, and condemned it, but did not agree with the assembly that the evil would be cured by the remedy proposed. This committee thought that the qualification in the bill permitting, in the alternative, the manufacture of home products if it did not interfere with outside industries, would be ineffective because there was no tribunal to determine whether there was such an interference. Prison competition with outside labor was admitted, but the committee thought the bill would not afford the relief desired. The committee declined to report the assembly bill, but recommended the appointment of a commission to examine the whole subject. This course was adopted, and a commission was appointed, which presented a report to the legislature in 1871, in which the commission expressed the opinion that the contract system was bad, and ought to be abolished, basing its judgment on the testimony of experienced prison officials that the contract system tended to diminish the revenues of our prisons, had a demoralizing effect

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upon their discipline, and operated as an obstruction to the reformation of the prisoners.

Governor Tilden, in 1876, said he thought the state prisons ought to be self-supporting, and would be under proper administration. At his suggestion another investigating commission was appointed, which reported in 1877. The commission does not seem to have given any special consideration to the contract labor question, but devoted its attention more particularly to questions of discipline and business methods in prison administration. The commission thought that questions of discipline and finance were closely related; and it clearly appeared that discipline had been so lax that convict labor could not be made profitable. The report states that convicts at Sing Sing were employed almost exclusively in the marble industry, that those at Dannemora were employed in the working of iron mines,—in the extracting of ore, and putting it into a marketable condition,—and that the Auburn prison was engaged in mechanical branches of business exclusively. The commission recommended the erection of a wall around the Clinton prison, which it was thought could be built by the convicts, and that the prison be used as a strictly penal one for the worst class of offenders. The report contained no recommendations concerning contract labor.

Governor Robinson, in 1878, said that during the last year Sing Sing prison showed a surplus of receipts over expenditures, and that there was a gratifying improvement in the financial conditions at the other prisons. He thought the improvement was largely due to the change in administration resulting from the creation of the office of superintendent, thus placing the prisons under a single head. The Governor again referred to the subject in 1879, and said that Sing Sing prison showed a surplus exceeding $40,000, and that the deficiency in all the prisons

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was less than $70,000, as against a deficiency exceeding $700,000 in 1876, part of which, however, was caused by appropriations for permanent improvements. The reduction of deficiencies was attributed largely to the new prison administration, which had affected all aspects of prison affairs.

Governor Cornell, in 1880, said that, under the recent constitutional amendment changing the method of administration, the prisons had become nearly self-supporting, but that this gratifying result had been accomplished "at some detriment to certain mechanical interests with which prison manufactures have come in direct competition." He thought that "care should be taken to avoid all unnecessary interference with industrial interests." Governor Cornell informed the legislature, in 1882, that "for the first time in their history" the state prisons had been self-sustaining during the past year. The statement that the prisons had not before been self-sustaining was not quite accurate, as we have already shown. It was true of prison management subsequent to the act of 1835, which made such a radical change in prison administration and in the application of prison labor, but prior to that time, as already appears, the prisons were occasionally self-sustaining.

In 1882 (March 16) Mr. Murphy offered resolutions in the assembly, received by him from the Democratic organization of the city of New York, reciting that the contract-labor system was "detrimental alike to the welfare of the mechanical and mercantile interests of the people," by creating a ruinous competition between convict labor and free labor, and also between contractors and employers of honest labor, thus fostering an iniquitous monopoly, and demanding the abolition of convict labor, or its continuance at rates of compensation equal to that of free labor, and that convict-made goods

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should not be sold at less than the market rate for other goods of the same class. These resolutions were not adopted. Mr. Boyd offered in the senate, on the 30th of March, concurrent resolutions on the same subject. The preamble recited that the contract system worked "great injury to business and working men outside prison walls," and that public sentiment demanded an immediate investigation as to the best method of withdrawing convict labor from competition with outside industries. The resolutions proposed an investigating commission of five members, representing respectively the Chamber of Commerce of New York, State Prison Reform Association, State Workingman's Assembly, Farmer's Alliance, and State Board of Charities, charged with the duty of endeavoring "to provide a system based upon public improvements or other work, which will come as little as possible in competition with outside labor," also of considering the feasibility of employing convicts on state lands. The resolutions were adopted by the senate, but not concurred in by the assembly. The Democratic party, in state convention in 1882, adopted a resolution to the effect that convict labor should not come into competition with the industry of law-abiding citizens.

Governor Cleveland, in 1883, after referring to the financial condition of the prisons, said that, if the penal institutions were self-sustaining without injury or embarrassment to honest labor, it was a matter for congratulation; but he thought the state should not "go further and seek to realize a profit from its convict labor,"—especially if competition with outside labor would thereby be increased. The assembly, at this session, passed a bill prohibiting contracts for convict labor, providing that such labor should be performed only by and for the state, and that the prisoners should, so far as practicable, be required to make their own clothing.

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While this bill was on its way through the assembly, Thomas F. Grady, a Democrat, introduced in the senate a bill to submit to the people the question whether the contract system of prison labor should be abolished, and this bill was passed in the senate the next day after the assembly passed the bill abolishing contract labor. Governor Hill, in his message of 1885, says the submission bill was the result of Republican opposition to the bill to abolish contract labor, it being claimed, he said, by the representatives of that party that the people would not approve such abolition. Both houses of the legislature were then (1883) under Democratic control, and presumably the abolition bill passed by the assembly could also have been passed by the senate; but the Governor says the Democrats yielded to the Republican demands for a submission of the question to the people, and the Grady bill was accordingly passed. It should be noted, however, in this connection, that the Grady bill was passed by a vote of 15 Democrats and 2 Republicans, and that 12 Republicans and 1 Democrat voted against it; from which it seems that the Republicans were, apparently, not in favor of submitting the question to the people. The Republican state convention of 1883 severely criticized the Democratic party for its course in the legislature of 1883 on this question, and said it had "shirked" the issue directly presented in the platform of the last Democratic state convention. The Democratic state convention of 1883 declared that the injurious competition of convict labor had been curtailed. This curtailment, so far as I have been able to discover, consisted of a provision enacted at the session of 1883, prohibiting any further contracts for the manufacture or finishing of fur or wool hats in any state prison. This partial abolition is found in a law passed six weeks prior to the passage by the assembly of the foregoing general aboli-

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tion bill. The proposition to abolish contract labor was submitted to the people at the general election in 1883, and 405,882 electors voted for it, and 266,966 voted against it; showing a majority of 138,916 against continuing the contract labor system; 226,822 electors who voted for secretary of state did not vote either way on the contract labor proposition.

The decisive vote in 1883, in favor of abolishing contract labor, was a sufficient warrant for prompt action by the legislature to complete the policy initiated in 1883. Governor Cleveland, in his message of 1884, said the question "should be approached with the utmost care and deliberation. . . . The opportunity of the workingmen should not be injuriously affected by the labor of convicts in the prisons; nor, unless to avoid such a danger or other serious abuses, should the self-supporting feature of the prisons be lost, and the expense of their maintenance added to the burden of the taxpayers." Here were the same alternatives that had been so often presented to the legislature during the period covered by the agitation against convict labor beginning as far back as 1831, namely, on one side were the legitimate complaints of outside mechanics, and on the other were the interests of the taxpayers, who had a right to relief from the burdens of taxation for the support of convicts by the application of the policy which would require such convicts to support themselves in prison by their own labor. So, while clearly bound to obey the popular mandate and abolish contract labor, it was not easy to find a satisfactory substitute for it. The legislature sought to obtain information by providing, on the 9th of February, for a commission to inquire into the subject, and report on the 1st of March. This time was evidently too short, and the commission did not furnish the desired information. The legislature therefore, without substituting any

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other policy, passed chapter 21, which became a law on the 3d of March, providing that no contract for convict labor should thereafter be renewed or extended, nor any new contract made.

Governor Hill, in 1885, reviewed the recent history of the agitation relating to contract labor, resulting in the act of 1884 abolishing the system. He expressed regret that the legislature had not provided a substitute for the system which had been abolished. He said that, by the recent termination or abandonment of certain contracts, all of the convicts at Dannemora and 360 at Auburn had been thrown out of employment, and that another contract employing 250 men would be terminated in February, 1885. In the absence of any legislative policy to be pursued by prison authorities, he said the superintendent of prisons had purchased machinery for manufacturing on state account, and had thus been able to give the prisoners employment to a greater or less extent. Governor Hill renewed the suggestion made by several of his predecessors, that prison manufactures be equalized by the employment of only a limited number in each industry, and that the products should not be sold at less than the market rates. There was no legislation on this subject in 1885. Governor Hill, in 1886, informed the legislature that the state-account system of convict labor was then in operation, and that, notwithstanding the difficulties attending the change of policy incident to the abolition of the contract system, the prisons during the last fiscal year had produced a surplus of nearly $3,500 above expenses.

The legislature created another commission to investigate the subject of prison labor, which was directed to report early in the session of 1887, and to continue in office until June 1st of that year. Pending the investigation, the public-account system was to be continued; but

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convicts who could not be conveniently employed in that manner might, with the approval of the governor, be employed in what was known as the "piece-price system" of labor. The commission made its report to the legislature of 1887, recommending the public or state account system as the best substitute for the contract system, which had been abolished on the authority of the popular vote. By the public-account system the state becomes a "manufacturer and a seller of goods upon the open market," and can regulate the amount to be manufactured. By this system the productive labor of convicts is to be employed by prison authorities "without the interference, and wholly free from the intervention, of outside individuals or interests." The commission thought it impracticable, if not impossible, to provide employment for convicts which should in no way compete with outside labor. In many instances the extent of the supposed competition was overestimated; but, for the purpose of reducing the competition within the lowest practicable limits, the commission recommended that not more than 200 convicts be employed in any one industry, except in three or four where a larger number would not create any substantial competition. The commission recommended a list of permitted industries, with the important addition that the state should manufacture "all supplies for the penal and charitable institutions of the state, including the Soldiers' and Sailors' Home at Bath." Here seems to have been the germ of the provision subsequently incorporated in the Constitution and statutes, authorizing convict labor in the manufacture of articles for the state, or for municipalities or public institutions. The commission recommended an act providing for the employment of convict labor on state account, requiring managers of penal and charitable institutions, so far as practicable, to purchase from the state clothing, boots and

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shoes, and other articles suitable for the use of the inmates of such institutions, prohibiting the reception of United States prisoners in state penal institutions, and excepting from the operation of the act the penal institutions on Blackwell's Island so long as their products are absorbed by the penal and charitable institutions of the city and county of New York. The policy of this exception was consistent with the general purpose of the proposed act to use convict labor in the manufacture of supplies for public institutions. The act was not passed, but several of its features appear in later statutes.

The legislature of 1888 was urged by the Governor and superintendent of prisons to enact legislation which would provide for the employment of convicts, but nothing was done at the regular session. Later, on the 6th of July, the superintendent appealed to the Governor for relief, stating, in substance, that within a month 1,000 convicts would become idle at Sing Sing and 700 at Auburn, and that the available force at Clinton prison would be out of work by the 1st of August. Acting on this communication, Governor Hill called an extraordinary session of the legislature to meet on the 17th of July, 1888, to consider the subject of prison labor. At this session a bill was passed which the Governor approved in form, but not in fact, filing a memorandum in which several objections to the bill were stated; but, though not satisfactory to the executive, it was signed, because no better bill seemed then available. This law is important, not only intrinsically, but because of its relation to the constitutional amendment adopted by the Convention of 1894. It provided, among other things, that "no motive-power machinery for manufacturing purposes shall be placed or used in any of the penal institutions of the state;" no convict labor could be "farmed out, contracted, given, or sold to any person or persons

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whomsoever." Prison manufactures were to be limited to articles "commonly needed and used in the public institutions of this state for clothing and other necessary supplies of such institutions and the inmates thereof," and no such articles could be purchased elsewhere if they could be procured from the state. The comptroller, superintendent of prisons, and the president of the State Board of Charities were constituted a board to fix the price of prison-made articles; but such articles could not be sold in the general market, and were to be used only by the state and its institutions.

Governor Hill, in 1889, again urged the adoption of a permanent convict-labor policy. The legislature at this session passed an important bill amending the Revised Statutes relating to prisons and prison labor. The bill was introduced by Senator J. Sloat Fassett, and the law resulting therefrom bears his name. It included many subjects and details not pertinent here. It prohibited contract labor, and provided, among other things, that state-prison convicts, so far as practicable, should be employed eight hours each secular day, and the state-account system, or the piece-price system, or both, might be used at the option of the superintendent. Public institutions were required, so far as practicable, to use only prison-made articles, which were to be procured by requisition on the superintendent. Prisoners might, under specified conditions, receive a percentage of their earnings in connection with the commutation for good behavior. The policy of the act of 1888 prohibiting the use of machinery was reversed, and prison authorities were authorized to purchase machinery for use in penal institutions. The act permitted the sale of prison-made goods in the general market; but the superintendent was required to keep in view the primary purpose of supplying public institutions of the state with articles commonly

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used therein. The effort to prevent competition with outside labor was intended to be expressed in the provision that "the total number of prisoners employed at one time in manufacturing one kind of goods which are manufactured elsewhere in the state shall not exceed 5 per cent of the number of all the persons within the state employed in manufacturing the same kind of goods as shown by the last United States census or state enumeration, except in industries in which not to exceed fifty free laborers are employed;" and not more than one hundred prisoners could be employed in the manufacture of either stoves, or iron hollow ware, or boots and shoes; but, except in state prisons, convicts could not be employed in the last-named industries in manufacturing for the general market. I have already called attention to the act of 1804, which prohibited the employment of more than one eighth of the convicts in making shoes.

The legislature of 1890 prohibited the making or finishing of fur or wool hats in any penal institution, and restricted printing to official reports and printed matter to be used only in the institution in which it was printed. In 1892 the statute of 1890 was amended by also prohibiting the making or laundering of collars or cuffs in penal institutions.

Governor Flower, in 1893, said the deficiency of earnings over expenditures in state prisons amounted to $140,498.90, that the prisons had earned during the last year $81,707.72 more than during the preceding year, and that at Auburn the earnings exceeded the cost of care and maintenance. He thought that supplies for the inmates of hospitals for the insane might be largely manufactured by prison labor. He said the state controlled the roads for about 20 miles around Clinton prison, and he recommended that 200 convicts be employed in road building in the vicinity of that prison. The latter sug-

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gestion was adopted by the legislature in a statute authorizing the employment of 300 convicts in the improvement of public roads within 20 miles of Clinton prison. The legislature of 1894 extended this act to the other prisons, and authorized the employment of convicts in road building within 30 miles of a prison, but not within an incorporated village or city.

I have now given a very brief sketch of convict labor in connection with prison administration, omitting many details which would be found important in a full history of prisons. It has been my purpose to show the general policy of the state on the subject of prison labor as expressed in various statutes, without noticing numerous minor experimental variations and modifications projected or tried from time to time, while demonstrating the utility of larger policies directly prescribed or authorized by the legislature. From the first suggestion by Governor Jay in 1796 that the abolition of capital punishment in a large number of cases in which it was then imposed would require the establishment of institutions for the confinement of criminals for the purpose of punishment and reformation, with employment as a necessary condition of their confinement, prison labor has been the subject of anxious deliberation by the executive, the legislature, by prison authorities, and philanthropists. In the efforts—running through a century—to devise and maintain a satisfactory scheme of prison labor, two principal purposes have been kept in view, namely, the punishment and reformation of the offender, and the reimbursement of the taxpayers, so far as practicable, for the expenses incurred in prosecuting and punishing the criminal. Hard labor having been imposed by the first prison statute (1796) it became necessary for the state to find something for the convict to do. This necessarily resulted in the introduction of various industries and manufactures

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on which the prisoners could be employed, and, had it not been for the competition with outside labor, which the new policy produced, and the complaints by mechanics that their business was injuriously affected by prison operations, the prisons would probably have been for the most part self-sustaining during the whole of their history. This competition, and the complaints resulting from it, presented difficulties in prison administration not easily overcome, and the history of convict labor for at least ninety years prior to the adoption of the constitutional amendment of 1894 shows that the adjustment of the relations of convict labor to free labor was an ever present element in the consideration of prison methods by the executive and the legislature, and by prison authorities.

These two considerations, partially hostile to each other, namely, the interests of the general taxpayer, and the effect of prison labor on mechanical industries, constantly confronted the legislature in its attempts to solve the problem. Sometimes the interests of the taxpayer were given predominance, and sometimes these interests were deemed of secondary importance. There was much hesitation and fluctuation, but always a manifestly sincere purpose to discover a scheme of labor which would be just to both contending interests. The agitation and discussion of the question in 1834 and 1835, and the statute passed in the latter year, resulted in giving the mechanics the right of way, and for several years afterwards the taxpayers were obliged to meet large deficiencies in maintaining the prisons. To avoid competition so far as possible in ordinary industries, prison labor was used on the public works,—especially in prison construction; and in some cases prisoners literally built their own cells. But this was only a temporary expedient,—prisoners could not always be building prisons; and it became necessary to

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carry on general industries if the prisoners were to be employed at all. The contract system was deemed especially objectionable, and it was abolished in 1884 in response to a popular demand.

When the constitutional convention assembled in May, 1894, the policy of the state on this subject was expressed in the Fassett law of 1889, and in subsequent statutes excluding certain industries from the field of prison operations, and permitting the employment of convicts in road building. Contract labor was prohibited. The state-account plan and the piece-price system were both permitted. The number of convicts to be employed in any one industry was limited, and the primary purpose of prison manufacture was to supply articles for use in public institutions. This showed the beginning of a policy initiated by the commission of 1886, extended by the act of 1889, and elaborated, apparently, to its fullest extent by the constitutional amendment of 1894 and subsequent statutes, under which the state might use convict labor in state work, and in the manufacture of articles used in any public institution or in any political division of the state. This was the climax of a century of agitation since the inauguration of the prison system under the act of 1796.

In the Convention a standing committee on state prisons and penitentiaries was appointed, of which John T. McDonough was chairman. On the 31st of May Mr. McDonough introduced the following amendment:

"The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails, and reformatories in the state; but no person in such prisons, penitentiaries, jails, or reformatories shall be required or allowed to work while under sentence thereto, at any trade, industry, or occupation wherein or whereby his work, or the product or profit of his

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work, shall be farmed out, contracted, given, or sold to any person or persons whomsoever."

This required the employment of prisoners, and prohibited contract labor in any form. There were numerous hearings on the proposed amendment, and the committee gave the whole subject careful consideration. A large number of labor representatives appeared and advocated the adoption of the amendment. The original amendment did not suggest any policy; it only commanded prison labor and prohibited contracts. It put into constitutional form the judgment of the people as expressed in 1883 on the proposition to abolish contract labor. On the 30th of August the committee reported the amendment in the following form:

"The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails, and reformatories in the state; and on and after January first in the year one thousand eight hundred and ninety-seven no person in such prisons, penitentiaries, jails, or reformatories shall be required or allowed to work while under sentence thereto, at any trade, industry, or occupation wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given, or sold to any person, firm, association, or corporation.

"This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institutions owned or managed and controlled by the state, or any political division thereof."

Mr. McDonough, who had given the subject very careful study, made the principal speech in support of the amendment. He reviewed recent legislation relating to convict labor, and discussed the effect of prison labor on

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outside industries, presenting substantially the arguments concerning competition which had been so often stated in petitions to the legislature, and which have been summarized in the above sketch. He said that "one hundred labor organizations, with a membership of 40,000, petitioned for this proposed amendment." But the labor organizations did not favor the policy of keeping the prisoners idle; and he said the State Trades Assembly, at a recent convention, voted unanimously against maintaining the prisoners in idleness. They would be satisfied with the employment of prisoners at any industry, and only objected to the sale of the products of their labor. Mr. McDonough said that outside mechanics were not satisfied with the act of 1889. He said the amendment proposed that the convicts should work for the state, the county, the city, the town, the village, any public institution. The inmates of public institutions must have supplies,—let the prisoners make all these things. Referring to the postponement of the effect of the constitutional change until 1897, Mr. McDonough said there would be an opportunity to keep the men employed and give the state two years to make the necessary changes. He cited the French prison system as a precedent for the employment of convicts in government work, quoting from an official report the statement that articles "made by convicts are the property of the government, and are never sold." The same practice existed in the English prison system. "In these prisons the convicts work exclusively for the prison department,—not even for any other public department;" in one the convicts were employed in making clothes for the prison population. "In the large central prison at Melun there is a printing office, which is operated only for the prison department's use, printing official reports and administrative papers." Mr. McDonough said that for the ten years from 1884 to 1893 inclusive the

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prison expenditures amounted to $12,723,813.84, and the receipts to $9,553,095.72, showing a deficiency of $3,170,718.12. He said that, if the amendment were adopted, the legislature ought to compel "every public department to receive from the prisons, penitentiaries, and reformatories every possible article that can be manufactured there, and then they will become self-supporting." He said the amendment was proper because it imposed a restriction on the legislature, and because it was apparent that the legislature had not done its whole duty. Replying to a question by Mr. Smith, Mr. McDonough said there would be as much objection to selling prison products in foreign countries as to permitting the sale of foreign products here. Mr. Springweiler, a representative of the labor interests, supporting the amendment, said that "if anyone ought to suffer by idleness it is the convict, and not the honest man; if anyone ought to have the comforts of life, it is those who obey the laws, rather than those who violate them. . . . If anyone is to be idle, let it be the felon, regardless of its effect upon health. The state should not pursue a policy calculated to impoverish workingmen." Mr. Francis, Mr. Peck, and Mr. Roche supported the amendment on behalf of the large industries of Troy, which they said were seriously affected by prison competition. Mr. Crosby also supported the amendment, asserting that the "state of New York should not engage in, or carry on, any business in competition with a citizen, whether he is a laborer or manufacturer, who is earning a living by honest, free employment." He approved the proposition to supply the needs of the prison population by the product of prison labor.

Mr. Bigelow said the question involved in the amendment was purely for legislative action, and he was, therefore, opposed to incorporating it in the Constitution. Mr.

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McIntyre thought it was a mistake for the Convention to adopt an amendment which favored only a particular class. He thought prison manufactures should be continued, but that the products should be put upon the market for what they were worth. Mr. Pratt thought the proposed amendment was of a legislative character, and therefore should not be included in the Constitution. He said the effect of the competition of convict labor with free labor was largely overestimated, and that "the amount of the products of the industries of the prisons and reformatories of the state is so small and insignificant in proportion to the products of the industries outside of the prisons that it is not worth considering." He said it was in the power of the legislature "to have such a diversity of industries that no perceptible damage will result to any particular industry, or to all of the industries combined."

Mr. Griswold moved to amend the section by striking out all after the first clause, and stating the amendment in the following form: "The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails, and reformatories in the state" (as in the original, and adding) "as shall be for the best interests of the state, having regard to the safe confinement in prison, and welfare and improvement of the prisoners, without other limitations." He said the taxpayers collectively had as many rights as any individual; "they have a right to employ and engage in such employment as they see fit, and put their prisoners to such employment as they see fit." Mr. Griswold's amendment was not adopted. Mr. Marshall proposed to amend the section by striking out all after the first clause, and substituting the following: "So far as practicable, such employment shall be restricted to the performance of labor upon public works,

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and the manufacture of products for use by the state, or any political division thereof, in the public institutions of the same, and by the several charitable institutions, subject to state visitation and inspection." Mr. Marshall thought the plan proposed by the McDonough amendment was fraught with great danger; that, if the needs of public institutions and political divisions could be supplied by the labor of convicts during two months, no plan was proposed by which they could be employed during the remainder of the year. This would create a manifest inconsistency between the first clause and the remainder of the section, because it would command the legislature to keep the prisoners employed, but no employment could be given them. Mr. Marshall's amendment was not adopted. Mr. Pratt, speaking particularly for the Elmira Reformatory, moved to omit reformatories from the operation of the section; but the Convention declined to make the exception.

President Choate said he regarded the amendment "as a most unwise interference with the power of the state to manage the prisons of the state according to the best results of modern science as it has developed from time to time." He thought the relations of prison labor to outside labor had not been solved, and would not be solved for some time to come; "and, while it goes without saying that free labor ought to be protected in every possible manner from competition of convict labor, whether in the form of contract labor or piece work, or any other form, it is no place and no time for us now to put into the Constitution such a rule as this, that cannot be changed for twenty or thirty years. In my judgment, if adopted, it will be seriously regretted, as well by the champions of free labor, as by the other people of the state." Mr. Root supported the amendment, observing that it declared a "principle which ought to be asserted,

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and that it ought to be inserted in the Constitution." Mr. Lauterbach also supported the amendment, saying that he thought the state of New York could be "engaged in better business than in competing with the honest mechanic while using convict labor to save, in some slight degree, the expense of caring for the criminal." A large number of delegates spoke on the amendment, either directly or in explanation of their votes, but without adding materially to the arguments already summarized. The amendment was adopted by a vote of 91 to 51.

So much doubt was expressed by prominent members of the Convention concerning the propriety of this amendment, that its results should be examined before closing this article. The legislature of 1895, which had been chosen before the new Constitution took effect, was evidently dissatisfied with the form and scope of the amendment. It agreed to a new amendment in the following form: "All prisoners sentenced to the several state prisons, penitentiaries, jails, or reformatories in the state shall be kept occupied and employed at labor; and on and after the 1st day of January, 1897, no such prisoner shall be required or allowed to work at any trade, industry, or occupation wherein or whereby his labor or time shall be farmed out or contracted to any person, firm, organization, or corporation. The legislature shall provide for the employment of such prisoners, so far as practicable, upon public works, or in the manufacture of supplies required for the use of public institutions owned or managed and controlled by the state or any political division thereof." This permitted the sale of prison products in the general market; in other respects it was, in substance, the Marshall amendment offered in convention, and was an important modification of the provision as adopted. The legislature of 1896 did not again pass the amendment, but accepted the responsibility imposed on it by the

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new provision, and enacted legislation intended to carry it into effect. It substantially enacted the new section in statutory form. It required convicts to labor eight hours each secular day; "but such hard labor shall be either for the purpose of production of supplies for said institutions, or for the state, or any political division thereof, or for any public institution owned or managed and controlled by the state or any political division thereof, or for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes. . . . All convicts sentenced to state prisons, reformatories, and penitentiaries in the state shall be employed for the state or a political division thereof, or in productive industries for the benefit of the state or the political divisions thereof, or for the use of public institutions owned or managed and controlled by the state or the political divisions thereof."

Thus, on the 1st day of January, 1897, when the constitutional amendment went into full operation, a legislative policy consistent with it, and intended to carry it into effect, had been clearly declared; and prison authorities could begin to test the efficiency of the significant change in prison administration inaugurated by the amendment. The new policy has been in force eight years, and time enough has elapsed to judge of its efficacy. It is a far-reaching policy; under it supplies are to be furnished by penal institutions so far as practicable, not only for these institutions themselves, but for all other public institutions of the state, and also all the political subdivisions. This includes, not only institutions specifically designated as such, but all the state departments, all counties, cities, towns, villages, school districts, and other distinct political divisions, all the state hospitals, charitable institutions, twelve normal schools, nearly 11,000 school districts, besides the separate school divisions in cities,

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aggregating an equivalent of 1,000 additional districts; all of which departments, institutions, and geographical divisions must, so far as practicable, resort for supplies to the penal institutions. The recent reports of the prison authorities show that in the state prisons no convicts are idle who are able to work, that the demand for articles manufactured in the prisons exceeds their capacity, and that there is a constant increase in the receipts from profitable industries. The net earnings for the year ending September 30, 1904, are reported at $110,103.96. The official reports may be consulted for further details.

Three principles are clearly enunciated in the amendment:

First, prisoners must be employed. The people have thus declared in the most solemn manner that convicts shall not be idle; that persons who have forfeited their liberty by violating the established laws of society shall, so far as practicable, by their labor make recompense to the state whose laws they have disobeyed, and which finds it necessary to withdraw them for the time being from active life; and that this labor shall be imposed, not only as a part of their punishment, but also for the purpose of promoting their reformation and preserving their health.

Second, that the products of convict labor shall not be sold in open market, and thus compete with outside industries.

Third. The state shall, by the labor of convicts, supply, so far as practicable, manufactured articles which may properly be used in its departments and institutions, and by its subordinate political divisions. This is a necessary corollary to the first two propositions, namely, that convicts must be employed, and that the products of their labor cannot be sold in the open market; the only market left therefore is the state itself. Society, having deter-

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mined to incarcerate and punish the offender, may, by his compulsory labor, legitimately reimburse itself for the expense incurred by him in connection with his punishment. A person thus placed under involuntary servitude loses a portion of his personal rights, and cannot complain if the state exacts of him a degree of labor which it deems sufficient for punishment, reimbursement, and reformation; and it may itself use the products of his labor, or sell them to subordinate governmental agencies. Under this policy, the taxpayers become the only customers for prison products, and all money used for the purchase of such products is directly or indirectly raised by taxation. This clearly is not competition within the meaning of that term as understood through the long and fluctuating struggle which culminated in the constitutional amendment, for, when it is once admitted that the convict may be compelled to labor, it must necessarily follow that the product of his labor may be used in maintaining the government, which thus seeks to enforce order and obedience to law.

It should be noted, incidentally, that in no event is all the expense caused by the convict reimbursed, for it should not be forgotten that the burden of the prosecution is borne by the county, and state expense does not ordinarily begin until after conviction. This local expense is not repaid, but the taxpayers who have borne the burden of the prosecution must still, by additional taxation, pay for prison-made products purchased of the state.

The opinion seems to prevail among prison authorities and others interested in the subject that, notwithstanding the doubt felt by many persons at the time of its adoption, the new policy has substantially solved the prison problem by providing adequate and profitable employment for convicts for the benefit of the state, and by removing any just grounds of complaint on behalf of free labor. Al-

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though the new policy has been in full operation only eight years, I think that even this brief history amply justifies the wisdom of the McDonough amendment of 1894.

AMENDMENTS NOT ADOPTED.

Increasing or diminishing official salaries.—An amendment proposed by Mr. Mereness, to prohibit any change in an officer's salary during his term of office, gave rise to an animated debate, resulting in an almost equal division of the Convention on a proposition which many delegates believed should be included in the Constitution. It was pointed out that the compensation of officers named in the Constitution could not be increased or diminished during their term of office, and that, by §§ 18 and 24 of article 3, the compensation of certain officers could not be increased or diminished; but that, by judicial construction, these provisions did not apply to officers who were compensated by fixed salaries, which left the proper legislative body either of the state, or of a municipality, at liberty to increase the salary during a term. The Mereness amendment sought to place all official compensation and salaries on the same basis, and subject to the same prohibition against any change during a term. It was urged, in support of the amendment, that the person who accepts an office enters into an implied contract, or at least that he is under a moral obligation, not to seek an increase of his salary. On the other hand, it was said that while the state or a municipality might, for the existing salary, reasonably expect that a person should continue to perform existing official duties during the term without additional compensation, this rule did not give a moral right to increase or enlarge official duties, and require the performance of them without also increasing the compensation; and that the state or a municipality

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ought to have power to pay a larger salary whenever additional duties were required. The committee of the whole, by a vote of 54 to 52, recommended the adoption of the amendment, but in convention a motion to agree with this report was defeated by a vote of 55 to 58. Afterwards this vote was reconsidered, and the amendment referred back to the committee on legislative powers and duties, but it was not reported again.

Commissioners of jurors.—Mr. Becker proposed to amend the jury provision in § 18 by authorizing the legislature to provide for the appointment of a commissioner of jurors in counties containing a city of over 25,000. The appointment was to be made by a judge of a court of record residing in the county. The judiciary committee reported a substitute extending the provision to all counties, and authorizing the appointment to be made by justices of the supreme court of the judicial district including the county, and the county judge, or a majority of them. The amendment had its origin in Governor Flower's refusal to approve a bill in 1894 providing for the appointment of a commissioner of jurors in counties containing a population of 300,000. The bill was intended primarily for Erie county. Justices of the supreme court residing in the county, with other judges, were clothed with the power of appointment of the commissioner. Governor Flower vetoed the bill on the ground, among others, that the legislature could not constitutionally vest this power of appointment in a justice of the supreme court; that it constituted an "office or public trust" within the meaning of § 10 of article 6, and that it was, therefore, invalid. After some debate, the amendment was rejected by the Convention. The legislature of 1895 passed a similar bill relating to Erie county, which Governor Morton permitted to become a law without his approval. Afterwards several other

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statutes were passed creating the office of commissioner of jurors in different counties. In 1898 the statutory revision commission reported a bill containing provisions for the appointment of a commissioner of jurors in any county, which, in substance, were enacted in 1899 as chapter 441. Other similar statutes have been passed for particular counties, some of which have received judicial attention. The decisions in these cases will be considered in another part of this work. The object which Mr. Becker sought by his proposed amendment has since been substantially accomplished by legislation, and any county may now have a commissioner of jurors.

Official pensions.—Mr. Roche proposed an amendment prohibiting pensions to any civil officer or employee except policemen and firemen. The amendment was reported favorably by the committee on legislative powers and duties. After some debate in committee of the whole, the proposition, with several amendments, was referred back to the standing committee, and, on a second report, was stated in a very comprehensive form, which will be found at length in the convention debates. During the debate several amendments were proposed excepting from the operation of the section judges of the court of appeals and justices of the supreme court elected prior to 1894. The amendment was again referred to the standing committee, by which it was reported favorably a third time, but it was not again considered by the Convention.

Intoxicating liquors.—Mr. McKinstry proposed the following new section: "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the legislature may, by law, tax and restrict such traffic with the purpose to prevent or diminish the evils thereof." The amendment was reported favorably by the committee on legislative powers and duties in the follow-

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ing form: "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the legislature shall, by law, impose a uniform tax upon such traffic." During the debate Mr. McKinstry proposed to add the following local option clause: "The legislature shall also preserve, by law, the right of each city and town, by majority vote of the electors thereof, to prohibit traffic in intoxicating liquors within the limits of said city or town," and on his motion the whole subject was referred back to the committee on legislative powers and duties. The amendment was not reported again.

Initiative and referendum.—Mr. Tucker introduced a long amendment intended to give the people substantial control over legislation by conferring on them authority to determine whether bills passed by the legislature should become laws; also authorizing the people by prescribed proceedings to initiate legislation and compel its submission to a popular vote, and to initiate constitutional amendments in the same manner. Measures so initiated were to be submitted to the legislature if in session, or if it would be in session before the next regular election; otherwise the proposed measure was to be submitted to the people by the secretary of state. The amendment contained similar regulations relating to measures affecting local officers. The amendment was not reported.

Mr. McDonough introduced an amendment to § 15 authorizing the legislature to submit any law to the electors affected thereby, and providing that such a law should not take effect unless approved by a majority of the electors voting thereon. The committee on legislative powers and duties reported the amendment favorably, modified by providing specifically that the law might be submitted to the electors "either of the state, or of any political division thereof." Mr. McDonough, discussing the amendment, said a large number of labor

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organizations had presented petitions for a constitutional provision authorizing an initiative and referendum relating to legislation, and that the persons specially interested in the movement had expressed their satisfaction with his amendment,—it was not all they desired, but it would at least permit the legislature to submit questions to a popular vote. He referred to *Barto* v. *Himrod*, 8 N. Y. 483, 59 Am. Dec. 506, in which the court of appeals decided that the free school law of 1849, chap. 140, was unconstitutional, for the reason that the fact of its becoming a law was made to depend upon the result of a popular vote. The amendment was intended to obviate this constitutional objection, and permit the legislature, in its discretion, to submit laws to the people for their approval. Mr. Alvord and Mr. Dean thought the legislature should not be permitted to shirk the responsibility vested in it by the Constitution as the lawmaking power, and that questions of appropriate legislation should not be constantly submitted to the people, who were busy enough with their ordinary affairs without being required to study and pass upon legislative bills. Mr. Hill doubted the propriety of the amendment, and said the operation of the referendum in Switzerland had not been "wholly successful." Mr. Marshall said the amendment embodied a "vicious principle," and would deal the death blow to representative government. Mr. Hamlin said the amendment was "revolutionary, and designed to overthrow our system of government." It was not a modern idea. It had been applied in ancient Athens and in the Italian Republic, but in both cases it had destroyed human liberty. Mr. Holls thought the proposition would be a "dangerous experiment," and that, while the Constitution, as the fundamental law, should be submitted to the people for their approval, there was a wide difference between this action and the

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action required on the mere details of legislation. Mr. Cady said the proposition was "opposed to the whole genius of Anglo-Saxon and Anglo-American government;" and he cited a recent opinion by the judges of the supreme court of Massachusetts, to the effect that a proposed law could not be constitutionally submitted to the people, and in which it was declared that the Constitution provided for a representative government, and not a government directly by the people. Mr. McDonough said that ours was a government by the people, and that it could not be dangerous to submit a law to the people for their approval. The committee of the whole reported the amendment adversely, and this action was agreed to in convention by a vote of 83 to 33.

Notice of intended legislation.—Mr. Arnold offered an amendment providing for notice of local or special bills. The committee on legislative powers and duties reported Mr. Arnold's amendment adversely, but this report was disagreed to by the Convention and the proposition, materially modified, was placed on general orders, but received no further consideration. Mr. Bigelow proposed to amend § 16 by providing for the publication of the text or an abstract of each private or local bill before its presentation to the legislature. Mr. Hawley also proposed to amend the same section, prohibiting the introduction of a private or local bill without proof that within sixty days before its introduction it had been advertised by its title one week in the county official paper, and that the bill, signed by five electors and taxpayers, had been filed one week in the county clerk's office. Mr. Holls and Mr. Root also introduced amendments relating to this subject. This subject has been considered in previous chapters in connection with similar propositions which have been proposed in conventions and in the legislature.

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Miscellaneous suggestions.—In addition to the foregoing amendments, some of which were seriously considered by the Convention, the following propositions were submitted, but most of them received little attention except in committee: Mr. Johnston, fixing the salary of a senator at $3,500, and the salary of a member of assembly at $2,500; Mr. Mantanye, relating to boards of supervisors; Mr. Hill (eligibility to the legislature), by excluding the office of commissioner of deeds from the prohibition contained in § 8, also requiring a member of the legislature to be an elector; Mr. Barrow, adding to § 9 (two-thirds bills) the provision that "no service, duty, or obligation, payment, or other consideration for an appropriation of such public moneys or property, shall be construed to authorize the same without such assent;" Mr. Cookinham, that the word "shall," used in the Constitution in relation to a required act or duty, must be construed as mandatory, and not directory; and that "no meeting of the legislature shall be finally adjourned until every act required by the Constitution to be done at such meeting has been performed;" Mr. Roche, adding the following subjects to the prohibition contained in § 18, namely, "regulating county or township affairs, regulating or defining the powers and duties of justices of the peace and of constables, providing for extending or renewing municipal or county bonds, exempting property from taxation, water rates or assessments for local improvements, except public property, providing for the consolidation of two or more corporations relating to ferries or incorporating ferry companies;" Mr. Hottenroth proposed to add to the same section laws limiting the area of assessments for local improvements, and fixing the rate of interest on unpaid taxes and assessments; and Mr. Tekulsky, relating to street improvements, docks, parks, public or private buildings, as-

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sessments, collection of taxes, salaries, or choice of officials in any city; Mr. Doty, also amending § 18 by adding the provision that "no local or private act in the cases hereinabove specified shall be passed by the legislature in the form of a bill to amend any general law;" Mr. Roche, and afterwards Mr. Lauterbach, original purpose of bill not to be changed by amendment, ayes and nays necessary in concurring with amendments by other house, and on adopting report of a conference committee; Mr. Rogers, § 18 (private or local bills), an elective officer's term not to be increased or diminished during his incumbency; Mr. Goodelle, § 10, depriving the legislature of the power to determine the elections, returns, and qualifications of its members, and requiring the legislature to provide another tribunal for this purpose. (This subject has been fully considered in a previous chapter, and I have there noted the rejection by the people, in 1892, of a constitutional amendment intended to accomplish the same result.) Mr. Hawley, requiring the legislature, at least two weeks before final adjournment, to fix a day therefor; making it the duty of the presiding officers at noon on that day to declare their respective houses adjourned without special motion therefor; requiring all bills to be reported at least seventy-two hours before final adjournment, prohibiting the introduction of a bill within such seventy-two hours, and, after that time has begun to run, requiring the legislature to dispose of all bills in the order of their first introduction; also requiring the board of supervisors to designate an official paper for the county, prohibiting the use of the words "for other purposes" in the title of a bill, requiring general laws to originate in the senate and private or local laws in the assembly, and requiring the two classes of laws to be separately published; Mr. Lauterbach, requiring the governor's approval of concurrent resolutions,

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requiring all bills to be printed, and "read at length on three different days in each house," and requiring all amendments to be printed before the final vote; requiring the presiding officer of each house, "in the presence of the house over which he presides, to sign all bills and joint resolutions" after their titles have been publicly read immediately before signing; Mr. H. A. Clarke, prohibiting a change of county boundaries without an application by the board of supervisors of each county affected, except to add territory to a city conterminus with a county; C. A. Fuller: "No bill hereafter passed, relating to a part or parts only of the state, shall describe such part or parts by a reference to the number of inhabitants thereof; but bills relating to a particular locality, village, or city shall designate the same by appropriate words without reference to population." (Such a provision would have prevented the enactment of several statutes which, under the guise of a general law, are intended to relate specifically to a particular locality, and which, by reference to population, geographical location, or other description, exclude all other parts of the state.) Jesse Johnson, a general law can embrace only subjects indicated in its title; Mr. Becker, prohibiting a private or local act granting land under navigable waters, or permitting the erection of a pier, bulkhead, or other structure on such land without a deed from the commissioner of the land office; Mr. Pratt, prohibiting the legislature from extending exemptions of property from taxation, but not affecting conditions; Mr. Gibney, requiring boards of supervisors to fix the compensation of all county and town officers, and prohibiting the increase or decrease of such compensation during an official term; O. A. Fuller, requiring all taxes to be levied equally on all personal and real estate in the territory affected thereby; Mr. Kellogg, prohibiting any act validating a pre-

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viously void conveyance of property; Mr. Tekulsky, prohibiting the legislature from enacting laws relating to places of amusement in cities, and requiring the delegation of authority for that purpose to the legislative body thereof; Mr. Gilbert and Mr. Gibney, requiring the legislature to establish boards of arbitration to adjust disputes between employers and employees; W. H. Steele, requiring a private or local bill to become a law by the governor's approval, or otherwise, at least one legislative day before final adjournment of the legislature; Mr. Floyd, prescribing the required officers of each town, and creating various local administrative boards; Mr. Hottenroth, regulating railroad franchises; the committee on finance and taxation,—"All real and personal property, not exempt from taxation, shall be assessed and taxed in proportion to its value under such general laws as the legislature may prescribe, which assessment and taxation must be equal and uniform upon the same class of subjects;" and the legislature was prohibited from extending existing exemptions. The Convention seriously considered an amendment proposed by the committee on powers and duties of the legislature, intended to prevent or restrict the diversion of water, for commercial purposes, from Niagara river above the falls. Such an amendment was reported favorably by the committee of the whole, but after a long discussion, was finally rejected by the Convention.

Art. IV. The Executive.

For the purpose of separating municipal from state and national elections, the Convention determined to provide for the election of governor, lieutenant governor, state officers, and senators in even-numbered years. I have already noticed the change which transferred elec-

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tions of senators from odd-numbered years, as provided by previous Constitutions, to even-numbered years. The change in relation to state officers will be considered in the next article.

There was some difference of opinion concerning the proper length of the executive term. Mr. Holls on the 22d of May introduced an amendment fixing the official term of the governor and lieutenant governor at four years, and made it applicable to the officers elected in 1894. The next day, May 23, Mr. Lauterbach introduced an amendment fixing the official term of the executive at two years, beginning with the election of 1894, and providing that thereafter the governor and lieutenant governor should be elected at the same time as senators. Mr. Moore on the same day offered an amendment fixing the executive term at four years. Mr. McMillan afterwards introduced an amendment fixing the term at four years, and making the governor and lieutenant governor ineligible for re-election for the next succeeding term. The amendment was to apply to the officers elected in 1894. Mr. Mantanye proposed to elect a governor for four years and a lieutenant governor for two years, the election to be held in even-numbered years; the governor was to be ineligible for re-election for the next term; and, if the lieutenant governor should become governor by reason of a vacancy in that office, he also was to be ineligible for re-election as governor. Like the other amendments, this amendment was to apply to officers elected in 1894.

Mr. Lauterbach's amendment was reported favorably by the committee on governor and state officers; it was adopted without change, and appears as § 1 of article 4 of the Constitution. Mr. McMillan, chairman of the committee, said the amendment "was prepared by the committee in New York, having in hand the suggestion

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to separate the municipal and state elections." The Convention, by adopting the cities article, having determined to separate state and municipal elections, it became necessary to change the governor's term, which at that time was fixed at three years. Mr. Lincoln opposed the change in the governor's term, and said he thought the cities were asking too much at the hands of the Convention; that "they ought not to ask that the entire scheme of our governmental system should be overturned and revolutionized or reorganized for the purpose of accommodating the cities in their attempt at separation of municipal and state elections." He said these elections would come together only once in six years, and he thought the people of a city could vote for governor and mayor, either on different tickets, or on the same ticket. He said three years was a fair term for the governor, and that it had proved satisfactory. Mr. Osborn took the same view, and opposed a reduction of the governor's term. He thought the separation of city from state elections would not have the importance which had been ascribed to it, and that it did not justify the proposed change in the "fundamental basis of our state system." He thought that if city elections should be taken out of politics, state elections should also be taken out of politics; "if the people of a city cannot purify their politics in two elections out of three, I have not the slightest idea that they are going to be able to purify them in the third election."

Mr. Holls, Jesse Johnson, A. H. Green, Mr. Moore, and Mr. Dickey favored a change of term, which would require the election of the governor in an even-numbered year, some advocating two years and some four years. There was no separate vote on this amendment. The report of the standing committee included this section with two others relating to state officers, and these three

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were, therefore, combined on third reading. The three amendments were together adopted by a vote of 107 to 24.

When speaker may act as governor.—Mr. Vedder offered an amendment to § 7 (relating to the powers of the temporary president of the senate) by adding the provision that, "if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the assembly until the vacancy is filled or the disability is removed." The amendment was reported favorably by the committee on legislative powers and duties, of which Mr. Vedder was chairman.

Mr. Vedder, speaking on the amendment, said it was intended to add another officer to the gubernatorial succession, so that, if by any contingency the governor, lieutenant governor, and temporary president of the senate were either absent or incapable of acting as governor, the speaker of the assembly could, for the time being, assume and exercise the duties of the office. In previous chapters I have considered this subject in relation to amendments intended to confer executive functions on the speaker in certain cases, and have there expressed the opinion that the temporary president of the senate cannot act as governor, unless the office of governor is actually vacant and the lieutenant governor has assumed the duties of that office in consequence of such vacancy; and that the mere absence of the governor and lieutenant governor from the state does not give the temporary president authority to act. If this is the correct view, the speaker cannot act as governor unless the office of governor becomes actually vacant. I am aware that this is not the view of this question generally entertained, but it seems clear to me that the framers of the original pro-

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vision in relation to this subject did not intend to vest executive functions in the temporary president of the senate, simply because the governor and lieutenant governor might both be absent from the state at the same time. Mr. Cochran moved to substitute the secretary of state for the speaker, for the reason that he is more likely to be of the same political faith as the governor, and also because he is elected by the people of the state, instead of by the people of an assembly district. The Convention declined to make this change, and, after some verbal alterations, the Vedder amendment was adopted by a vote of 94 to 36.

The pardoning power.—Several amendments relating to the pardoning power were proposed, but none adopted. Mr. Marks proposed to create a court of pardons, to be composed of the governor, the chief judge, and two associate judges of the court of appeals. Mr. Emmet proposed to deprive the governor of the power "to restore the right of suffrage to persons who have been convicted of bribery, or of any infamous crime." By an amendment offered by A. B. Steele the governor could exercise the pardoning power only with the concurrence and on the recommendation of a majority of the judges of the court of appeals; and by an amendment introduced by Mr. Abbott this power could be exercised by the governor only with the concurrence and on the recommendation of the council of revision which Mr. Abbott proposed to establish. Mr. Hawley proposed to create a pardoning board composed of the governor, attorney general, and the senior justice of the supreme court in point of service. An amendment offered by Mr. Arnold vested the pardoning power in a board composed of three justices of the supreme court who had reached the age limit, who were to be designated by the governor, and whose action was to be subject to his approval. Mr. Tucker proposed to

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deprive the governor of the pardoning power in cases of persons sentenced to imprisonment for life; and Mr. Blake in cases of persons convicted of murder in the first degree. These two amendments were in connection with others offered by Mr. Tucker and Mr. Blake proposing to abolish the death penalty, and which have been described in this chapter in the notes on article 1. By Mr. Johnston's amendment the governor and the chief judge of the court of appeals were to compose a board of pardons.

Council of Revision.—Mr. Abbott proposed to establish a council of revision to be composed of three members appointed by the governor and senate. Each legislative bill, on its introduction, was to be submitted to this council for an opinion as to its constitutionality and its effect on existing laws, and a bill could not be put on its final passage until the lapse of ten days after its submission to the council. In previous chapters I have given a sketch of the original Council of Revision, its abolition by the Convention of 1821, and the subsequent attempts to revive it in another form; and have taken occasion to express my judgment of its value as a part of our legislative machinery. Mr. Abbott's amendment was not reported to the Convention.

Executive consideration of bills.—Mr. Lauterbach and Mr. Kellogg each offered an amendment to § 9, providing that "no bill shall become a law after the final adjournment of the legislature." Mr. Lauterbach's amendment also required the legislature to fix the day of final adjournment twenty days in advance, and prohibited the presentation of a bill to the governor during the last ten days of the session; but during such ten days bills might be passed over the governor's veto, or amended upon his suggestion. Similar provisions were included in an amendment offered by Mr. Abbott. Mr. Alvord

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and Mr. Kellogg proposed to abrogate the two-thirds rule in passing vetoed bills, and permit such bills to be passed by the same vote which was required for their original passage. By Mr. Abbott's amendment, if the governor objected to a bill he was required to submit it to the council of revision for its approval, if the council concurred in the governor's objections, the legislature was required to pass the bill again, but if the council did not concur, the bill was to become a law notwithstanding the governor's objection. This provision was in effect quite similar to the provision relating to the original Council of Revision under the first Constitution, of which council the governor was a constituent member with only one vote, and he could not overrule a majority of his colleagues. Mr. Root, by request, introduced an amendment requiring bills to be presented to the governor and two judges of the court of appeals to be designated by the chief judge; and a bill must have been approved by the governor and one judge, or by the two judges, who were required to sign it. If not approved by two members of the board, the legislature was required to pass the bill again by a two-thirds vote. None of these amendments were adopted.

Mr. Durfee introduced an amendment to § 3 prescribing the procedure in case of a tie vote for governor and lieutenant governor in certain cases.

Art. V. State Officers; Civil Service.

STATE OFFICERS.

Mr. Lauterbach introduced an amendment providing for electing state officers at the time of electing the governor, providing that these officers elected in 1895 should hold office for three years, and that their successors should be elected for two years. Mr. Moore offered an amend-

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ment authorizing the governor and senate to appoint the secretary of state, attorney general, state treasurer, comptroller, the superintendent of public works, superintendent of prisons, the state engineer and surveyor, the superintendent of public instruction, superintendent of banks, and superintendent of insurance. Andrew Frank proposed to make the offices of secretary of state, comptroller, treasurer, attorney general, superintendent of state prisons, chief factory inspector, commissioner of labor, commissioners of mediation and arbitration, and superintendent of public buildings elective by the people for terms of four years.

Mr. Lauterbach's amendment was reported favorably by the committee on governor and state officers in connection with the amendment changing the governor's term of office, which has been reviewed under article 4. There was little discussion of the amendment relating to state officers. Mr. Roche offered an amendment providing for the election of the superintendent of public works by the people. The amendment was lost. The amendments relating to state officers, and changing the date of their election, were adopted by a vote of 107 to 24.

Section 3 (superintendent of public works) was amended by omitting a provision relating to the abolition of the office of canal commissioner, and § 4 (superintendent of state prisons), by omitting a similar provision relating to the office of inspector of state prisons; and § 5 (canal board) was amended by substituting the superintendent of public works in place of the canal commissioners.

CIVIL SERVICE.

§ 9. Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities

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

There was no civil service reform in the first Constitution. The makers of that instrument were too busy in the struggle for independence, and in too much haste to establish some sort of a state government, to devote to the subject of public office the time needed to construct an ideal system of public service in which the relations of all its parts should be scientifically adjusted to one another, and made to realize and illustrate the dream of the social philosopher. In the chapter on the first Constitution I have described some of the difficulties which confronted the patriots during the Revolutionary period, and especially prior to and coincident with the framing of the Constitution. It was a time for action more than for visions, except for visions of a great nation yet to be after foreign rule had been destroyed. We therefore find, as we might expect to find, that the men who made the first Constitution were intensely men of action, and not visionaries. They were not only fighting for civil liberty, but they even had to fight for an opportunity to frame a form of government; and we have seen how the making of the Constitution was postponed from month to month while the delegates chosen for this purpose were engaged in the sterner duties of actual war. Again, it has already been pointed out that the formation of the first state government was a transition, not a creation;

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and this generation is not called upon to apologize for the men of the Revolution who appropriated and continued under the new government so far as practicable the colonial policy concerning public office, including the methods of selection with which they were already familiar. They found only one office of a general character which was then filled by popular election, namely, the office of member of assembly; and there was no office which was filled by the suffrages of all the people of the colony. The governor was appointed by the Crown, and even the legislative council, which, under the colonial system, answered to our modern state senate, was an appointive body, and not responsible to the people. Other general officers of the colony, as well as the principal officers of counties, and many town officers, were also appointive, leaving little to the voice of the people in the selection of public officers. It was not surprising, therefore, that the first Constitution did not transfer to the people at once the right to choose their own officers. The statesmen of that period were not accustomed to this method of selection; they were not inclined to try experiments; and it will be remembered that only four offices of a general character were made elective, namely, the office of governor, lieutenant governor, senator, and member of assembly. It was obvious that under a popular form of government these officers could not be made appointive, but that the right of selection must be vested in the people. With these exceptions, and also that of minor town officers already elective, public officers were made appointive, and the larger part was placed under the jurisdiction of the Council of Appointment, an instrumentality unknown under the colonial system, except in the legislative council already mentioned, which also acted as an executive council to aid the governor in the administration of public affairs. This council was

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composed of four senators annually chosen by the assembly. The governor was president of the council, and I think—as I have tried to show in a former chapter—that the first Constitution vested the governor with the sole power of nomination of officers, subject to confirmation by the council. The unfortunate, and I think indefensible, construction given to this provision by the Convention of 1801 changed the character of this machinery, and clothed each senate member of the council with a power of nomination equal to that of the governor. This made the council an irresponsible and obnoxious machine; and the history of that period shows that it often used this power in a harsh and high-handed manner, removing men from office solely for political reasons to make room for friends of the appointing power.

Nearly all the offices which the Council of Appointment had jurisdiction to fill have since been made elective. The council had the sole power to determine the qualifications of appointees. It was the civil service commission of that period, without responsibility to any superior, and had the sole right to determine the fitness of candidates for office. What rules of fitness were applied in addition to the rules prescribed by the Constitution or by statute, we do not know. It was not required to hold examinations to determine the qualifications of candidates for office. It appointed whomsoever it would, and the primary qualification seems usually to have been loyalty to the party in control of the council, or to the reigning family or families, which sometimes during our early history either directly controlled the council or dictated its appointments. The Constitution and the early statutes had little to say concerning the required qualifications of public officers. The governor was, by the Constitution, required to be a "wise and discreet freeholder,"—the qualification that he must be wise and discreet has

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been omitted in subsequent Constitutions. The original draft of the provision creating the state senate also required senators to be "wise and discreet" persons, but this requirement was omitted in the final draft. It was customary in the early days to require public officers to be freeholders; and local officers were usually required to be residents of the territorial division for which they were chosen. There was little attempt, under the first Constitution, to impose on the Council of Appointment any restrictions or limitations in the manner of exercising their functions by prescribing qualifications of officers or otherwise; and usually legislation on this subject was evidently intended to be suggestive, rather than mandatory. Thus, the provision in different statutes that certain officers should be "fit and proper," or "fit," or "fit and competent," could be considered only as in the nature of advice to the Council of Appointment, which was the only authority by which fitness could be determined. An assistant attorney general, and afterwards a district attorney, was not only required to be a "proper person," but also to be of the degree of counselor at law in the supreme court. I have already noticed in a previous chapter that in our early history judicial officers were frequently laymen. Most officers were deemed to hold their positions during the pleasure of the Council of Appointment. This made removals easy; and the power was exercised without any substantial restraint, not only in relation to state officers, but the council reached out into counties and towns, pulling down and setting up officers at will, in consequence of which, according to Mr. Hammond in his Political History of New York, vol. 1, p. 178, "the political power and influence of the council was carried into almost every neighborhood in the state. . . . The tendency of this practice was to produce an impression among all ranks of people that men were

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to be punished or rewarded for their political opinions according to their standing and influence in society, and more especially at the polls of the election. The effect naturally was to create a corps of electioneerers in every township in the state under the name of justices of the peace; and thus judicial officers, who of all others ought to be entirely removed from party bias, were made the most active and zealous combatants in the political arena." The magnitude of the political power wielded by the Council of Appointment is readily appreciated when we recall the fact that at the time of its abolition by the Convention of 1821, 8,287 military, and 6,663 civil, officers were appointed by this council. After that Convention had unanimously determined to abolish the council, there were serious differences of opinion as to the proper method of choosing officers then within the council's jurisdiction. By the second Constitution a large number of officers were made elective by the people, the selection of several others was transferred to the legislature, and many were to be appointed by the governor, subject to confirmation by the senate.

The Convention of 1846 carried the policy of popular election almost to the extreme. This subject has been fully considered in the chapter on that Convention, and we need not go over the ground again here. We have already observed the rise and fall of tides of opinion and the fluctuations of judgment which characterized that Convention as it sought a larger measure of popular rights, and which finally accomplished in such a high degree what Mr. Tilden afterwards called "the dispersion of power." This dispersion of power transferred to the people the right to select their own officers, and, within very narrow limitations, to determine their qualifications. The people themselves are solely responsible for the choice they make, and may be presumed to intend to

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select men competent for given offices. The Constitution and statutes in a few instances prescribe qualifications of officers, but as a rule no special qualifications are prescribed, and the people must determine the question for themselves. They constitute the tribunal—in a sense the civil service commission—which must determine whether a candidate is qualified for the office he seeks. No commission can take the place of the people in the exercise of this function, and it is for this obvious reason that elective officers are excluded from the operation of civil service examinations. We may note here that school-district officers must be able to read and write, and that an election-district officer must be of good character, able to speak and read the English language understandingly, and to write it legibly, and possess a general knowledge of the duties of the office to which he is elected or appointed. These limitations apply to the people in their right of selection; and, if it should be found that an officer elected does not possess these qualifications, he would be subject to removal, for this reason, by the proper authority. The people may not always be able to determine in advance whether a candidate possesses the required qualifications, but they are not, for that reason, compelled to accept the service of an unqualified officer. In cities where for reasons of public policy it is deemed wiser to appoint than elect election-district officers, such officers are to be nominated by political committees, and, as to their qualifications, are to be examined by, or under the direction of, the appointing power, which for this purpose possesses the powers and exercises the functions of a civil service commission. Several statutes require specific qualifications, quite often of a technical or professional character, while other statutes prohibit the incumbent of a particular office from holding another office whose functions and duties are

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deemed incompatible or inconsistent with the first. Other statutes require property qualifications in specific cases; and it is a general rule that local officers must be residents of the locality which they are chosen to represent. These various provisions relating to particular elements of qualification apply usually to officers outside the ordinary range of the civil service idea, which is generally limited to subordinate positions whose incumbents are not elected, or appointed by the central authority, but who are secondary appointees, and therefore removed one degree or more from the original source of power, which may be the people themselves, or an executive officer charged with the duty of making appointments to positions, many of which the people might, in their discretion, fill by election with equal propriety. It is these subordinate positions whose incumbents usually perform the larger part of the actual labor of a given department or branch of public business which civil service reform seeks to exclude from the operation of ordinary partisan considerations by requiring such incumbents to possess the peculiar and necessary qualifications demanded for specific service, and which qualifications, it is believed, can be reasonably determined primarily by an examination of a candidate before his induction into office; and then, as a corollary, it is urged that after the officer or employee has, by his experience, demonstrated his capacity and fitness, he should be protected in his position, and not be removed except for good cause; and that such good cause should not include any reason based on mere partisan considerations. The evils of removals for partisan reasons were keenly felt under the first Constitution while the Council of Appointment was in power; but the abolition of that council, and the substitution of other methods of selection to office, did not wholly relieve the situation from partisan influence. The evil consequences

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of applying partisan considerations to the appointment of subordinates in permanent departments, resulting in a general change in the office force on the accession of a new head of the department, were appreciated long before the modern civil service idea took tangible statutory form by declaring that fitness and experience were superior to mere partisan service as qualifications for the performance of official duties.

Thus, Governor Seymour, in 1854, forty years before the constitutional amendment, considering the administration of state prisons, said that "the management of these institutions demands mental and moral qualities of the highest order, and these are inadequate without the advantages of long experience in the performance of the complicated and difficult duties" incident to the peculiar nature of the service required. The governor called attention to the report of an assembly committee appointed in 1851 (submitted in 1852), from which it appeared that the average length of time for which the wardens and agents had held their offices since 1834 did not exceed eighteen months; and said: "It is impossible that the requisite experience can be obtained under our present system, which affords an insufficient compensation to the officers, and renders the tenure of their places dependent upon political changes. While it is true that under our form of government official stations should ordinarily be held by those who reflect the sentiments of the people with regard to the measures and policy of government, our charitable institutions, and those designed for the punishment of crime, should be placed beyond the reach of political influence. Fortunately our public establishments for the relief of bodily or mental infirmities, and for the reformation of juvenile delinquents, have, by common consent, been left under the charge and control of capable and philanthropic individuals, without respect

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to their political sentiments. Their successful management and the liberal support which have been accorded to them, under the influence of public sentiment, have been just occasions for state pride. The same principles of freedom from party action which have rendered our asylums for the insane, the deaf, the blind, and the idiotic, and our houses of refuge for juvenile offenders, so successful, should be applied to our prisons and penitentiaries. Humanity, justice, and policy all dictate that our prisons, which are designed to punish crime, to reform offenders, and to protect society from violence and outrage, should be rescued from the destructive influences of party spirit and partisan prejudices."

Governor Seymour's observations read quite like a modern essay on civil service reform. He states principles of administration relating to penal and charitable institutions which have since been substantially applied to all departments of the public service. The assembly committee, in its report of 1852, had recommended the division of the state into three prison districts, and the appointment of three governors of each prison, who should hold office for a long term. It was thought that by this reform frequent "changes of officers, which have been a very serious evil, would be avoided, and the prisons would cease to be party machines for the reward or punishment of active political partisans." The committee stated the substance of the civil service idea in the remark that "in the selection of the chief and subordinate officers it should be a cardinal point that they are fitted, both by nature and education, for the important stations they are to fill." The board of governors could have established and required examinations of candidates, and could have secured the appointment of persons best qualified for the respective positions.

Governor Fenton, in 1866, suggested that to accom-

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plish the highest success "our prison system should be wholly absolved from party influence, and the changes incident to the varying fortunes of political organizations." The prison investigating commission of 1870, from whose report I have already quoted in the article on prison labor, commenting on the proposed change of the labor system from contracts to state management, said it would be an "essential condition precedent that political control be eliminated from the government of our state prisons, and that their administration be placed and kept in the hands of honest and capable men." The senate committee on prisons, in 1870, also said that "an evil greater even than the contract system is the domination of party politics in prison affairs and the brevity of official tenure. Indeed, these perpetual changes in the head and staff of our state prisons are fatal to success in all their great interests, industrial, financial, and moral. The best system of prison discipline that human, or even superhuman, wisdom might devise could never work out its normal results under such a scheme of government and administration."

I have given a sketch of the amendment of 1876, which abolished the office of inspector and created the office of superintendent of state prisons, who was required to appoint the agents, wardens, physicians, and chaplains; the agent and warden, subject to the approval of the superintendent, was required to appoint all the other prison officers except the clerk, who was to be appointed by the comptroller. The prison law of 1889 (chap. 382), after repeating the constitutional provisions above cited and designating the officers and subordinates thus to be appointed, provided that "no appointment shall be made in any of the state prisons of this state on the grounds of political partisanship; but honesty, capacity, and adaptation shall constitute the rule for appointments."

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This declared, in substance, the principle enunciated in the assembly committee report of 1852, and by Governor Seymour in his message of 1854. In *People ex rel. Griffin* v. *Lathrop*, 71 Hun, 202, 24 N. Y. Supp. 754, affirmed by the court of appeals in 142 N. Y. 113, 36 N. E. 805, the general term of the supreme court, in the second department, said that the constitutional power of appointment was subject to regulation by the legislature; that the prison law of 1889 relieved the warden from the force of prior statutes, apparently including the civil service acts, and vested in the warden a broad discretion in relation to appointments, subject to which, however, the warden was bound to give preference to an honorably discharged Union soldier or sailor "in cases otherwise evenly balanced." The court of appeals said that the act of 1889, which vested in the agent and warden the power to remove subordinates, was not controlled by the so-called soldier act of 1887, chapter 464, which related only to appointments, and did not abrogate the power of removal. The effect of the civil service amendment of 1894 will be hereafter considered.

In the note on inspectors of election in article 2, I have given a sketch of the development of that part of the election law relating to election boards, and have there cited the act of 1860, providing for inspectors of election and canvassers in the city and county of New York to be elected by the board of supervisors, which act for the first time prescribed an educational qualification for this class of officers by requiring such inspectors and canvassers to be able to read and write. The statute of 1866, chap. 812, amending a prior law, required the board of metropolitan police of the city of New York to "examine" local election officers "in relation to their qualifications;" and, if approved, they were to take the constitutional oath of office. In ad-

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dition to certain technical qualifications, the act required appointees to be "able to read and write the English language understandingly;" and this was one of the tests to be applied in the examination. The board of police was, in effect, thus constituted a civil service commission for this purpose; and I think this is the earliest statute requiring examination of candidates by the appointing authority. Its requirements in this respect were, in substance, continued by the act of 1872, chap. 675, which also required the examination of local election officers before appointment. The general policy of the civil service acts, both before and since the constitutional amendment, has vested the power of examination in an independent body, and has required the appointing authority to accept as qualified for a given position persons certified by a civil service commission. A substantial departure from this policy was effected by the act of 1897, chap. 428, commonly known as "Black civil service law," under which qualifications for merit were to be determined by the civil service commission, and qualifications for fitness by the appointing authority. This act was repealed by the revised civil service law of 1899. I shall have occasion to refer to this subject again in a note to the civil service section in the fourth volume.

The Tilden commission on the affairs of cities, appointed in 1875, which reported in 1877, and from which report I have already quoted in an article on cities in a previous chapter, considered the subject of an improvement in the civil service as an element of municipal reform, observing that, "however desirable it may be to introduce a reform which will change the methods of accession to minor political offices from that of political patronage to competitive examination, we are persuaded that, under existing circumstances, the intensity with which partisan strife is carried on within the limited area of a

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muncipality forbids the hope of its successful introduction until the national and state governments shall have set the example, and demonstrated the superiority of its methods." The commission also expresses the opinion that "our municipal organization does not afford proper material for examining boards," and that the defects in the municipal clerical force were not at all important when compared with the mischiefs.

Governor Cleveland, in 1883, briefly referred to the subject of civil service, suggesting that "the appointment of subordinates in the several state departments and their tenure of office or employment should be based upon fitness and efficiency, and that this principle should be embodied in legislative enactment, to the end that the policy of the state may conform to the reasonable public demand on that subject." The legislature at the same session enacted chapter 354, providing for the appointment by the governor and senate of a civil service commission to be composed of three members, not more than two of whom should be adherents of the same political party. The statute required the commission to provide for open competitive examinations for testing the fitness of applicants for the public service, with other details which need not be mentioned here. The act also authorized the appointment of civil service commissions in cities containing a population of 50,000. The statute expressly provided that no recommendation or question under it should "relate to the political opinions or affiliations of any person whatever." Elective officers, laborers, and workmen were excluded from the operation of the act. The legislature of 1884, by chap. 410, made an important addition to the civil service law by providing that honorably discharged Union soldiers and sailors should be preferred for appointments to positions in the civil service over other persons of equal standing; and that they should not

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be disqualified on account of age, or by reason of any physical disability not amounting to actual incompetency for the duties required. By an act passed in 1885 (chap. 240) orderlies and watchmen in public buildings were required to be honorably discharged Union soldiers and sailors, and they were exempted from the "civil service rules of examination." The act of 1886 (chap. 29) required examining boards to certify to the appointing authority honorably discharged Union soldiers and sailors, who were to be preferred for appointment "over all other persons, though graded lower than others so examined and reported," provided their qualifications and fitness had been ascertained as required by the civil service acts. The act required competitive examinations, and, whenever an appointment was to be made, all soldiers or sailors on the eligible list, not exceeding three, were to be certified to the appointing authority. The policy of these statutes was further extended by an act passed in 1887 (chap. 464), which provided that "in every public department and upon all public works of the state of New York, and of the cities, towns, and villages thereof, and also in noncompetitive examinations under the civil service laws, rules, or regulations of the same wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved." The appropriation act of 1887 (chap. 195) again exempted from civil service examinations orderlies and watchmen in public buildings, and they were required to be honorably discharged Union soldiers or sailors. This provision was continued in the appropriation act each

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year until 1894, and this rule was, therefore, in force at the time of the Convention.

The statute of 1894, chap. 354, amending the original civil service law of 1883, authorized the senate to require any appointee subject to its confirmation to be classified, or to pass an examination. The legislature of 1894 re-enacted the provisions of the soldier act of 1887, already cited (chap. 464), which required an examination of soldiers before they could be placed on the eligible list, and exempting from such examination soldiers who were applicants for positions the compensation of which did not exceed $4 a day.

The foregoing summary shows the development of the civil service policy and the condition of the law on this subject when the Convention of 1894 began its deliberations. Mr. Holls introduced the first amendment in this Convention, and it related to the civil service. It provided, generally, that the selection of appointive state and city officers and employees should be based on "merit and competency," ascertained through open competitive test, excepting elective officers, judges, heads of departments and of public institutions, officers whose nomination requires the confirmation of the senate, or from whom bonds for the safe keeping of public moneys are required, and also laborers and workmen.

The preliminary discussion of this subject in and out of the Convention, taken in connection with a civil service investigation by a recently appointed legislative committee, convinced many prominent members of the Convention that the proposition to incorporate the civil service idea in the Constitution should receive careful consideration. Mr. Gilbert gave tangible expression to this view in a resolution offered by him on the 12th of June, proposing to relieve the committee on legislative powers and duties from consideration of civil service mat-

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ters, and to transfer the whole subject to a select committee of eleven members. This resolution was adopted, and the next day President Choate appointed a select committee, making Mr. Gilbert its chairman. On the same day H. A. Clark introduced the following amendment, which was referred to the select committee:

"The legislature shall, by law, provide for and require examinations, so far as appropriate, concerning fitness for official duties, of all persons seeking appointment to, or promotion in, any of the several parts of the official service of the state, or any city thereof; and shall also provide by law for the just and convenient selection of laborers and workmen seeking employment by or under the state, or any city thereof; and that all appointments shall be without discrimination based on official favor or on political or religious opinions or affiliations."

The committee gave hearings on the subject, and several advocates of civil service reform appeared before it and urged the incorporation in the Constitution of an amendment which should, without detail, express the principle of the reform, and impose on the legislature the duty of enforcing it so far as practicable in the selection of candidates for appointment to subordinate positions in the public service. The committee reported the Clark amendment in the following form, which was prepared by Mr. Foote, a member of the select committee:

"Appointments and promotions in the civil service of the state, and of cities, shall be made, so far as practicable, according to merit and fitness, to be ascertained by examinations, which, so far as practicable, shall be competitive.

"Laws shall be made to provide for the enforcement of this section."

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Mr. Gilbert, opening the debate, said the amendment was intended to embody the principle that appointments and promotions in the public service should be based on merit, to be ascertained by examinations so far as practicable. It was obvious, he said, that examinations would sometimes be impracticable, and the qualifying words were added for that reason. The examination should also generally be competitive, but this rule should be subject to the limitation that in some cases a competitive examination would not be practicable. Whether any examination in a given case should be required, and whether it should be competitive, were questions which it was deemed wiser to leave to the good sense of the legislature. Mr. Gilbert seems to have used the terms "merit" and "fitness" synonymously, as appears from his remark that the effect of the amendment was to embody in the organic law the proposition that appointments to and promotions in the civil service ought to be based upon "merit, fitness,—fitness for the particular service to be rendered." The amendment used the phrase "merit and fitness," and Mr. Holls in his amendment used the phrase "merit and competency." Mr. Gilbert called attention to the decision of the court of appeals in *People ex rel. Killeen* v. *Angle* (1888) 109 N. Y. 564, 17 N. E. 413, to the effect that the amendment of 1876, creating the office of superintendent of public works, vested in that officer exclusive power to determine the qualifications of appointees in his department, and that this power was not affected by the civil service act of 1883. He said the same principle would apply to the department of state prisons; that a large number of petitions for the amendment had been presented urging its importance for the purpose of bringing these two departments—public works and state prisons—within the operation of the civil service laws; and the committee believed that the civil service principle

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should be applied to these two departments as well as to other departments of the public service. It may be noted here that the court of appeals in *People ex rel. McClelland* v. *Roberts* (1896) 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082, said that the *Killeen Case* was superseded by the civil service amendment of 1894, which, without further legislation, applied the existing civil service acts to the department of public works.

Mr. Tibbetts moved to amend the proposed section by adding the following provision: "Honorably discharged Union soldiers and sailors, who are not otherwise disqualified for such appointment or promotion, shall be exempt from the provisions of this section." Mr. Tibbetts said the amendment as reported would disfranchise a large number of citizens who were protected by the existing civil service laws, and entitled to a preference in appointments, and which laws, so far as they applied to honorably discharged Union soldiers and sailors would be abrogated by the amendment. H. A. Clark said his original amendment was introduced at the request of certain good government clubs of the city of New York, and he believed that, if the soldier amendment had been brought to their attention, it would have been included in the original section. Mr. Countryman opposed the soldier amendment on the ground that it sought to create a class of men "entitled to greater rights and preferences than their fellow citizens." Mr. Galinger offered the following substitute for the Tibbetts amendment: "That honorably discharged soldiers and sailors of the late war be exempted from the civil service examinations, and that all that shall be required of them shall be capacity to perform the service for which they are applicants." The Tibbetts amendment was adopted in committee of the whole by a vote of 65 to 5.

On third reading, Mr. Hotchkiss called attention to the

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words, "who are not otherwise disqualified," in the soldier amendment, and suggested that they ought to be stricken out as meaningless. Mr. Hawley objected to this for the reason that the omission of this clause would exempt soldiers from any merit or fitness. He said the form of the Tibbetts amendment was not satisfactory to the committee on revision, which had carefully considered it with a view of stating it in more appropriate language. He hoped that someone would present in satisfactory form the idea which should "require some measure of fitness and qualification for public positions, even of a Union soldier." Mr. Tibbetts then proposed to state the amendment in the following form: "Honorably discharged Union soldiers and sailors shall be exempt from such examination, and shall be entitled to preference in such appointment and promotion." Mr. McIntyre suggested the following: "Honorably discharged soldiers and sailors who served in the late war, and who are not otherwise disqualified for appointment or promotion, shall be exempt from the provisions of said competitive examination." Mr. Durfee proposed alterations in the Tibbetts amendment which would make it read as follows: "Honorably discharged Union soldiers and sailors of the late Civil War shall be exempt from the examinations required by this section." He said he supposed it was not intended to relieve soldiers and sailors from the requirement of merit and fitness, only that they shall be relieved of the requirement of passing an examination. "Merit and fitness may be ascertained in other ways than by examination," and his motion was made for the purpose of exempting soldiers and sailors from the examination required by the first part of the section. Mr. Morton, to carry Mr. Durfee's idea into effect, proposed to add at the end of his amendment the words, "and shall be eligible for such appointment or promotion without

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such examination." After some further discussion, Mr. Cochran presented the soldier amendment in the following form: "Provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War shall be entitled to preference in appointment and promotion, without regard to their standing in any list from which appointment or promotion shall be made." This was adopted by a vote of 59 to 24. On Mr. Peck's motion, appointees under this provision were required to be citizens and residents of the state. With this addition, the provision was finally adopted and appears in the following form:

"Provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made."

DeLancey Nicoll proposed to amend the first part of the section by making it applicable, not only to the public service of the state, and of cities, but to all civil divisions, specifically including villages; stating the first part of the proposition in the following form, "appointments and promotions in the civil service of the state, and for all the civil divisions thereof, including cities and villages," and continuing as in the section reported by the committee. Mr. Nicoll said he thought the principle of the section should be extended to counties, towns, and villages. He thought that no good reason could be given for excluding office holders in these localities from the operation of the principle; and that the test of merit and fitness should be applied to them as well as to candidates for office in cities or in the state at large. He said there was grave doubt whether the provision should be in-

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cluded in the Constitution at all, for the reason that the legislature had already enacted laws on the subject which were being executed with "more or less diligence." But if it was to go into the Constitution, he thought the Convention should be consistent, and extend it over the whole state. Mr. Gilbert said the committee deemed it "entirely unnecessary and impracticable to attempt to apply the new provision to villages and towns and counties;" the number of offices in these localities to which the provision could be applied was very limited, and it would be impracticable to create machinery for this purpose. The legislature might apply the provision to these smaller localities, but should not be required to do so. It should be stated here, in connection with the Nicoll amendment, that the advocates of the original provision, who appeared before the select committee on civil service, expressly disclaimed any desire to apply the idea to the smaller localities, for the reason, as stated by them, that it would be impracticable, and would create unnecessary official machinery. Mr. Nicoll's amendment was adopted by a vote of 61 to 36. The section in its final form was adopted by a vote of 97 to 56.

The subsequent history of this subject, including the references to later statutes and judicial decisions, will be found in a note to the civil service section in the fourth volume of this work.

Miscellaneous provisions.—Mr. Bigelow proposed to abolish the office of superintendent of insurance and the office of superintendent of banks, and to transfer these departments to the comptroller's office. He also proposed to authorize the superintendent of public works to appoint three assistants without the authority of the legislature; also to transfer to the superintendent of public works the powers and duties then vested in, or imposed on, the state engineer and surveyor in relation to canals.

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T. A. Sullivan proposed to create the office of superintendent of corporations, to be elected by the people for a term of four years; and the same amendment abolished the office of railroad commissioner, superintendent of banks, and superintendent of insurance, whose duties were to be performed by the superintendent of corporations.

Art. VI. Judiciary.

The judiciary has been a subject of deep solicitude and anxious attention by every convention and commission, except two, that has had authority to deal with it. The Convention of 1777 gave it little consideration, adopting existing conditions substantially without change. The Commission of 1872 was primarily created for the consideration of other parts of the Constitution, and, although subsequently authorized to consider the judiciary article, gave it little attention for the reason that the judiciary article proposed by the Convention of 1867 went into full operation on the 1st of July, 1870, and the state had, therefore, had scarcely two years' experience under it. The Convention of 1801 had no jurisdiction of this subject. In the previous chapter I have reviewed the work of the judiciary commission of 1890, submitted to the legislature of 1891, and have pointed out the changes in the judicial system recommended by that commission. The Convention of 1894 found a judicial system with enough machinery, but which experience had shown was not properly adjusted to the needs of the people; indeed, there seemed to be too much machinery, especially in the larger cities, and one of the problems presented to the Convention related to the appropriate consolidation of several courts of original jurisdiction with the view of making the supreme court the only great court of original jurisdiction in all cases. The features of the existing judicial system

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which seemed to demand, and which received, the chief consideration of the Convention were the court of appeals and the general term of the supreme court. It was deemed absolutely essential to afford some relief to the court of appeals, and this object was sought along two lines, namely, by limiting the jurisdiction of the court, and thereby reducing the number of appeals requiring its determination, and also by modifying the structure of the court by increasing the number of judges. It was the prevailing opinion that the general term had proved inadequate for its original purpose, and this intermediate appellate tribunal therefore received a large share of the Convention's attention with the view of so reorganizing it and augmenting its strength and character that it should stand as the only appellate court of the state in the majority of cases, leaving the court of appeals as a tribunal of final resort to settle great principles of law and reconcile possible differences of judgment among the different branches of the supreme court.

The Convention of 1894 was fortunate in being held so soon after the judiciary commission of 1890 had submitted its recommendations to the legislature, and whose work was thus fresh in the minds of lawyers; it was also fortunate in having among its delegates two prominent members of that commission,—Mr. Choate and Mr. Marshall,—who were able to speak intelligently of the plans, purposes, and deliberations of the commission. The report of that commission, which has been considered in a previous chapter, seems clearly to disclose the groundwork and essential principles of the plan of judicial reform finally adopted by the Convention, and it is a high tribute to that commission, whose work was, apparently, not well received at the time, and which was not considered by the legislature, that in less than four years the chief features of the judiciary system proposed

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by it were incorporated in the Constitution by a convention which apparently could find no better solution of the then troublesome judiciary problem. The Convention showed great wisdom and breadth of view in accepting in such large measure the results of the labors of its immediate predecessor, and it is no disparagement of the value and beneficent results of the labors of the Convention of 1894 and of its judiciary committee to say that, if the recommendations of the judiciary commission of 1890 had been adopted and incorporated in the Constitution, the Convention would have found little occasion to suggest material alterations in our judicial system.

The judiciary commission of 1890 was composed of thirty-eight members; the judiciary committee of the Convention was composed of seventeen members,—nearly half as large as the commission. Elihu Root, whose abilities and position at the New York Bar clearly entitled him to this honor, was made chairman of the committee, and, almost of course, Louis Marshall, who had taken such an active part in the previous commission, was made the second member of the committee. The other members of the committee were Henry J. Cookinham, Tracey C. Becker, J. Rider Cady, John F. Parkhurst, John I. Gilbert, Jesse Johnson, Daniel H. McMillan, Nathaniel Foote, Charles H. Truax, Roswell A. Parmenter, Edwin Countryman, John M. Bowers, DeLancey Nicoll, Almet F. Jenks, and George H. Bush.

The committee held numerous sessions, and gave many hearings to persons interested in various parts of the judiciary article. Every aspect of possible judicial reform proposed was patiently considered, and out of the mass of recommendations and suggestions the committee evolved an article intended to comprehend the whole subject, and presented it to the Convention on the 15th of August. The article was rearranged, beginning with the

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supreme court instead of with the court for the trial of impeachments, as in former Constitutions. Mr. Marshall urged this change in the order of arrangement on the ground that the supreme court, being the great court of original jurisdiction, should have the first place in the article, and that appellate and subordinate courts, and also the high court for the trial of impeachments (the latter court having been used scarcely once in a generation), might reasonably be given a secondary position in a logical arrangement of the structure and powers of the numerous judicial tribunals. The committee presented with the article an explanatory statement showing the changes proposed with the reasons which actuated the committee in recommending them. Debate on the article was begun August 20, and continued through four days, including evenings. Several sections were adopted by the Convention without change or debate, others were considered at length, and several were amended in important particulars.

In no part of the work of the Convention did Mr. Root more clearly demonstrate his capacity and fitness for leadership than by the patience and discrimination with which he received and disposed of the attacks and criticisms upon the judiciary article,—sometimes requesting a little delay for deliberation, and afterwards frankly conceding the propriety of a suggested amendment as a real improvement; sometimes accepting a suggestion immediately on its presentation, and again opposing with force and earnestness amendments which he believed would destroy or seriously impair the integrity of the scheme as presented by the committee; always manifesting a sincere desire to produce the best results from whatever source suggested, and without any exhibition of a narrow tenacity of purpose to adhere at all hazards to the policy recommended by the committee, as if, because the

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committee had deliberated long and patiently on all the judicial problems presented to it, the result must therefore be right, and could not be a subject of legitimate criticism. While Mr. Root, by virtue of his position as chairman of the committee, became its spokesman in the debate, he did not stand alone, but was ably supported by other members of the committee, who also manifested a like patriotic purpose to construct a judicial scheme that would not only reflect credit upon the Convention, but would mark a substantial and permanent improvement in this department of the government. The members of the committee were not all of one mind, and they did not hesitate to express their views freely, even if not in accord with the majority of its members. It was only natural that members of the committee regarded the result of its labors as expressed in the proposed article entitled to a presumption in its favor. The Convention evidently received the work of the committee with general favor, as must be apparent when it is remembered that, with the exception of the provision enlarging the court of appeals, which was rejected, the general features of the proposed article were accepted without serious modification, and several tests were made on important points for the purpose of changing the policy proposed by the committee. Several delegates, some of whom did not fully accept the entire scheme, spoke in terms of the highest praise of the judiciary article as a whole. Thus President Choate, speaking on the question of enlarging the court of appeals, said he was "loath to differ in any particular from the report of the judiciary committee, because I think," he said, "that, if you look over the whole history of legislative bodies since their work was done by committees, it would be impossible to find a more masterly piece of work than this has been." Mr. Vedder, moving to strike out the provision relating to minority representation in

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electing the additional judges of the court of appeals, said he believed that no better scheme had been proposed "by any convention of this state, or any other state, since jurisprudence began;" and then, rising still higher, said that, with the minority representation plan omitted, it would, in his opinion, be "the most matchless and peerless system of jurisprudence that ever came from the brain of man, and one that could not be equaled in this or in any other state or country." Mr. Peck also spoke of it as an "intelligent, philosophical, and lawyer-like scheme of judiciary," though urging the separate election of judges for the general term.

The high character of the work of this committee was clearly manifest from the general favor with which it was accepted by the Convention. Serious criticism was directed against it in vain, because in the main it was impregnable. The article presented was consistent, harmonious, and conservative; and, while many delegates desired specific changes, the majority of the Convention sustained the committee, except in relation to the proposed enlargement of the court of appeals, and this plan, as will be seen later, received only a bare majority in the committee, the vote for it being 9 to 8. While the committee initiated many important changes, it also did not hesitate to borrow prior suggestions which had been put in tangible form by other conventions or commissions and the legislature, and from all these sources, without any pretense of invention or extended originality, it was able to present a judicial scheme which at once commanded the respect, and secured the support, of the majority of the Convention, and which has been amply vindicated by experience.

So many provisions of the existing Constitution were continued without change that it hardly seems profitable to review the article in detail. The

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section relating to the court for the trial of impeachments was not changed, except specifically to prohibit the lieutenant governor from acting as a member of the court in case of his own impeachment. This amendment introduced by Mr. Vedder grew out of the discussion of the provision relating to the election of a temporary president of the senate, which has been considered in a former article in this chapter. This prohibition was already included in the Code of Criminal Procedure. Notwithstanding the arrangement proposed by the committee and adopted by the Convention, it seems most convenient to review the work of the committee and the Convention in the order already followed in previous chapters, treating the court of appeals as the highest tribunal, not because it has original jurisdiction, which it has not, but because it may review and affirm, reverse or modify, the judgments of the supreme court, and of other courts of inferior rank; and then, considering the supreme court, and other courts of general or limited jurisdiction, closing with miscellaneous provisions.

Court of appeals.—The judiciary committee found a court of appeals composed of seven members, which had been organized under the judiciary article proposed by the Convention of 1867, which was adopted in 1869, and went into operation in 1870. In determining possible constitutional changes concerning this court, the committee was bound to consider, and did consider, the facts that when the court was created it began its work with a clean calendar, all the business of the former court having been transferred to a commission for completion; that in 1872, 500 causes from the new court of appeals were transferred to the commission, and that after an existence of five years it was terminated on the 1st day of July, 1875; that in 1887 another movement was begun for the relief of the court, which resulted, in January,

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1889, in the creation of a second division of the court of appeals; that a second division was again appointed on the 22d of January, 1891, and finally closed its labors October 1, 1892; that the two second divisions, which were, however, substantially continuous, disposed of 1,593 causes, which, added to the 500 transferred to the commission of appeals in 1872, made an aggregate of 2,093 appeals to the court of appeals which were disposed of by other tribunals during a period of twenty-four years since the organization of the new court. Assuming that the court of appeals performed all the judicial labor which might be reasonably expected of it, it can readily be seen what would have been the condition of its calendar in 1894 if no relief had been afforded by the creation of temporary tribunals. It was perfectly evident that an effort should be made to provide a court of last resort adequate to the growth of the state, and able within a reasonable time to dispose of causes submitted to it for review. Many delegates thought the problem could be solved by increasing the number of judges; others believed that relief could be found in limiting appeals, and thus reducing the number of legal problems requiring consideration by the court. The committee adopted both plans, adding two judges to the court, and also limiting appeals.

The judiciary committee proposed a court of appeals of nine judges, expressing the opinion that this was the "highest number with which the unity of the court, and its consistent declaration and development of the law, can be maintained." The committee thought that while the court might be enlarged so that it could sit in two divisions, "or so that, only a little more than half of the court being present at once, the members could rotate in their service," which would doubtless secure the disposition of more causes, either plan "would frustrate the sole purpose

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for which the court exists. The unity of the court, the consistent harmony of its views upon the fundamental questions which underlie the determination of causes, the certainty of the law, the authority of its opinions, now respected throughout the Union, and just cause for pride of every member of the state,—all these would disappear, and in their place would be the varying utterances of a divided or fluctuating body, less valued and less respected than the opinions of the courts which it reviews." It is worth while to note here that, according to Mr. Marshall's statement during the debate, the increase of judges was adopted in the committee by a vote of 9 to 8.

Mr. E. R. Brown proposed an amendment reducing the number of judges from nine to seven. He thought that, if the policy of limiting appeals, recommended by the committee, should be adopted, and should be effectual for the purpose intended, it was not consistent for the Convention at the same time to increase the number of judges. He also thought it was very doubtful whether nine judges would do more work than seven; inferring from Mr. Root's statement concerning the views of the judiciary committee that the "efficiency of the court would not be increased in proportion to the number of judges that are added to it." Mr. Hotchkiss thought the existing court was satisfactory, that it could properly dispose of its business, and that the proposed increase of judges would not increase the capacity of the court; that under the plan proposed the court would be "always shifting." The homogeneity of the court would be destroyed, because, while the court would be composed of nine members, only seven would sit in any cause. Mr. Marshall also expressed the opinion that an increase in the number of judges would not "in any way facilitate the transaction of the business of the court, . . . nor in any way make the court a more useful one, nor in any

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way add to the working power of the court." On the contrary, he thought that an increase would "detract from the working powers of the court, and would prevent the court from transacting as much business as a court of seven judges can perform." He said there was no demand by the judges of the court for any increase,—"They state that they are entirely able to transact the business which is submitted to them," and Mr. Marshall estimated that, under the limitation of appeals proposed by the committee, the court would not, during the next ten or fifteen years, have on its calendar at any time in any year more than 500 causes. Mr. Cassidy proposing a substitute section providing for seven judges, also expressed the opinion that no more business could be done by a court of appeals with nine judges than with seven. He thought less business would be done, because it would take more time to consult with nine judges than with seven. Mr. Choate said that, as the result of experience and observation, the state "would get more work, and better work, out of a court of seven judges than out of a court of nine." He also thought that the policy of limiting appeals, proposed by the committee, combined with the reorganized general terms, would materially reduce the work of the court of appeals. He thought there would be "vastly more dissension, vastly more dissent, in a court of nine judges than there has been found to be in a court of seven." Mr. Choate said the past had "demonstrated that, for the purpose of maintaining the uniformity of the law, of keeping the citizens of this great state informed as to what their rights are, and what their conduct should be," the court of appeals had been a tribunal that could not be exceeded in quality. Mr. Becker said that a postal-card canvass among lawyers showed a great preponderance of opinion against enlarging the court of appeals. Judge Country-

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man thought nine judges could hear no more causes than seven, "and, when they come to deliberation among themselves, nine only results in an unnecessary delay."

Mr. C. B. McLaughlin, Mr. Bowers, and Mr. Lincoln favored the increase to nine judges. They believed that with this number the court would retain its solidity and unity, and that nine judges might reasonably be expected to do more work than seven. Mr. Lincoln thought the business of the court would be increased by the removal of the money limitation on appeals.

The plan of the judiciary committee to enlarge the court of appeals found little favor in the Convention. The Brown amendment reducing the number of judges to seven was adopted in committee of the whole, but the record does not give the vote.

Mr. Brown apparently experienced a change of opinion soon after the Convention, for, having entered the state senate, he introduced in that body, on the 25th of February, 1898, a little more than two years after the new constitutional provision relating to the court of appeals went into operation, a constitutional amendment authorizing the governor, on the request of a majority of the judges of the court, to designate not more than four justices of the supreme court to act as "additional judges" of the court of appeals until the calendar of the court should be reduced below five hundred causes. Not more than seven judges could sit in any case. While the amendment was pending it was changed so that the designated justices became "associate judges" of the court of appeals, and they might act until the calendar was reduced below two hundred causes, when they were to return to duty in the supreme court. The limitation of seven judges to act in any case was continued. In this form the amendment was agreed to by the legislature of 1898 and again in 1899, and, at the November election in the

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latter year, it was ratified by the people. It took effect January 1, 1900, and the next day, January 2, Governor Roosevelt designated three supreme court justices to act as associate judges of the court of appeals under the amendment. One retired from the court December 31, 1901, by operation of the age-limit provision of the Constitution. The other two continued as members of the court by appointment until January 1, 1905, when they became regular members of the court, to which they were elected in 1904. During 1900 and 1901 the court of appeals consisted of ten judges, and afterwards of nine judges, until August 5, 1904, when Chief Judge Parker resigned. From that time until the end of the year 1904 it was composed of eight judges. Judge Martin retired December 31, 1904, by operation of the age limit, and at the beginning of 1905 the court was composed of seven judges.

From information obtained at the office of the clerk of the court of appeals, it appears that from 1893 to 1902 inclusive, ten years, the court each year decided the following number of causes: 1893, 606; 1894, 610; 1895, 525; 1896, 467; 1897, 450; 1898, 492; 1899, 509; 1900, 672; 1901, 690; 1902, 544. During the first seven years of this period the court was composed of seven judges, in 1900 and 1901 of ten judges, and in 1902 it was composed of nine judges. The largest number of causes was decided during the time of the ten judges, which shows that ten judges, as might reasonably be expected, can do more work than seven, though it may be noted that the average is much less during these two years than during several of the preceding years when the court consisted of only seven judges. But no general rule can be deduced from these figures, for the reason that many conditions enter into the problem, including especially the character of the cases,—whether small and comparatively unim-

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portant, and requiring little attention, or whether large, involving great public questions, requiring long argument and patient consideration by the court. Besides, groups of cases involving substantially the same questions are frequently considered together. The computation does not include dismissals or other methods by which appeals are finally disposed of. The year 1902 is said to have been marked by an unusual number of important causes which required more than the average time for their consideration.

Section 9 of the new judiciary article was intended to limit and reduce the number of appeals. Since that time the right of appeal has also been further restricted by the legislature in several important classes of subjects. The operation of the restrictive clause in the Constitution and of the statutes appears from the following comparative statement of appeals to the court of appeals from 1893 to 1902 inclusive, during which time appeals were taken as follows: 1893, 803; 1894, 1,024; 1895, 609; 1896, 816; 1897, 445; 1898, 583; 1899, 591; 1900, 610; 1901, 589; 1902, 550. These figures show a general decline in the number of appeals since the 1st of January, 1896, when the new judiciary article took effect. They also show, taken in connection with the number of appeals decided, that there is no immediate prospect of reducing the court of appeals calendar below 200 causes, as provided in the amendment of 1899. When the ten judges began work in January, 1900, the calendar numbered 889 causes. This number, added to the appeals taken since that time, makes a total of 2,833 up to May 1, 1903. The total number of appeals decided during the same period was 2,205, which, as already stated, does not include appeals disposed of by dismissal or otherwise, not requiring actual decision by the court. Taking the last ten years as a cri-

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terion, it seems probable that the court will only gradually reduce the number of accumulated causes.

These figures seem to refute the arguments in the Convention that nine judges could do no more work than seven, and it seems clear that, if the recommendation of the majority of the judiciary committee enlarging the court to nine judges had been adopted by the Convention, the Brown amendment of 1899 would not have been necessary.

The judiciary committee included in its scheme a plan for electing the two additional judges by minority representation, giving each elector the right to vote for only one judge. This was specially opposed without regard to the question of increasing the number of judges. Mr. Dean and afterwards Mr. Vedder moved to strike out this provision, and it was necessarily disposed of by the adoption of the Brown amendment as stated in the Cassidy substitute. Mr. A. H. Green proposed to fix the official term of judges of the court of appeals at seven years, Mr. Moore proposed ten years, but the Convention rejected both propositions, and continued the term at fourteen years. The Convention also declined to adopt Mr. Parmenter's proposition to increase the court to fourteen members. Mr. Dickey offered an amendment continuing the provision relating to the second division of the court of appeals. This was once adopted in committee of the whole, but, on reconsideration, was rejected by a vote of 43 to 71. Many delegates in the Convention, as appears by this vote, and many other lawyers, believed that the second division afforded a reasonable method of relief for the court. At the same session of the legislature (1898) at which Senator Brown introduced the amendment enlarging the court as already noted, Senator Brackett introduced an amendment providing for a second division;

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but the legislature preferred the Brown plan, and it was accordingly adopted.

The jurisdiction of the court of appeals was made the subject of special consideration. The judiciary committee in its report said the court of appeals was "to be strictly limited to its proper province of reviewing questions of law (except in capital cases), leaving the judgments of the appellate division final upon all questions of fact. . . . The right of appeal to the court of appeals is to be limited to final judgments and orders, leaving the decision of the appellate division final upon all matters of interlocutory practice and procedure, which do not enter into the final judgment as affecting substantial rights." Referring to the evil of delay in final disposition of causes, "which results from the overcrowding of the court of appeals calendar," the committee said: "Every state is bound to give its citizens one trial of every controversy, and one review of the rulings and results of the trial by a competent and impartial appellate tribunal. . . . There is no consideration, either of public duty, or of the private interests involved in litigation, which requires a second appeal and a second review." Observing that the several tribunals into which the general term of the supreme court was divided, "uncontrolled by higher authority," could not settle the law, the committee went on to say that public interests "demand that the law should be settled, that it should be the same for the whole state, that it should be a consistent and harmonious system, and that it should be declared clearly and authoritatively by some supreme power. . . . It is this necessity alone which justifies the existence of a court of appeals superior to the appellate tribunals which first review the decision of trial courts. . . . The occasion which gives rise to a second single appellate tribunal marks the limit of its proper and neces-

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sary function to settle and make certain the law, not only for litigants, but for all the people." The committee thought the money limitation should be removed because important questions arise in small causes as well as in large, and a great majority of the people have only small causes. Commenting on the plan of limiting appeals in specific cases recommended by the judiciary commission of 1890, the committee said this was "complicated and uncertain." "Human foresight could hardly prevent mistakes in enumeration and definition which would require amendment," and it would be impracticable to include such details in a constitution, which cannot be readily amended. The committee expressed the opinion that "the limitations upon the jurisdiction of the court of appeals and the right to appeal thereto will further very largely reduce the number of appeals to that court;" and that with the slightly increased working force resulting from the addition of two judges "the court will be able to keep pace with the demands upon it."

Mr. Root, opening the debate on the whole article, amplified the committee's report in many particulars, saying, among other things, that the committee had "endeavored to follow a clear line of logical distinction between the proper functions of this court of appeals and the courts of first review, a line of distinction marked out by the very definition of the proper function of a court of second appeal." "There is a general understanding now that the proper function of a court of appeals is to pass only on questions of law," and the committee had sought to preclude a second review of questions of fact "by providing that no unanimous decision of an appellate division that there is evidence to sustain or support a verdict not directed by the court, or finding of fact, shall be reviewed by the court of appeals." The committee thought the controversy over a fact thus established

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should stop. "We believe," Mr. Root said, "that these two limitations, one limiting them to the decision of questions of law, may be made effective by the supplementary provision that I have mentioned; the other limiting the review of final judgments, together with the increased respect and efficiency of the appellate tribunal, will so greatly decrease the number of appeals to the court of appeals that it will for many years, until the time comes for another Constitution to be made, be able to deal with all questions presented to it, and to keep up with its calendar." The last remark is worth remembering, in view of the fact that, only three years after the judiciary provisions of the new Constitution went into full operation, an amendment was adopted by the people authorizing the temporary addition of four judges to the court of appeals, and that three were thus added at the beginning of the year 1900; and it should not be forgotten that the opinion expressed by the committee, and by Mr. Root, that the court, under the new scheme, could keep up with its business, was based on its increase to nine members, in connection with the expected reduction of business by the proposed limitation of appeals. Mr. O'Brien proposed to strike out the prohibition against the money limitation, saying that the legislature, in its wisdom, ought to have power to impose such a limitation on appeals. The motion to strike out this provision was lost by a vote of 52 to 78.

The section, as proposed, contained a clause authorizing the legislature further to restrict the right of appeal; "but it shall never make the right to appeal depend upon the amount involved." Mr. Roche suggested that this provision might not affect existing statutes which imposed a money limitation, but would simply prohibit future legislation on that subject; and, on his motion, the

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clause was amended by providing that "the right to appeal shall not depend upon the amount involved."

Mr. Crosby proposed to permit a review by the court of appeals of the facts in a case where the defendant had been sentenced to imprisonment for life. He said that under such a sentence the defendant was deemed civilly dead, and that a person so convicted might with as much reason go to the court of appeals on questions of fact as a defendant under judgment of death. Mr. Crosby's amendment was once adopted in committee of the whole, but, on reconsideration, was rejected by a vote of 55 to 67.

Supreme court.—The existing supreme court was continued with the addition of thirty judges,—eighteen transferred from local courts which were abolished, and twelve who were to be chosen in the several judicial districts, making a total judicial force of seventy-six judges. Mr. Root, discussing § 1 in its relation to other parts of the system, said the "two evils" manifestly requiring treatment were the delay in bringing causes to trial and the delay in hearing appeals. An increase in the number of trial judges was the relief proposed for the first evil by providing enough judges to dispose of litigation promptly. The consolidation of local courts with the supreme court was one element of this branch of relief, and it was thought that this would result in great economy of judicial force. The increase of judges was deemed essential, not only for the purpose of providing additional judicial force in the trial courts, but also because, by reason of the proposed enlargement of the appellate branch of the supreme court, more judges would be needed for this purpose. It would not be practicable to reorganize the general term on the plan proposed without additional judges.

Mr. Chipp proposed to provide for two additional

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judges in the third district, instead of one as recommended by the committee; but the Convention declined to increase the number. Mr. E. R. Brown moved to strike out the provision for twelve additional justices in the several districts, and to substitute a provision authorizing the legislature to create twelve additional justices as "public interests require." The motion was lost. The Convention also declined to adopt a proposition by Mr. Smith to increase the additional justices to sixteen, giving the first district five, second, three, third, two, and each of the others, one.

It will be noted that the last clause of the section, providing that, on the alteration of a judicial district subsequent to an enumeration, the legislature may "thereupon reapportion the justices to be thereafter elected in the districts so altered," is new. Mr. Root, replying to a question by Mr. Vedder, said this was intended to authorize the redistribution of judges on the alteration of the territorial limits of a district; that it was "necessary to have some power to take a judge out of one district and put him into another district," when territory was taken from one district and put into another.

The chief feature of the committee's plan, so far as it affected the supreme court, related to the reorganization of the appellate branch of the court which had previously been known as the general term. While much concerning this branch of the supreme court has been written in previous chapters, it seems convenient to present here a brief sketch of the evolution of the appellate division. It will be remembered that under the first Constitution the judges of the supreme court acted as trial judges, and constituted also a court of review. When the second Constitution was framed, the growth of population and the increase of business demanded an increase of the judicial force, and the reorganization of the supreme

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court in a manner adequate to the needs of the people was one of the most serious problems which engaged the attention of the Convention of 1821. That Convention thought it had solved the problem by providing a chief justice and two associate justices of the supreme court, and authorizing the creation of eight circuits with a circuit judge in each. These circuit judges were trial judges, and appeals from their judgment were taken, either to the chancellor in equity cases, or in other cases to the supreme court or court for the correction of errors. The development of the state demanded a still greater increase in the judicial force, and a reorganization of the judicial system in 1846, at which time the court of errors was abolished, and the court of appeals substituted. The circuit judge system was abolished, and the circuits (then called districts) were each to elect a specified number of justices of the supreme court. The judges in each district constituted a general term with appellate jurisdiction. By the judiciary act of 1847 the justice in each district having the shortest time to serve was *ex officio* presiding justice, and there were no designations by the governor. The Convention of 1867, by the judiciary article adopted in 1869, divided the state into four departments, and authorized the creation of not more than four general terms with a presiding justice and not more than three associate justices in each department. The legislature, by the judiciary act of 1870, established four departments, and provided for the designation by the governor of justices to sit in the general term. The presiding justice was to act as such during the remainder of his official term, and the associate justices for five years, or for shorter unexpired terms. The constitutional amendment of 1882 authorized an additional department in which the justices were designated in the same manner. The Constitution of 1894 reduced the number of

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departments to four, changed the name of the general term to the appellate division, and provided for five justices to be designated by the governor substantially as provided in the case of the former general terms. Thus it will be seen that the general term, as a branch of the supreme court, has existed since 1847. Under the Constitution of 1846 each district was independent, each had a general term, and there was no occasion for designations by the governor. But the reduction of the number of general terms in 1869 made it necessary to provide for a system of designations, and the legislature of 1870, deeming this an executive power, vested it in the governor. The Convention of 1894 saw no occasion to change the method of making designations, and included in the Constitution itself the provision relative to the governor's power, which prior to that time was prescribed only by statute. Since 1870, then, the governor has possessed the power, and it has been his duty, to make designations to the general term and appellate division, and thus to constitute this appellate tribunal.

The judiciary committee proposed a section reorganizing the general term under the name of the appellate division, and prescribing its jurisdiction and general duties. A comparison of this section with the corresponding section recommended by the Commision of 1890 will show a very close similarity between the two. Both provided for four departments, and both provided for five judges in each department, except in the first, in which the Commision recommended five and the Convention seven, but the Convention proposed to permit only five to sit at one time; both fixed the term of an appellate judge at five years, and both proposed to prohibit or limit the service of an appellate judge in any other court, or in any other judicial capacity. Other matters, largely

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of detail, show differences of opinion, and the Convention section adds topics not included in its predecessor.

I have already pointed out that a general term of five judges was recommended in the Convention of 1867, and the plan from this point of view was, therefore, not new in the Convention of 1894, or in the Commission of 1890. The judiciary committee, in its report accompanying the article, made the following statement concerning the proposed appellate division:

"The nine general terms which now exist, five in the supreme court and four in the superior city courts, are to be abolished. The state is to be divided into four departments. In each department an appellate tribunal is to be constituted of five justices selected by the governor from all the justices elected to the supreme court. The name 'appellate division of the supreme court' is adopted in place of the now meaningless expression 'general term.' All appeals, except in capital cases, are, in the first instance, to be to the appellate division.

"We propose to make this tribunal a more efficient and satisfactory court of review than the old general term:

"(*a*) By making its judgments final in a much wider range of questions through limitations imposed upon the jurisdiction of the court of appeals and upon appeals to that court.

"(*b*) By giving it stability and independence through the establishment of fixed terms for its members, and power to control its own sessions, and appoint its own clerk, and designate the place of his office.

"(*c*) By making it large enough to insure full discussion and the correction of individual opinions by the process of reaching a concensus of opinion.

"(*d*) By relieving its members from all other duties, so that there shall be the fullest opportunity for consultation and deliberation undisturbed by the demands of

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circuit or special term assignments, and so that no litigant shall be obliged to argue his appeal before a court of which the judge from whom he appeals is a member. . . . We are of the opinion that the new appellate courts will be more efficient, that their opinions will be more highly respected, that their judgments will be less frequently reversed, and that, for all these reasons, there will be fewer appeals from them to the court of appeals than there are from the existing general terms."

Mr. Peck thought the term "appellate division" was unfortunate because it did not suggest an independent tribunal, but a branch of some other court instead of the court itself which the name should describe. Mr. Platzek offered an amendment to the effect that all justices of the supreme court should be eligible to the appellate division, and not those only who were elected as justices of the supreme court; thus intending to make eligible the judges transferred to the supreme court by the abolition of the several local courts. He thought it was unjust to discriminate against these transferred judges, and exclude them from the appellate division. Mr. Root said the provision reported was the outcome of a large number of plans, and he understood it was satisfactory to all the judges concerned. It would be "going a great way," he said, to put the judges of the abolished local courts "into the appellate division to review the decisions of the justices of the supreme court." The Convention rejected Mr. Platzek's proposition, and also Mr. Dickey's to change the word "counsel" to "parties," so that appellate division judges might hear motions by consent of parties; thus including cases where parties appeared in person. The Convention also declined to adopt Mr. Chipp's amendment to strike out the provision prohibiting the appellate division judges from performing other judicial

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service. He thought the appellate division would not have enough to do to keep the judges busy.

Mr. Root, replying to an inquiry by Mr. Spencer, said it was the design of the committee to make the appellate division a unit, to sit with not more than five justices in any one case in each of the four departments. It is the appellate division sitting in a given department, not an independent appellate division in each department. The appellate division therefore, as a unit, appoints the reporter. Mr. Root further said that this form of the appellate division "follows the analogy of the court of King's bench in England, and the high court of judicature in England, which is a single court, although it never meets, and never comes together into one body for any purpose. The high court of judicature is sitting at the trial of numerous causes throughout the United Kingdom, and is sitting in its appellate divisions and in its divisional courts at the same time. And it is in strict analogy to the supreme court of this state. It is the supreme court which sits at the same time, presiding in the persons of its several judges in the special terms and the circuits all over the state. It is one supreme court, although sitting in many parts; and it is the supreme court at the same time which is sitting in each of its departments."

Mr. Cornwell, at the request of a justice of the supreme court in the seventh district, offered an amendment to the effect that justices of the supreme court, instead of justices of the appellate division, be authorized to fix the times and places of holding trial and special terms, and to assign justices for that purpose. Mr. Root, opposing the amendment, said that justices of the supreme court "are the only body of public officers who have the absolute power to determine what they shall do, when and where they shall do it, and whether they shall do it or

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not." He said a judicial system should provide "some way in which duties may be prescribed, which it shall be incumbent upon a justice of the supreme court to perform." He thought that in practice the appellate division judges would make rules and permit them to be executed by the trial justices; "but there ought to be some power which the citizen can hold responsible for the performance of judicial work, and some place to which the citizen can go to complain if it is not performed, with judges the same as anyone else." Mr. C. B. McLaughlin supported the original provision, and said the power should be lodged somewhere to distribute the work to be performed by trial judges. Mr. Cornwell's amendment was rejected, and also I. S. Johnson's amendment to require at least one equity term annually in each county. Mr. Foote thought this amendment was unnecessary because the judges of the appellate division had power to fix the terms, and could therefore provide for such an equity term in each county.

Mr. Peck proposed an important amendment to the section, reducing the number of general term judges to three in each department, to be elected by the people of the respective departments. I have already referred to a similar amendment in the Convention of 1867, except that in that instance the state was to be divided into three departments with five judges each, to be elected by departments. I have also quoted the report of the committee on the supreme court in the judiciary commission of 1890, recommending four general term departments with five judges each, making twenty in all, to be elected from the state at large, and not by departments. Mr. Root said the plan would degrade the supreme court to the third rank, and make its judges practically circuit judges with two appellate courts above them. The plan had been submitted to the judiciary committee, but was

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rejected by a very large majority. Mr. Gilbert, a member of the judiciary committee, supported the Peck amendment, except that he preferred to keep the number of judges at five, as proposed by the committee. He said that stability and independence in the general term were not secured by the committee plan. Mr. Becker, also a member of the committee, opposing the amendment, said it was deemed desirable that appellate division judges should, at short intervals, go back to the work of the circuit and special term, thus keeping in touch with the bar and the people. Mr. Bowers, also a member of the committee, expressed the opinion that an appellate division of far better material would be obtained by the governor's selection than by an election by the people of the department. Mr. Peck's amendment was rejected, but the record does not give the vote.

It should be added here that early in the Convention an amendment was presented by Mr. Moore providing for four general terms, with a possible membership of five judges, to be elected by the people of the department for ten years, and another by Mr. Woodward, providing for similar general terms, to be elected in the same manner for terms of eight years.

The appellate division in each department was authorized to appoint a clerk and fix the location of his office. Several attempts were made to reduce the judicial term below fourteen years, but they were defeated, and the established term was continued.

The county court.—A history of this court has been given in former chapters, and, among other things, the fact has been noted that the court was saved from destruction in the Convention of 1846 by only one vote. The judiciary committee, in 1894, proposed to increase the money jurisdiction of the court from $1,000 to $2,000 in actions against residents of the county. The commis-

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sion of 1890 had proposed the same increase, and both the commission and the judiciary committee proposed an additional county judge in Kings county. When the county court section was reached in the consideration of the judiciary article, Mr. Lincoln proposed to amend it by conferring on the county court "general original jurisdiction in law and equity in all cases where the defendants reside in the county." He showed that the former court of common pleas possessed general jurisdiction, and was a popular tribunal, transacting much the larger part of the litigated business prior to 1846; and urged that a restoration of the early jurisdiction would not only add to the dignity and influence of the court, but would greatly relieve the supreme court, in which many actions were brought which might often more conveniently be brought in the county court. Against this amendment, it was argued that it was the modern tendency of judicial reform to have only one court of general jurisdiction, that this was manifested in the proposed judiciary article by the abolition of the superior courts of Buffalo and New York, the court of common pleas of New York, and the city court of Brooklyn,—all of which had general jurisdiction; and that it would be a radical departure from the scheme proposed by the judiciary committee again to vest in the county court the large jurisdiction it possessed prior to the judicial reorganization of 1846. Mr. Lincoln's amendment was rejected by a vote of 49 to 62.

The Convention declined to adopt propositions to increase the money jurisdiction above $2,000, and also a proposition to give the board of supervisors power to establish the county judge's salary. The court of sessions was abolished, except in the county of New York, and its duties and functions were transferred to the county court.

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Surrogates' courts.—The judiciary committee proposed to continue without substantial change the provisions in the former Constitutions relating to surrogates' courts, incorporating, however, the act of 1892, which gave to New York county an additional surrogate, and fixing the official term of the surrogates in that county and in Kings county at fourteen years. When the section was reached in convention the provision relating to the official term of the surrogate of Kings county was stricken out on Mr. Root's motion. The section as proposed provided that the surrogate's salary should not be diminished. On motion of Mr. Mereness the provision was amended by providing that the salary should not be increased or diminished. The Convention rejected a proposition by Mr. A. H. Green to reduce the official term of the surrogate of New York from fourteen years to six years. The section as finally perfected was substantially the same as the surrogate's court section as recommended by the judiciary commission of 1890.

Superior city courts.—In former chapters I have given a sketch of the superior courts of New York and Buffalo, the court of common pleas of New York, and the city court of Brooklyn, and their inclusion in the Constitution by the judiciary article adopted in 1869. I have also noticed a movement, beginning in 1876, for the abolition of the superior court and court of common pleas of New York and their absorption by the supreme court, and an amendment passed by the legislature in 1893 providing for a similar disposition of the city court of Brooklyn. The judiciary commission of 1890 recommended the immediate abolition of the general term of the superior court of New York, and the gradual abolition of the court for any purpose, and its final absorption by the supreme court. The superior court of Buffalo, the court of common pleas of New York, and the city

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court of Brooklyn were continued by the commission, but were deprived of appellate jurisdiction; and the legislature was authorized to abolish any of these courts, and provide for a corresponding increase in the number of justices of the supreme court in the judicial district in which such city court was located. The judiciary committee, in 1894, recommended an immediate abolition of all these courts, and the transfer of their judges, powers, functions, and jurisdiction to the supreme court. This abolition was a part of the scheme of consolidation recommended by the committee, and by which, among other things, four general terms were to take the place of nine under the former system, namely, the five general terms of the supreme court and the four general terms of the local courts thus abolished. Besides, it was deemed unnecessary longer to continue these local courts with the same jurisdiction as the supreme court. By this absorption the supreme court became the one great court of original jurisdiction for all parts of the state, thus producing a consolidation and concentration of judicial influence and authority not attainable under the local court system.

While the superior court section was under consideration Mr. Platzek offered an amendment to except the city court of New York from the operation of the provision requiring appeals from inferior local courts to be heard by a justice or justices of the supreme court, who might be assigned for this purpose by the appellate division, intending, he said, to provide specifically for appeals from the general term of the city court to the appellate division of the supreme court. He thought the city court was of sufficient dignity and importance to warrant this exception. Mr. Root, opposing the amendment, said there was a widespread opinion that the city court ought to be abolished, and he thought the legislature ought to

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have power to abolish the court or reduce its jurisdiction, which would be prevented by putting the court into the Constitution. He thought the court should be treated the same as any other inferior local court. Mr. Platzek's amendment was rejected. Mr. Forbes thought the superior court and court of common pleas of New York should be continued in existence, and accordingly moved to except them from the operation of the section, but the Convention sustained the committee in the proposed abolition of these courts.

Inferior local courts.—The provision of the existing Constitution relating to justices' courts was continued, except that justices were no longer required to be elected at town meetings, but might also be elected at such other times as the legislature might prescribe. The Convention declined to adopt Mr. C. A. Fuller's proposition to apply the age limit of seventy years to the justices, judges, and justices of the peace named in § 17. On Mr. Pratt's motion, "shall" was changed to "may," in the provision relating to the election of justices of the peace and district court justices in cities. He thought the provision ought not to be compulsory in view of the modern tendency to supersede justices' courts by special city courts. The committee proposed an important change in relation to other inferior local courts included in the former § 19 and the new § 18, making it read as follows:

"Inferior local courts of civil and criminal jurisdiction may be established by the legislature, but no inferior local court now existing, or hereafter created, shall be a court of record. The legislature shall not hereafter confer upon any inferior or local court of its creation any equity jurisdiction, or any greater jurisdiction in other respects than is conferred upon county courts by or under this article. Except as herein otherwise provided, all judicial officers shall be

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elected or appointed at such times, and in such manner, as the legislature may direct."

The committee, in its report, said that provision had been "made for preventing a repetition of the process by which, through constantly enlarging the jurisdiction of local and inferior courts, local rivals of the supreme court are built up. The trial of small causes is just as important to the people who have them as the trial of large causes is to others. When a court is organized for the purpose of trying small causes, an enlargement of its jurisdiction necessarily withdraws its attention, interest, and efforts from its original field of work. Therefore, while we leave power in the legislature to establish inferior local courts, we provide that they shall not be courts of record, and that the legislature shall not confer upon them any equity jurisdiction, or any greater jurisdiction in other respects than is conferred upon county courts."

Mr. Root, in his speech opening the debate on the judiciary article, commenting on the merger of local courts into the supreme court, said the committee proposed to "prohibit the legislature from ever enlarging the jurisdiction of local and inferior courts, so that they shall exceed, as to the courts now existing, the jurisdiction they now have, and, as to any court they may hereafter create, the jurisdiction of the county courts. We thus keep down to the level of the county court, local tribunals, and useful tribunals, adapted to the performance of specific functions, all courts except the one supreme court. We propose, by this inhibition upon the legislature, to keep a system of courts in this state which will attend to the proper function of properly trying the small causes, in which the great body of the people are more interested than they are in the large ones."

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On Mr. McClure's motion, the words "now existing or" were stricken out. He thought the existing courts of record should be continued as such. Several inferior courts of record were of great value to the community, "and the exemplification of their records is a matter of necessity in the interest of litigants." Mr. Root accepted Mr. McClure's suggestion, remarking that the provision as reported might be an interference with existing courts, and would occasion some inconveniences if they ceased to be courts of record. Mr. Roche proposed an amendment requiring all judges or magistrates of courts established under the section to be elected by the people. He thought that, if the people should be permitted to elect county judges and surrogates, they might also safely be permitted to elect judges of other local courts. Mr. Root opposed the amendment, saying that it was a matter which should be determined according to the needs of each locality; that the Convention could not in advance determine whether, in a given instance, it might not be wiser to appoint than to elect the judges of inferior courts hereafter established. The subject was one peculiarly within the province of the legislature, and should be left to its discretion. The Roche amendment was rejected.

Judicial pensions.—The origin of this provision has been noticed in previous chapters, and also the dissatisfaction arising from the payment of salaries after the termination of judicial service, which was manifested, not only by several proposed amendments intended to abrogate or modify the pension provision, but which was the subject of a resolution adopted by the Republican State Convention in 1891, recommending the discontinuance of the payment of judicial pensions and the adoption of an amendment expunging the pension provision from the Constitution.

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The judiciary commission of 1890 proposed to prohibit pensions to judges elected after November 1, 1890, continuing the provision as to judges then in office, with the further modification that the judge must have served ten years during the term which was abridged by the age limit. The judiciary committee, in 1894, substantially adopted the policy recommended by the previous commission, but moved the date forward so that no judge elected after January 1, 1894, would be entitled to receive a pension by reason of the abridgment of his term by the age limit. Mr. C. B. McLaughlin moved to strike out the entire pension provision, intending thus to prevent judges then in office, as well as those thereafter elected, from receiving any compensation after the termination of the judicial service. Mr. Cookinham thought the state had no power to abrogate the provision as to judges then in office. Mr. Cady said the question involved in Mr. McLaughlin's amendment was not one of sentiment, but involved "purely a question of state honor and state dignity." Mr. E. R. Brown offered as a substitute to Mr. McLaughlin's amendment the provision recommended by the judiciary commission of 1890, amplified by postponing the date from November 1, 1890, to January 1, 1894. Mr. Choate hoped the Convention would "avoid being known as the repudiating Convention." He gave a sketch of the origin of judicial pensions, referring to the establishment of the policy by the Federal government in the provision that, if a judge had been ten years on the bench of the supreme court, and had reached the age of seventy, "he might retire, and should have his pension for the same salary for the residue of his life." Mr. Choate thought there was no answer to the legal claim of a judge for the continued compensation under the existing constitutional provisions, even if abrogated by the Convention, and there

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was no answer to the moral claim. "Do not let us debase ourselves," he said, "nor take a position that we cannot afford to take before the people, nor afford for the people of the state to take before the world. . . .This state never has repudiated its obligations, and by our aid it never shall." Both amendments were rejected, as was also Mr. Vedder's amendment fixing the age limit at seventy-five years.

Mr. Dickey offered the following amendment:

"The governor shall have power to appoint to duty any supreme court judge or justice, with his consent, whose term of office shall be abridged; and he shall receive no compensation therefor."

He said the object of the amendment was to permit the judges to work after they had passed the age limit, "so that they may do something to earn the money that is still to be paid to them." Many of them, he said, were willing to work, and as able to perform judicial service as they had ever been. The amendment was adopted by a vote of 52 to 38. The committee on revision reported the amendment, and it was adopted in the following form:

"But any such judge or justice may, with his consent, be assigned by the governor from time to time to any duty in the supreme court while his compensation is so continued."

By the section, as reported by the committee, the compensation of a judge or justice mentioned in it could not be diminished during his official term. On motion of H. A. Clark the section was amended by providing that the compensation should not be "increased or diminished."

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Miscellaneous amendments.—Circuit courts and courts of oyer and terminer were abolished, and their jurisdiction was transferred to the supreme court. The judiciary committee, in its report, said that since side justices had been dispensed with the separate existence of these courts had been useless, "and the continuance of the form and name without the substance merely mystifies laymen, and embarrasses lawmakers."

Section 11, relating to the removal of judicial officers, was amended by substituting "cause" for "charges" in the proceedings for removal. Mr. Root said that under existing provisions of the Constitution a judicial officer could not be removed unless there was something to justify charges, which must have been served upon him; that in several instances judicial officers, through no fault of their own, had been unable to perform their duties, but they could not be removed except for some dereliction, involving charges of malfeasance or misfeasance in office. The amendment permitted a removal for "cause," after a statement of the cause had been served on the officer and an opportunity given him to be heard, which, Mr. Root said, had been construed by the court of appeals to mean "incapacity to perform the duties of an office."

The section authorizing the legislature, on the application of a board of supervisors, to establish the office of special county judge, or of special surrogate, was extended so that such an officer might act, not only in case of a vacancy in the office of county judge or surrogate, or of their inability to act, but also "in such other cases as may be provided by law." This seems to give the legislature a wide, if not an unlimited, discretion in prescribing the jurisdiction of a special county judge or special surrogate.

Important additions were made to the provisions re-

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lating to the professional qualifications of judicial officers, and the limitation imposed against engaging in private practice. The provision in the existing Constitution related to the judges of the court of appeals and justices of the supreme court, or a judge of a court of record in New York, Brooklyn, or Buffalo. The new provision omitted the local judges because their courts were abolished, but it included county judges and surrogates. The judiciary committee, following the commission of 1890, proposed to exclude from the right to practice law county judges and surrogates in counties having a population exceeding 100,000. As a partial compensation for depriving county judges and surrogates of the opportunity to practise law, the committee proposed to authorize the legislature to extend the term of these officers to ten years in counties where the constitutional prohibition applied. No person except a lawyer was to be eligible to any judicial office included in the section. The committee reported the section in the following form:

"No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office; nor shall any judge of the court of appeals, or justice of the supreme court, or any county judge or surrogate hereafter elected in a county having a population exceeding 100,000, practise as an attorney or counselor in any court of record in this state, or act as referee.

"The legislature may impose a similar prohibition upon county judges and surrogates in other counties.

"In counties where the county judge and surrogate shall be prohibited from practising law, the legislature may extend the term of office to not exceeding ten years.

"No one shall be eligible to the office of judge of the court of appeals, justice of the supreme court, county judge, or

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surrogate, who is not an attorney and counselor of this state."

Mr. C. A. Fuller offered an amendment to the effect that all county judges and surrogates should be prohibited from practising law. This was rejected. Mr. Dickey proposed to strike out the provision requiring judicial officers to be lawyers. He thought it was legislating for a class, and that the people could be trusted to elect competent persons to judicial positions. In the chapter on the Convention of 1846 I have referred to the proposition there seriously considered, to constitute the new court of appeals in part of laymen, and the reasons urged for the adoption of this policy. Mr. Root thought that whether the court was to be composed of lay judges or professional judges was one of principle, and ought to be stated in the Constitution. He believed that, as a practical question, the Constitution ought to provide specifically that judges of the higher courts should be lawyers. Mr. Dickey's amendment was lost, but, on motion of Mr. Spencer, Hamilton county was excepted from the operation of the provision, for the reason, as stated by him, that it sometimes happened that no lawyer resided in that county. Mr. M. E. Lewis proposed to reduce the population limit as to county judges and surrogates from 100,000 to 60,000. Mr. Hirschberg, for the purpose of excepting Orange county, proposed to fix the limit at 120,000, and this amendment was adopted. The Convention declined to adopt Mr. Roche's amendment permitting only lawyers to be eligible as local judges under § 18.

On Mr. Veeder's motion, the provision authorizing the legislature to extend the official term of county judges and surrogates to ten years in counties where they were prohibited from practising law was stricken out, but the

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Convention rejected his motion to strike out the provision authorizing the legislature to impose the same limitation on county judges and surrogates in other counties.

The provision in the former Constitution (§ 23), that the legislature shall provide for the "appointment, by the justices of the supreme court designated to hold general terms, of a reporter of the decisions of that court," was modified by the provision in § 21, that the legislature "shall regulate the reporting of the decisions of the courts." This should, of course, be considered in connection with previous provisions authorizing the court of appeals, and also the appellate division, to appoint a reporter.

The section in the former Constitution relating to courts of special sessions was continued without change. Mr. Maybee sought to abolish courts of special sessions, and transfer their jurisdiction to justices of the peace or other local magistrates, which he thought would make the provision consistent with the other provisions abolishing the oyer and terminer, and transferring its jurisdiction to the supreme court, and abolishing the court of sessions, with a like transfer of jurisdiction to the county court. Mr. Root said that, in view of the fact that there were in many cities local courts of special sessions which were not held by justices of the peace, it might not be safe to abolish courts of special sessions, for the reason that these city criminal courts would be destroyed without providing any substitutes. He said the provision proposed, which had been taken without change from the former Constitution, should be permitted to stand. The Convention concurred with Mr. Root, and concluded to leave the provision unchanged. Obsolete provisions in the former judiciary article were omitted, including §§ 17, 22, 24, and two sections numbered 28.

Propositions not accepted.—The judiciary committee

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had before it a large number of propositions and suggestions which it was unable to use. There were numerous suggestions relating to the structure of the court of appeals. These included amendments by Mr. Marks for a court of thirteen judges, by Mr. Lauterbach for a court of eleven judges, by Mr. Moore, a court of fifteen judges, by Mr. Parmenter, for a court of fourteen judges. Mr. A. B. Steele proposed to elect judges of the court of appeals practically for life by providing for a term which should end on the 31st of December next after they should become seventy years of age. This was substantially the plan so eloquently urged by Mr. Evarts in the Convention of 1867, and which on one test failed by three votes. Mr. Kellogg proposed to prohibit a supreme court justice from making any *ex parte* order in a case relating to the registration of voters, or which questions the title of any office except in the judicial district in which the justice is chosen, or for which he is duly designated. Mr. E. R. Brown proposed to authorize the governor to appoint a temporary justice in any district on the certificate of a majority of the justices of the district that a justice has become incapacitated. Mr. C. B. McLaughlin proposed to give the supreme court jurisdiction to hear and determine claims against the state. Mr. Moore proposed to abolish county courts and surrogates' courts, and transfer their jurisdiction to the supreme court. Mr. Maybee and Mr. Lincoln proposed a separate surrogate in each county, to be chosen for the same time and in the same manner as the county judge, but Mr. Lincoln's plan excepted Hamilton county. Mr. A. B. Steele proposed to create the office of special county judge and special surrogate in each county containing a population of 80,000, to be elected in the same manner as the regular county judge or surrogate. Mr. Steele also proposed a scheme of district courts in each county, which,

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excluding cities which had a special court, were to be divided into districts containing not more than 25,000 inhabitants, and one judge was to be elected in each district. The plan abolished the office of justice of the peace. Mr. Hawley, amending §§ 18 and 21, proposed to provide for a fixed compensation for justices of the peace, and to prohibit them from receiving any fees. Mr. Titus proposed to create a new court, to be called a court of criminal appeals, to be composed of a chief judge and four associates elected by the people for fourteen years by minority representation, with exclusive criminal jurisdiction on appeals in criminal cases. Mr. Tucker proposed a scheme of electing referees in each judicial district, to hold office three years. Mr. Lincoln offered an amendment reorganizing the board of claims, and changing its name to a court of claims. This change was made by a statute in 1897. Mr. A. B. Steele proposed a new section specifying in detail the courts included in the state's judicial system. Mr. Tucker proposed to establish a court of arbitration, to be composed of five judges elected for terms of three years by minority representation. The court was to be convened on the order of the governor to settle controversies between employers and employees. Mr. Church proposed to establish a court of arbitration, to be composed of seven commissioners; the chief commissioner was to be appointed by the court of appeals, and was required to be a lawyer, and one associate commissioner was to be appointed jointly by the chancellor of the state university, the presidents of Cornell and Rochester universities, and of Columbia and Union colleges, such person to be learned in "social and economical science." One was to be appointed by the governor, one by the senate, one by the assembly, one by the corporations and organizations subject to the jurisdiction of the court, and one by the

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employees of such corporations and organizations. Mr. Root proposed to prevent frequent amendments of the codes or statutes relating to practice by requiring bills for this purpose to be submitted to the chief judge of the court of appeals and the presiding justices of the several general terms, who were required to report on such bills to the legislature. Mr. Root also proposed to prohibit any court from granting naturalization within sixty days prior to an election, and to authorize the state to be represented by counsel, and cross-examine the applicant for naturalization. Mr. Lauterbach proposed to deprive all courts of jurisdiction to admit an alien to citizenship within three months prior to a general election, and to require written notice of an application for naturalization to be given to some officer who should represent the state. Mr. Lauterbach also proposed to prohibit candidates for a judicial office from making political contributions.

Art. VII. Canals; State Finances; Forest Preserve.

CANALS.

The story of our canals has been told in former chapters, terminating in the abandonment of the lateral canals and the abolition of tolls in 1882, and the adoption of the constitutional policy of maintaining the canals as free highways. The enforced change of policy concerning the canals, resulting from railroad competition and other causes, which has been recounted in a previous chapter, by which the state abandoned the hope of making the canals, not only self-supporting, but a permanent source of revenue for the state treasury, naturally relegated them to a subordinate position in our constitutional system, for the manifest reason that, having fallen from their original high estate as producers of revenue, and

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having served their purpose and consummated their primary design as instruments in the development of the state, and having become, by the operation of new and unexpected economic causes, only, or at least chiefly, a check on the cost of transportation by other means, they had come to occupy a negative, rather than a positive, place in state administration or commercial prosperity. The discussion and proposed amendments relating to canals in the Convention of 1894 were therefore naturally confined to a limited range. The canals had been made free, and there was no hope of the restoration of tolls; the canal problem in this Convention was almost necessarily limited to questions relating to the preservation, disposition, or improvement of the canals. A synopsis of the proposed amendments shows the narrow limit of consideration, and also that the great days of intense canal agitation, which reached its highest point in the Convention of 1846, had passed forever, and the later Convention needed to consider only what should be done with the canals. These amendments naturally fall into three classes:

a. Disposition.—Mr. McMillan proposed to authorize the sale of the Main and Hamburg Street canal in Buffalo. Mr. McDonough and Mr. Alvord proposed to authorize the transfer of any of the canals to the Federal government. Mr. Cady, chairman of the canal committee, referring to these amendments in his speech in committee of the whole, said they received no favor and no votes in the canal committee.

b. Improvement.—Mr. Cady, at the request of the canal conference, introduced an amendment for the improvement of the Erie and Oswego canals by giving them a general depth of 9 feet, and the Champlain canal 7 feet, also providing that canal improvement debts might be paid at any time within fifty years. Mr. Roche pro-

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posed the creation of a canal improvement commission composed of the state engineer and surveyor, the superintendent of public works, and three representatives of commercial bodies, who were required to examine and report concerning the improvement of any or all of the canals,—the proposition reported by the commission to be submitted to the people for their approval; and, if approved, the legislature was required to make the improvement accordingly. Bonds not exceeding $20,000,000 might be issued for such a purpose, running not more than forty years. Mr. Forbes proposed to authorize a debt of $12,000,000 for canal purposes.

c. Miscellaneous.—Mr. Barrow proposed to include in the definition of canals "all reservoirs, waters, feeders, heretofore appropriated for such canals and now owned by the state, and all parts thereof." By Mr. Doty's amendment this provision should not "prohibit the use for municipal purposes, under the authority of the legislature, of any surplus of waters in such feeders or reservoirs not required for canal purposes." Mr. Cassidy proposed to abrogate §§ 1, 2, 4, 5, and a part of § 3 of the existing canal article. Mr. Baker proposed to amend the toll section by authorizing the legislature, in its discretion, to "impose or remove tolls on products of the Dominion of Canada passing through any canal of this state." Mr. Roche proposed to authorize the legislature to fix and regulate charges at private elevators, and also to provide for the erection of state elevators, and regulate their use.

The canal committee reported two amendments, one authorizing the sale of the Main and Hamburg Street canal in Buffalo, and the other authorizing tolls on Canadian products. The Cassidy amendment, abrogating certain provisions, was referred to the committee on canals, and also to the committee on state finances. Both

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committees reported a § 3 relating to tolls, but they were not alike. The report of the committee on state finances and the two sections reported by the committee on canals were considered together in committee of the whole. At the opening of the discussion, on motion of Mr. Cady, chairman of the canal committee, the section as reported by that committee was substituted for the section as reported by the committee on state finances, and the section relating to tolls and the section relating to the disposition of the canals were the only sections before the committee of the whole at the opening of the discussion. The Convention thus had before it practically only two canal questions; namely, whether the Main and Hamburg Street canal in Buffalo should be sold, and whether the legislature should be permitted to impose tolls on Canadian products.

Mr. Cady proposed an amendment to § 3 that "the canals of the state may be improved in such manner as the legislature shall provide by law; and a debt may be authorized for that purpose in the mode prescribed by § 12 of this article." In his speech on the general subject, Mr. Cady said the canal committee thought it would be "unwise to undertake to outline in the Constitution any detailed plan of canal improvement," but that the canal committee was a unit on the proposition that "there ought to be provided in the Constitution some reasonable plan by which the canals may, under certain circumstances, be improved." He said there was not in the Constitution any specific provision for canal improvement, but only the provision that "the legislature shall annually, by equitable taxes, make provision for the expenses of the superintendence and repairs of the canals;" and he therefore thought that a distinct proposition embodying the element of canal improvement should be incorporated in the Constitution. Mr. Cady said that,

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as a result of an extended inquiry, he thought it was unnecessary to deepen the Erie canal to 9 feet, that it was not then used to its full capacity.

Mr. Roche said he was surprised and disappointed at the result of the canal committee's deliberations. He strongly urged a more liberal policy of canal improvement, and presented statistics showing the business of the canals, and their value as an element in the prosperity of the state. He quoted the opinion of the New York Produce Exchange that the Erie canal was "of ten times more value to the commerce of the nation than when it was first constructed. It indirectly dominates freight rates in a dozen or more states, and indirectly over half the northern continent of America." Replying to the statement that the canal was not used to its full capacity, he said this was due to the fact that the canal had not been kept in proper repair, that it no longer invites capital, and men no longer receive an adequate return for their investment. He renewed and urged the adoption of the amendment introduced by him, already noted, relating to a canal commission and to other details of canal administration, with the design of inaugurating a scheme of general canal improvement; but the Convention declined to adopt his plan. He objected to the Cady amendment because, under § 12, even if the people should vote for a canal improvement, the legislature could stop it by refusing to make the necessary appropriations to carry on the work.

Mr. Nichols said the Champlain canal especially needed repairs, that the other canals were "quite equal to the demands of commerce; notably the Erie and the Oswego are not overburdened. It is reliably stated that the former is not carrying to exceed one tenth of its capacity, and the latter is not carrying to exceed one tenth of what it did twenty-five years ago."

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The most elaborate and comprehensive speech on canals in the Convention was delivered by Henry W. Hill, of Buffalo. Mr. Hill had given the subject long, patient, and thorough study, and had, apparently, examined it from every point of view. The speech is replete with historical information, and with valuable statistics showing the development of the canal policy in almost every age and country. It contained a general argument in favor of canal improvement, and of such constitutional changes as would readily permit this improvement; and he fortified his argument by numerous facts, figures, and historical references to show the value and importance of the canal as a factor in the development of the state, and of its probably continued usefulness if a liberal policy should be adopted. The student of the economic relations of canals will find here the whole subject so carefully considered and so clearly arranged that little need be sought elsewhere. Mr. Hill thought it would be unwise to attempt the construction of a ship canal across the state. He said New York had taken her place at the head of the list of states as a consequence of the construction of our canals, and whether she could retain that position would depend on her attitude toward her great water ways. He urged the preservation and enlargement of the canals, both as a check on railroad charges, and as an important feature of our commercial prosperity; saying that "we ought to remove the present constitutional limitations prohibiting the creation of a debt for their improvement, and provide at once for such improvement."

Mr. Baker proposed to state the provision relating to tolls on Canadian products in the following form, the last part being new: "Except that the legislature may, in its discretion, impose tolls on products and property of the Dominion of Canada passing through any canal

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of this state, and such tolls shall not be imposed nor collected after the Dominion of Canada shall have ceased to impose or collect tolls on American products passing through the Welland canal and other canals of the Dominion of Canada." He thought the state had a right to impose these tolls as a retaliatory measure for the protection of commerce. Mr. McMillan moved to strike out the Canadian tolls provision on the ground that it was an international question. He thought it was not one of the prerogatives of the Convention, but was a question between the government of the United States and the Dominion of Canada. He also opposed the provision because it was contrary to our general canal policy, which sought to secure all possible business for the canals. Mr. McMillan's motion to strike out this provision, and Mr. Baker's to amend it, were both rejected in committee of the whole: but afterwards in convention it was stricken out on Mr. Baker's own motion.

Mr. Baker proposed a radical change of policy relating to canal improvement by the following addition to the section prohibiting the sale of the canals: "The canals of this state may be improved in such manner as shall be provided by law, and the legislature shall have the power to contract debts for the improvement of the canals, which shall be payable at such time, and in such manner, as the legislature shall direct." But the Convention declined to accept this amendment. Mr. McDonough and Mr. Durfee offered amendments to § 6 authorizing the sale of the canals to the United States, but on condition that no tolls be imposed. These amendments were both rejected. The Convention also rejected the following amendment to § 6, proposed by Mr. I. S. Johnson: "No special or exclusive privilege shall be granted to furnish electric or other power for propelling boats on the canals

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of this state, or to use the land on either side of said canals; and all contracts made in conflict with this section are hereby declared to be void." On Mr. Hottenroth's motion the word "improvement" was added to the provision relating to superintendence and repairs, but the Convention rejected Mr. Cady's motion to add a general provision relating to canal improvement. All substantial amendments were rejected in committee of the whole, except Mr. Hottenroth's adding the word "improvement," as already noted, which was probably unnecessary; and the two sections containing the provision relating to Canadian tolls and releasing the Main and Hamburg Street canal in Buffalo from the prohibition against a sale were reported to the Convention. Several attempts were then made to disagree with the report, and direct the incorporation of amendments already considered in committee of the whole, but these were all rejected, and the report of the committee of the whole was finally disagreed with by a vote of 50 to 55, and, on Mr. Cady's motion, the whole subject, with all amendments, was referred back to the canal committee. Subsequently, on Mr. Cady's motion, the canal committee was discharged from further consideration of the subject, and the amendments as originally reported by the committee of the whole were ordered to a third reading without change. It was on this second appearance of the sections that Mr. Baker moved to strike out the provision relating to Canadian tolls. No change was made in the provision relating to the Main and Hamburg Street canal.

Mr. Cady, on third reading, proposed the following provision relating to canal improvement:

"The canals of the state may be improved in such manner as the legislature shall provide by law. A debt may be

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authorized for that purpose in the mode prescribed by § 3 (12) of this article, or the cost of such improvement may be defrayed by an appropriation from the state treasury, or by equitable annual tax."

Mr. Cady said he thought there was substantial unanimity of opinion in the Convention "that there be provided by us, to go forth to the people in our completed work, some reasonable method of improvement for the canals; . . . some provision which will at once secure their improvement, and at the same time protect the interests of the taxpayers;" but that so many plans had been proposed by special interests to suit their own purposes that there was great danger that the whole matter would fail "with a general destruction and defeat of a number of ill-considered provisions." Mr. Cady said his amendment introduced into the Constitution "distinctly and firmly the element of canal improvement, which does not exist now. . . . All that is provided there now is that the legislature may provide by equitable annual tax for maintenance, superintendence, and repairs." Judge Cady urged with great force and eloquence the preservation and improvement of our canals, and the importance of the Erie canal as an element of state development. His speech reminds us of many of the utterances of De Witt Clinton concerning the great canal project,—at first a dream, and then a reality,—as, in reports of committees, executive messages, public documents, and private correspondence, he painted in glowing colors the beneficent results of the policy of internal improvements which he so earnestly advocated. It also carries us back to the debates in the assembly of 1878, when Dr. Hayes, with such vigor and felicity, combining the characteristics of a scholar and statesman, in speeches from which I have already quoted,

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appealed to the legislature and the people to adopt the policy of free canals, and thus perpetuate the prosperity and greatness of the state. Judge Cady said, in part: "The Erie canal is no Rhine, nor Rubicon, nor silvery stream, nor channel way; but the truth remains that no historic water way or river of the world has been more identified with the sovereignty of a great imperial state, and with its material prosperity, than this plain, prosaic ditch that stretches across the great plain of the state of New York; and it is to us the most important part of navigable water way between Liverpool and Fond du Lac. Step by step, with the progress of commerce upon that water way, have grown the wealth, prosperity, and primacy of the state of New York. It has carried, since 1837, more than ten billions' worth of property; more than all the actual value, real and personal, of the property of the state of New York to-day. Our equalized valuation to-day is between four and five billions, and yet I say this Erie canal has carried since 1837 more than twice that amount in freight to and from the commercial ports of the state of New York." He said the plan proposed provided for "all three conceivable methods by which the state can pay anything." It may be paid for by the creation of a debt, or by the appropriation of surplus and unused funds from the state treasury, or by equitable annual tax.

Mr. Veeder proposed to add to the Cady amendment that bonds under it might run thirty years. Mr. Dean, while hoping for more, accepted the Cady amendment as the best that could probably be obtained, admitting that the Convention had demonstrated that it was "thoroughly conservative." He said the canal system of the state represented "a great economic principle,—the principle that it belongs to the state to furnish and maintain this highway." It was "a great avenue of intercommuni-

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cation," and he had hoped the Convention would be willing to take the position that "its highways, being the property of the state, should be left under the control of the legislative authority of the state," untrammeled by "a Swiss referendum or the approval of the people," for the reason that it was better to trust to the judgment of the legislature than to have the people pass abstractly on these questions. He said there was no possible danger of any extravagance on the part of the legislature. Mr. Nichols proposed to strike from Mr. Cady's amendment the provision that "the cost of such improvement may be defrayed by the appropriation of funds from the treasury, or by equitable annual tax." Mr. Nichols thought the legislature already possessed the power to improve the canals "within a certain limited sense." He did not argue that the legislature had power to enter upon any extensive canal enlargement, but that, as construed by the legislature and officers of the state, the Constitution already authorized the legislature, in its discretion, to improve the canals from time to time. He therefore thought it was not necessary to adopt even the first part of the Cady amendment. Mr. Moore said the Nichols amendment would take the heart out of the provision as recommended by Mr. Cady; that the treasury would soon be overflowing with money from the collateral inheritance tax, and other sources, and it would be possible for the legislature to defray the expense of canal improvement without incurring a debt or levying a direct tax. Mr. Hottenroth said there was nothing in the Constitution which prevented canal improvement, and the conclusion was inevitable that the legislature could inaugurate canal improvement under the existing Constitution. Mr. Veeder's motion to authorize the extension of a canal debt to thirty years was lost by a vote of 48 to 61, and the motion by Mr. Nichols to strike out the last clause of

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the Cady amendment was lost by a vote of 30 to 66. Mr. Cady's amendment was adopted by a vote of 81 to 24. Mr. Choate moved to strike from the Cady amendment the words "or by equitable annual taxation," so that the moneys spent upon the canals shall be money out of the treasury, already appropriated for the purpose. This motion was lost, but on the final vote referring to the subject again, he said he did not know, and he did not believe any member of the Convention knew, what was meant by "equitable annual taxation." He said that, under the provision, the legislature could let a contract for canal improvement involving the payment of $20,000,000, "which cannot be taken back. . . . That may mean that it shall be a taxation running over ten years, or all confined to one year." The canal amendments were adopted by a vote of 89 to 44, and the Cady amendment appears as § 10 of the revised canal article.

We have already observed the limited range of canal amendments considered by this Convention, and the reader cannot fail to note that the net result was not large. Sections 1, 2, 4, and 5 of the existing article were abrogated because they had become obsolete. The Hamburg canal, which Mr. Lauterbach called a "rather large-sized gutter," was released from the prohibition against a sale. This was a negative, rather than a positive, provision, for it simply meant that this canal should no longer be considered a necessary part of our canal system. The remaining part of the result of the Convention's work on canals is included in the provision relating to canal improvement, chiefly contained in the Cady amendment, but also in a minor way in the Hottenroth amendment which added "improvement" to the subjects on which the proceeds of abandoned canals might be used. It may be doubted whether the canal improvement provision was a necessary addition to the Constitution, and

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whether it did not amount rather to a mere declaration of policy or principle, without conferring on the legislature any power that it did not already possess. The suggestion was made by several delegates, and opposed by others, that, because the Constitution did not contain any specific provision relating to canal improvement, the legislature could do no more than provide for the superintendence and repairs of the canals. This opinion seemed to be based, at least in part, on the provision in § 3, as adopted in 1882, abolishing tolls, that "the legislature shall annually, by equitable taxes, make provision for the expenses of the superintendence and repairs of the canals;" but, because tolls were abolished, this provision seems to have been a necessary substitute; or at least some substitute was necessary for the provision inserted in § 6 in 1874, that "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." This was intended and understood to limit canal expenditures to the amount received from tolls. When tolls were abolished this limitation was necessarily omitted because obsolete, and the other provision was adopted, requiring the expenses of superintendence and repairs to be provided by annual taxation. This was not a clause imposing a limitation, but rather a direct mandate to the legislature to raise by taxation, for canal purposes, money which had before been realized from tolls. I think it is worth while to remember, also, in this connection, that our Constitution has not at any time prior to 1894 contained any specific authorization of canal construction or improvement, except the provision included in the Constitution of 1846 and the amendment of 1854 providing for the completion of the Erie canal enlargement and of certain lateral canals. All the canals were originally

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constructed without any specific constitutional authority. Our great canal system was inaugurated, and the original canals were half completed, under the first Constitution, which was adopted forty years before the canal enterprise was actually begun, and that instrument was silent —naturally, we think, but not singularly so—on the economic questions which have since attracted such wide attention, and which have come to occupy such a conspicuous place in constitutional revision and amendment. The second Constitution, which was adopted while the canals were in process of construction, contained no special provision relating to canal construction or improvement, but simply pledged certain revenues for the completion of the enterprise. Neither should it be forgotten that the great project of canal enlargement, begun in 1836 and completed in 1862, after a period of twenty-six years, was begun under a Constitution which conferred no specific power on the legislature to engage in such an enterprise; yet it was not doubted then, and can scarcely be doubted now, that the legislature had ample authority to authorize, continue, and complete that enlargement. This project of enlargement was recognized in the Constitution of 1846 and the amendment of 1854, not in the sense of ratification, but rather as a part of the general scheme of canal finance, involved in the liquidation of a large accumulated debt, as well as the completion of the enlargement and of the unfinished lateral canals, on which several millions had already been expended. The recent practical construction of the Cady amendment is in line with the foregoing suggestion as evidenced especially by the act of 1903, chapter 147, which not only provides for an enlargement of the Erie, Oswego, and Champlain canals, but, on considerable portions of the route, contemplates the abandonment of the original canal and the construction of a new one on a

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different line. It seems perfectly clear that this action by the legislature is not specifically authorized by the Cady amendment (§ 10), but must have been taken under a general exercise of legislative power not expressly limited by the Constitution, and under which the legislature might even now, with the approval of the people, construct a new canal in any part of the state. The advocates of general canal improvement earnestly presented their views in and out of the Convention, before the canal committee, in various conferences, and in the press, and apparently hoped that the Convention would, by an appropriate amendment, commit the state to a radical policy of canal enlargement; but the conservatism of the Convention did not respond to this appeal, and probably a majority of the delegates would have been quite content if no action at all had been taken in relation to canals. The Cady amendment was a moderate concession to the extreme policy which those who called themselves the special friends of the canal sought to incorporate in the Constitution, and the indifference of the Convention toward even this moderate concession clearly appears from the final vote; several delegates voted for it because they deemed it harmless, and it received only 89 votes, one more than the number required to authorize its submission to the people.

I have already cited the amendment introduced by Mr. Cady at the request of the canal conference, containing a scheme of general canal improvement, including many details which could have no proper place in a constitution. This plan, with modifications, was included in an act passed by the legislature of 1895 (chap. 79) known as the $9,000,000 act, which was submitted to the people at the November election in that year and approved, and under which the canal enlargement contemplated by the act was begun, but not completed, because the amount

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voted was insufficient for that purpose. The act of 1903 (chap. 147) embraces a much more comprehensive plan of canal improvement at an estimated cost, in round numbers, of $101,000,000.

STATE FINANCES.

The sections of this article relating to state finances were not amended in substance, but only in a few instances by alterations made necessary by change of number, or for other technical reasons. Several suggestions, however, relating to this part of the article, were submitted, but failed to receive the approval of the standing committee on state finances. Mr. Dean, from whom I have already quoted the opinion that questions relating to state debt should not be submitted to the people, offered an amendment providing that such a debt should receive the approval of two thirds of each branch of the legislature, but that a bill for that purpose could not at the same session be passed over the governor's veto; and by another amendment he proposed to omit from § 12 the requirement that a law creating a debt be first submitted to the people. Mr. Dean also proposed to provide for the immediate completion of the state capitol within five years by contract. I have already considered in a previous chapter a proposition relating to this subject in the Convention of 1867. Mr. Dean also offered an amendment abrogating § 2 of the act of 1893 (chap. 499) relating to the use of electricity on the canals for light, heat, or power, and expressly nullifying any grants of public property or right, made under the statute to any corporation, or individual, and authorizing the legislature to establish and maintain electric motive power on the canals. Mr. I. S. Johnson's amendment made it a felony for a public officer to receive any benefit on account

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of any public funds in his possession or under his official control. Mr. Doty proposed to abrogate § 9, relating to loaning public credit, and substitute a similar provision which authorized the use of public funds for the education of the blind and the deaf and dumb "not under sectarian control," and also excepting from the operation of the section public funds held by the state for educational purposes.

Mr. Tucker proposed that the "government of the state shall be supported by taxation," and that no interest bearing state debt of any kind should be authorized or permitted. Mr. Pratt proposed the following substitute for § 14 relating to the limitation of claims: "No court or board, or 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. 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." Mr. Banks proposed that all public contracts, except for services of employees, be let to the lowest bidder on duly advertised and competitive bids. Mr. A. H. Green offered an amendment containing detailed provisions for establishing and maintaining "a state insurance fund for the aged."

FOREST PRESERVE.

Repentance is profitable for states, as well as for individuals. New York has abundant reason to regret the hasty and extravagant disposition of public lands during the early part of her history, and for more than thirty years the state has been engaged in the salutary labor of trying to repair, so far as possible, the mistakes of former generations. The wasteful destruction of our forests, which has continued even to our own time, has

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produced conditions which may well make the people wish that wiser counsels had prevailed among the statesmen of the first fifty years of our history, or that they had possessed more accurate information concerning the agricultural possibilities of the state, and the probable effect of the destruction of our forests.

This is not the place to write a history of state lands; indeed, it would be difficult now to write such a history, for the facts on which it must be based are not easily accessible, if available at all. At the Revolution, large tracts of unoccupied land passed under the control of the state, and afterwards the aggregate quantity of such land was largely augmented by acquisitions from Indian tribes or otherwise; but the actual quantity owned at any time by the state does not seem to have been definitely ascertained.

Public lands to be sold.—The legislature of 1783 provided for commissioners of Indian affairs to treat with the Indian tribes in relation to their land, and the next year provision was made for acquiring these lands by the state. It seemed to the statesmen of that period that easy methods should be devised for acquiring and settling state lands, and accordingly, in 1784, an act was passed "to Encourage the Settlement of the Waste and Unappropriated Lands," and which made the governor, lieutenant governor, speaker of the assembly, secretary of state, attorney general, treasurer, and state auditor commissioners with power to lay out and dispose of "waste and unappropriated lands," which were to be divided into townships, to contain not more than 23,040 acres, and these lands were to be disposed of by townships only, on the petition of not less than forty-two persons, who were allowed to purchase a township at the rate of one shilling an acre, with certain reservations for highways and for religious and educational purposes, the latter

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known as gospel and school lots. This law was not satisfactory, as appears from the preamble to a new public lands law passed in 1785, which repealed the act of 1784. The new law retained the township plan at the same rate, one shilling per acre; and also authorized individual locations of not more than 500 acres each, at the rate of four shillings per acre. Gospel and school lots were reserved, and the quantity in each was increased. Lands located under the act were to be exempted from taxation for seven years from the date of the passage of the act (April 11, 1785), except county and district taxes. The state officers named in the act of 1784 were specifically designated as "commissioners of the land office," with substantially the powers conferred on them by the former act, and the office has been continued since that time.

In the article on apportionment I have noted from that point of view the rapid increase of population incident to the settlement of the northern and western parts of the state, resulting in the frequent erection of new counties. The policy of encouraging immigration and the settlement of unoccupied parts of the state by offering state land at almost nominal prices produced immediate effects which were apparent, not only from the census tables, but also from the general prosperity of the people. One result of this policy, especially pertinent in considering the subject of forest preservation, was the early disposition by the state at low prices—sometimes as low as 5 cents an acre—of nearly all of that part of the Adirondack region which the state has recently determined to restore so far as practicable to its original condition. The needs of the people of the state in connection with the preservation of this part of our domain, now so keenly realized, were either not appreciated or were overlooked when these lands were disposed of not

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only without restraint, but with the positive encouragement of the men who were then in charge of public affairs.

The movement to establish a forest preserve, as described in one statute (1885), or an Adirondack park, as described in another statute (1892), and which were both included in a later statute, is of comparatively recent origin; and the project, so far as it was directly embodied in legislation, culminated in the act of 1893, chapter 332, combining the whole subject with modifications. This statute defined both the forest preserve and the Adirondack park. The park was included in the preserve, but was of smaller dimensions as defined by different parts of the act.

State park commission, 1872.—The forest preserve project had an earlier origin than the act of 1885. On the 15th of March, 1872, Thomas G. Alvord introduced in the assembly an act creating a state park commission. The bill was passed at that session, and became chapter 848. By the act former Governor Horatio Seymour, Patrick H. Agan, William B. Taylor, George H. Raynor, William A. Wheeler, Verplanck Colvin, and Franklin B. Hough were appointed commissioners to "inquire into the expediency of providing for vesting in the state the title to the timbered regions lying within the counties of Lewis, Essex, Clinton, Franklin, St. Lawrence, Herkimer, and Hamilton, and converting the same into a public park," and to report at the next session.

It will be observed that this was substantially the territory included in the forest preserve established thirteen years later by the act of 1885, except the Catskill district, which was added by the latter statute. I have not been able to discover the direct origin of the state park project included in the act of 1872 creating a state park commission, but perhaps it may be traced to the act of Con-

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gress of March 1, 1872, setting apart a specified tract of land in the then territories of Wyoming and Montana, near the head waters of the Yellowstone river, "as a public park or pleasure ground for the benefit and enjoyment of the people,"—which has since been known as the Yellowstone National park,—and by which act the land included in the park was withdrawn from sale substantially as provided by the New York act of 1883 withdrawing from sale state lands in the Adirondack region. Mr. Alvord's state park bill was introduced two weeks after the President had approved the Yellowstone park act, and it is not improbable that the idea of the Alvord bill originated in the Federal statute establishing a public park. But, whatever may have been its origin, the act of 1872 is, I believe, the pioneer statute on this subject in New York, and from it, by a process of evolution that now seems to have been somewhat slow, but which was probably as rapid as could have been expected under the circumstances, the state, after pursuing for a century a destructive policy in relation to the forests, decided to retrace its steps, and acquire and keep the land in the Adirondack region which had been so hastily and unwisely sold during the prevalence of an opposite policy.

The park commission's report.—On the 15th of May, 1873, the commission presented an interesting report containing a review of the policy of the state in relation to public lands, a brief historical description of the Adirondack region, and a recommendation that the territory be set apart as a public park. In connection with the description of the Adirondack region contained in this report, it may not be without interest to quote the supposed origin of "Adirondack," as given by a committee of the Brooklyn Constitution Club in April, 1885, approving a bill then pending in the legislature providing for the creation of a forest preserve. The report says:

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"The word 'Adirondack,' or 'tree eaters,' comes from the Indian word 'Garondah,' trees, and 'Hades,' they eat The words combining these ideas, 'Haderondac,' was changed by the French into 'Adirondack.' Of the story associated with its derivation, it is said that many years ago the Iroquois were attacked by an Indian nation. The latter being defeated, was mocked by the other, which boasted that their foes had been so weakened that they could not fight, and were compelled to eat trees." The Seymour commission of 1872 gives the following description of the Adirondack region, which has often been quoted in subsequent publications relating to this subject:

"The ancient 'Cough-sa-gra-ge,' the beaver hunting country of the Indian Six Nations,—now known as the Adirondack wilderness,—is essentially a great and almost primeval forest, covering the mountainous and semi-mountainous elevated region of northern New York. The northern portion of the county of Hamilton is the approximate center of the wilderness, while the western portion of Essex county contains the most elevated lands and the highest mountains of the state. From Lake Champlain on the east, the Mohawk river on the south, the Black river on the west, and the St. Lawrence on the north, the land slopes upward toward the wilderness, whose marked peculiarity is the multitude of its lakes, of greater or less degree, and the vein-like ramification of its crystal brooks and rivers. The surfaces of the principal lakes through this upland are generally elevated from fifteen to sixteen hundred feet above the sea, whence some writers have been erroneously led to term the whole region a plateau, or tableland; viewed from some lofty peak, it is seen as a silent expanse of mountains, shrouded in unbroken woods, vast and quiet, and stretching to the apparent limits of the sky."

The report states that a few settlements only had as

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yet been formed in this wild territory; that during the preceding two hundred years many attempts had been made to recover and cultivate the land, all of which had signally failed, because of the "deplorable ignorance in regard to the climate, soil, and general capability of the region." Many parts of the region are wholly unsuitable for agriculture, and most of the attempts to adapt the section to this pursuit had been disastrous failures; and, while there were several intervales and low places with alluvial soil, as a whole the elevation of the region was too high, the climate too cold, and the season too short for successful agriculture. Aside from the mineral deposits, especially iron, which are of great value, particularly in the eastern part of the Adirondack region, the production of timber and lumber was for many years the chief industry carried on in that region. Under the policy of the state to encourage the disposition of its public lands, nearly all of this large tract had been acquired by purchasers, and its timber was being rapidly cut. It was of little value for any other purpose, and it was the general policy of purchasers of the land to cut the timber, decline to pay taxes, and thus permit the land to revert to the state for the nonpayment of taxes. This wholesale destruction of timber resulted in conditions which often produced extensive fires, which the commissioners say revealed "the slenderness of the soil, which, though sometimes several feet in depth, is often totally consumed, even down among the crevices of the great boulders, which, after the fire, stand out red and burnt, like the uncovered bones of the world." Ages having passed while this peculiar soil—without base, substance, or solidity—was forming, its destruction, resulting in the condition so graphically described by the commissioners, means the "lapse of other ages before the slow growth and death of minor plants upon the naked

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rocks will again afford sufficient soil to enable the second growth of timber to attain the size and value of that destroyed."

The commissioners estimated the area of the region at 1,730,000 acres, or 2,703 square miles, not including Clinton county, and said that the destruction of the forests had resulted in a material diminution of the flow of water from this region. "About 834,480 acres, or 1,303 square miles, are upon the Hudson river side of the mountain divide, which separates the head waters of that river from the streams flowing to the St. Lawrence, which would be the approximate area of the forest park if the project were to be limited to the preservation of the forests covering and protecting the sources of the Hudson." The commissioners presented a statement in relation to public lands, from which it appeared that all state lands in this region had been sold, except the following: In Clinton county, 11,342 acres; Essex, 12,778; Franklin, 181; Hamilton, 10,955; Herkimer, 806; St. Lawrence, 66; Warren, 3,726,—in all 39,854 acres, of which 19,892 acres belonged to the school fund, and 19,962 acres to the general fund.

The commissioners expressed the opinion that the protection of a great portion of the Adirondack forest "from wanton destruction is absolutely and immediately required." "We do not," the commissioners say, "favor the creation of an expensive and exclusive park for mere purposes of recreation, but, condemning such suggestions, recommend the simple preservation of the timber as a measure of political economy." Foremost among the considerations which induced this conclusion, the commissioners place the question of water supply,—"of the maintenance of that quantity of water in the navigable rivers, in the streams that supply the canals and afford

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power to mills and manufactories, which from time immemorial has flowed in undiminished volume in their channels, and which only in these later days begins slowly to fail and disappear." "Science has demonstrated that the forests of a country are potent in the regulation of storms, the formation of clouds, and the descent of rain." The commissioners emphasize the point that, without a steady rainfall and water supply from this region, "our canals would be dry, and a great portion of the grain and other produce of the western part of the state would be unable to find a cheap transportation to the markets of the Hudson river valley." Second, that the "Adirondack forest has a powerful influence upon the general climatology of the state; upon the rainfall, winds, and temperature, moderating storms, and equalizing throughout the year the amount of moisture carried by the atmosphere; controlling, and in a measure subduing, the powerful northerly winds, modifying their coldness, and equalizing the temperature of the whole state." The commissioners further say that "by the ruthless destruction of the forest thoughtless men are depriving the country of a water supply which has belonged to it from time immemorial, and the public interest demands legislative protection. The canal interests of the state are very great, and are already suffering from this wrong." Referring to the value of the timber trade of the state in past years, the commissioners say that at "first sight it may appear that the absorption of all this vast forest (practically the only lumber region now remaining in the state) into a state park would amount to the immediate annihilation of that trade. The idea of such an unproductive and useless park we utterly and entirely repudiate. The park should be eminently a timber preserve and reserve." The comments of the commissioners on this subject are especially significant in view of the

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fact that twenty-five years later, during the administration of Governor Black, the state for the first time began to put into practical operation the policy of forest cultivation suggested by the state park commission in its report of 1873. Continuing their observations the commissioners say that the "carefully protected forests of Europe afford their states large annual incomes; the timber is cut under the direction of officers charged with the care of the forests, who mark the old and mature trees for cutting, and see that as little injury as possible is done to the growing timber. In England, and more especially in Ireland, forest *culture* has received much attention; for as early as the seventeenth century the cultivation of forest trees for industrial purposes was commenced. In Ireland barren hillsides and hitherto desolate regions have by arboriculture become rich with forests, and the native trees are now, in some sections, less abundant than the foreign varieties, the very scenery being changed. In France and Germany there are natural forests which are preserved and properly cared for, affording supplies of valuable timber for house and ship building. Should an Adirondack park be created, careful consideration should be given to the utilization of the forest."

We shall have occasion hereafter to notice that leases of the forest lands were prohibited by the constitutional amendment. On this subject this commission and later commissions and legislative committees took a different view. The report now under consideration states that, "should these wild lands become the property of the state, it is thought that leases of woodland points in lakes, and of islands near certain favorite localities, to citizens desirous of erecting rustic summer villas or hunting lodges, would form a very considerable source of income, and more than repay any expenditures which

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would be necessary." The report seems singularly silent as to the method of acquiring the land for the purpose of establishing the proposed park. The commissioners recommend that "the wild lands now owned and held by the state be retained." According to the report this meant the retention of the paltry 40,000 acres that the state then owned scattered through seven counties, but the commission did not suggest that the state buy other land or take any active measures to acquire it. It did not even suggest that proceedings be taken to obtain title to land which had been abandoned for nonpayment of taxes. We shall soon have occasion to observe that the latter course was adopted by the state with significant results.

I have quoted somewhat freely from this report, but much has necessarily been omitted. So far as I have been able to discover, it was the first formal discussion of the subject of forest preservation in this state. The Yellowstone park was earlier, but forest preservation was not the controlling idea in the initiation or consummation of that project, and, while the report of the commission shows that the territory specified in the New York act was suitable for a park or pleasuring ground "for the benefit and enjoyment of the people," as stated in the Federal statute, forest preservation and restoration were the chief subjects considered by the commission, and the importance of the preservation of the forests because of their influence on the rainfall and the maintenance of an adequate water supply. The creation of the commission in 1872 antedated by ten years the American Forestry Congress which was held in Cincinnati in 1882. Even then no active steps had been taken in New York to carry into effect the recommendations of the commission of 1872, except the measures adopted and pursued by the comptroller, as already noted, to reclaim

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for the state lands from which the timber had been cut, and which had been abandoned for nonpayment of taxes.

Regaining forest lands.—During the first twenty years of active forest preserve discussion it was generally deemed inexpedient for the state to purchase lands to become a part of the preserve, though a small beginning was made by the appropriation of $25,000 for this purpose in 1890, but large tracts were acquired by operation of the tax laws, and the state thus came into tardy possession of lands which had become almost, if not entirely, worthless as essential parts of the intended forest preserve, for the reason that the timber had been cut, the soil often destroyed by fire, and many generations must, therefore, come and go before those once valuable forests could be restored to their original condition.

Dr. Hough's views.—Dr. Hough, who had been a member of the State Park Commission of 1872, presented an important contribution to this subject in a communication to the state senate in April, 1875, relative to the maintenance of the state's timber supply. After reviewing the rapid destruction of timber, and probable early exhaustion of a supply necessary for domestic and commercial purposes, he recommended a commission to inquire as to the existing resources of timber and wood, and to prepare a concise statement of the methods of forest management in Europe; but, on this subject, Dr. Hough said that "it is not supposed that either our state or the general government can plan and manage forests at their own expense as they do in Europe, where large domains are owned by the public, and strongly centralized power can direct and control in matters of detail far beyond what should be advised or attempted with us." Dr. Hough referred to the policy established in some states where "encouragement is given to the planting of

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trees by exemption of the land so planted from taxation for a limited time." This suggestion was afterwards frequently repeated in discussions and proposed legislation concerning the culture and preservation of timber; and we shall find that the policy of encouraging private timber culture in connection with exemption from taxation was urged as a proper subject to be included in the constitutional amendment of 1894. Dr. Hough's communication did not relate specifically to a proposed forest preserve, but considered more directly the subject of "tree planting and forest economies generally." Dr. Hough's thorough study of the subject, both in this state and as chief of the Bureau of Forestry in the United States Department of Agriculture, to which he was appointed in 1876, entitled his opinions to great weight; and we shall find, as the subject develops, that his suggestions had a decided influence in the formation of our policy relating to forests, as well as in the preparation and enactment of legislation relating to this subject.

Governor Cornell's message of 1882.—During the ten years immediately following the creation of the State Park Commission of 1872, little attention seems to have been given to the subject of preserving the northern forests, and the report and recommendations of the commission did not bear immediate fruit. In 1882 Governor Cornell discussed the subject at some length in his annual message, referring to the inauguration of the state land survey in 1872 and the work done under it, resulting, among other things, in establishing, in connection with the United States surveys, "a continuous line of reference levels with monuments from New York harbor to the Canadian frontier," and also relocating boundary lines of counties included in the Adirondack region. He said the northern wilderness had become "one of the

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most inviting resorts to invalids and tourists. Its high altitudes, pure and bracing atmosphere, perennial streams and mountain lakes in the shade of primeval forests, constitute the desirable features of a retreat designed by nature for the uses of mankind in pursuit of health or pleasure." The situation concerning the ownership of land in this region had evidently changed since the report of the commission of 1872, by which it appeared that the state then had title to less than 40,000 acres; but the state had made large acquisitions by proceedings under the tax laws, and the Governor said that "by far the greater quantity of land within the Adirondack wilderness proper belongs to the state. Individual ownership is now confined to a few hundred thousand acres." He said it had been the "questionable policy" of the state to sell its lands at nominal prices; that in most cases, wherever practicable, the timber had been removed and the land had reverted to the state for nonpayment of taxes. Commenting on this practice, and on the effects of forest fires resulting in the destruction, not only of the timber, but of the soil itself, the Governor said it was a question of "serious import whether the state should any longer part with its title to land in this quarter now held or that may hereafter revert by the nonpayment of taxes." The Governor's suggestion that no more state land be sold was apparently the origin of the policy adopted the next year in a statute which will soon be noticed. The suggestion also made comparatively easy the realization of the recommendation of the commission of 1872 that the Adirondack region be set apart as a "forest preserve and reserve." The Governor suggested, as Dr. Hough had done in 1875, that portions of the Adirondack state land might be leased, "but its uses should be carefully restricted." He said the Adirondack region was the natural watershed of important navigable

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waters, and the diminution of the rainfall must necessarily diminish the sources of the streams which were fed from this region.

Forest lands withdrawn from sale, 1883.—No action was taken by the legislature of 1882, but the subject of forest preservation was clearly making its way. At the next session, 1883, Erastus Brooks, whose acquaintance we have made in previous pages, presented a resolution in the assembly requesting the committee on agriculture to examine and report some "positive legislation for the protection of the forests and trees of the state from destruction." The resolution also included national forest preservation, but that topic is outside the scope of this article. In compliance with the resolution, the committee on agriculture made a report, introducing it with the remark that "the protection of forests as a means of preserving the flow of water in the various streams of a country is doubtless the most interesting and important subject that could come before this or any other legislature," and it had "recently attracted the attention of the most learned and scientific men in this and nearly every European country." The committee said the subject had been too long neglected, and its consideration had not come any too soon; further neglect "would be a most serious crime, for which there could be no possible or reasonable excuse." Immediate action was necessary. The report considers European and American forest conditions, and notes the consideration of the subject by the President in a recent annual message to Congress. The committee say that the "Adirondack region alone embraces some 8,000 square miles, of which 2,703 square miles is a wilderness existing in separate sections throughout several counties, nearly all of which is thickly wooded with a heavy growth of natural forest." The report makes some comparisons showing that "this area

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is equal to six states as large as Rhode Island, and almost twice as large as the entire state of Connecticut, or it would make four states as large as Delaware, and one state larger than that of Massachusetts; and yet of this vast area of territory the state of New York is to-day in actual possession of less than 1,000 square miles." But it was not known how much of this area was still covered by the natural forests. Referring to the practice of re-acquiring land by operation of the tax laws, the committee said there was no doubt that the state would "again come quietly into possession of the entire 8,000 square miles for the same reasons, as soon as the forests are cut down and destroyed." The committee recommended the passage of a bill introduced by George W. Smith of Herkimer county for the appointment of a commission to investigate the whole subject of forest preservation. The need of such an investigation seemed to the committee manifest from the fact, as stated, that "there is no intelligent or definite knowledge in existence anywhere as to the extent, nature, and location of our forests," and that none of the state departments could furnish any definite or approximate information bearing upon the question of the forest lands belonging to the state. The committee further say that "the approximate number of acres now belonging to the state, so far as it is possible under the circumstances to determine the question, is about 1,000,000 acres; but there is no official information whatever as to what extent this vast area is covered with forest." This estimate was apparently too high, as we shall have occasion to note when we consider the report of the Sargent commission, appointed the next year by the comptroller. That commission was evidently more fortunate in obtaining the desired information, for the committee say that "nothing whatever could be obtained from the comptroller's department as to the extent of the forest belonging to the state," and this situation was due

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to the fact that the comptroller was not required to keep a record of forest lands. The committee say that the "grand old forests of this state must not be further destroyed," and their destruction could not be longer excused on account of lack of knowledge, for the study of the subject in this country and in Europe had resulted in procuring a mass of information concerning the importance of forest preservation which could not be ignored; and, if we should permit the further destruction of our forests, future generations will "condemn us for our neglect of what has been taught us by the history of the world." The legislature of 1883 did not pass the commission bill as recommended by the committee on agriculture, but, instead, passed a law (chap. 13) withdrawing from sale land belonging to the state in the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, and Warren. This was the "positive legislation" sought by the Brooks resolution, and was a direct legislative approval of the policy suggested by Governor Cornell in his message of 1882.

Here at last was fruit meet for repentance. A few days after the withdrawal act became a law the senate adopted a resolution reciting, among other things, that the state had become the owner of certain farming lands, and also of lots situated within villages in the counties embraced in the withdrawal act, and providing for the appointment of a committee to ascertain what part of such state lands "are farm lands and village lots and not useful for the purpose of forests," and also to inquire and report "what forest lands situated in said counties and adjacent to the forest lands now owned by the state can be acquired by the state, and at what price." I think this was the earliest suggestion that the state purchase lands for the purpose of forest preservation, instead of acquiring them under the tax laws.

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Public discussion.—The establishment of the Yellowstone National park in 1872, the creation of the New York State Park Commission the same year, and its report to the legislature of 1873, the frequent references to the subject of forest preservation in the reports of the Secretary of the Interior, the communication by Dr. Hough to the state senate in 1875, the consideration of the subject by Governor Cornell in his message of 1882, and by the President the same year, the American Forestry Congress held at Cincinnati in 1882, the report of the committee on agriculture in the legislature of 1883, the commission bill introduced in the assembly by George W. Smith and his speech in support of it, and the continued and increasing interest manifested in the subject by scientific bodies in this country and in Europe,—all combined to extend and intensify its consideration, and were, doubtless, among the moving causes of the agitation in the press and elsewhere in the autumn of 1883 immediately following the legislative withdrawal of the Adirondack lands from public sale, and which was probably instrumental in initiating another investigation of the subject in 1884. The New York Chamber of Commerce took formal action on the subject of forest preservation on the 6th of December, 1883, by the appointment of a committee of seven "with power to invite the co-operation of other associations and individuals throughout the state to secure the necessary legislation." On the 14th of January, 1884, Dr. Hough delivered an interesting address before this committee, reviewing the subject of tree culture from a national, as well as an international, point of view, giving valuable statistics concerning forest lands, and recommending the "care of the public woodlands, their protection and working upon the most approved plans, with the view of bringing up the production to the highest point they will admit of," and

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encouraging the cultivation and preservation of trees by private owners.

Governor Cleveland's message, 1884.—The discussion in the newspapers by the Chamber of Commerce and other similar bodies led to the inauguration of a new movement, or a revival of the former movement, for forest preservation. Governor Cleveland directed the attention of the legislature to the subject in his annual message of 1884, observing at the outset that "the Hudson, Mohawk, and Black rivers are to a very large extent fed by streams and lakes in the southern slopes of the Adirondack wilderness, and the Black river may well be regarded as the principal feeder of the Erie canal." The Governor said this statement made it "distinctly apparent" that the sources of water supply must be protected against serious diminution, and the fact needed no demonstration that this could only be done by preserving the forests. The importance of this subject from the point of view of the canals was clearly expressed by the Governor in the statement that "the immense volume of commerce which passes through the Erie canal and the Hudson river to the seaboard, and the low stage of water during the summer in the last-named water way, as well as the other rivers and streams of the state, have attracted the attention of the public to the necessity of arresting the further destruction of our northern forests." He said the present condition was due to the fact that the forests had not been cared for in the years past, "and because our forest-laden lands have been recklessly disposed of at nominal prices, until, at this late day, we are awakened to the fact that the control which the state should have always maintained over that part of those lands which are important to the preservation of our streams has been to a large extent surrendered." He referred again to the practice of cutting the timber and permitting the land to revert to the

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state for nonpayment of taxes. The extent of the reclamation of tax lands by the comptroller, and the practical bearing of the act of 1883 withdrawing the Adirondack lands from sale, appear from the Governor's statement that prior to the 23d day of November, 1883, the state had remaining of these wilderness lands in the neighborhood of 600,000 acres. On that day the state, because the owners had failed to redeem, acquired title to 177,842 acres more, and the Governor thought this was a "fair day's work on behalf of the state in the direction of acquiring these important lands." The Governor expressed the opinion that the trees already cut constituted only a small part of the real value of the forest as a means of preserving the water supply. The Governor evidently thought the state should not embark on a scheme of purchasing Adirondack lands on any plea "that this is the only means of protecting the interests involved." This would mean the expenditure of millions of dollars, and the Governor thought the purchase of lands should be opposed until it was certain that every other plan for preserving the forests must fail.

Report of the senate committee, 1884.—The senate committee appointed in 1883 presented its report on the 16th of January, 1884. The development of the subject is apparent from the statement by the committee that it regarded a discussion of the question of forest preservation as unnecessary, because the "scientific phase of the subject is now so well understood, the value of forest lands so much more appreciated than heretofore, and so many publications have now become a portion of the literature of the land." The committee considered the whole subject of forests and forest preservation, especially in the Adirondack region, from many points of view and with many details which cannot be noticed here. While collecting the information contained in the report, the com-

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mittee procured the testimony of several witnesses, and also made a personal examination of the region. The committee reached the conclusion that "the state lands are more valuable than has been supposed, and that the interests of the whole people require the protection and preservation of these forests." It expressed the opinion "that the entire mountain district is unfit for agriculture." The committee submitted a description of the proposed tract prepared at its request by the superintendent of the Adirondack survey, showing the boundaries within which public lands should be sold.

Perhaps influenced by Governor Cleveland's protest against acquiring these lands by purchase, the committee say "it is not proposed to take by eminent domain, or purchase, the lands of private citizens within this boundary." The committee recommended the creation of a board of commissioners of state forest lands whose powers and duties should be clearly defined by law. The committee said that in 1873 the state owned less than 40,000 acres of land in the Adirondack region, but that in 1883 the area of state lands had risen to 751,000 acres. "If this rate of increase continue, we shall soon become possessed of sufficient lands for the purposes of the reservation without any expense to the state." But it was suggested that the new commission should carefully consider the question of acquiring other lands for the purposes of the reservation. The report of the committee was also accompanied by a report from Verplanck Colvin, superintendent of the Adirondack survey, giving a detailed description of the proposed forest preserve, and reiterating the arguments already noted in favor of forest preservation.

The comptroller's commission, 1884.—Notwithstanding the urgent recommendations of Governor Cleveland and the senate committee and the general and animated

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discussion of the subject in the press, the legislature took no direct action to carry into effect any of the plans proposed in relation to the forest preserve, but authorized a new investigation of the whole subject by a commission to be appointed by the comptroller. This commission appointed by Comptroller Chapin under the act of 1884 (chap. 551) to investigate and report a system of forest preservation was composed of Professor C. S. Sargent, of Harvard University, D. Willis James, of New York, William A. Poucher, of Oswego, and Edward M. Shepard, of Brooklyn. It gave the subject careful consideration, and presented its report to the legislature of 1885. In the meantime Governor Hill had, in his annual message, briefly presented his views on the subject of forests, especially commending to the legislature the careful consideration of the forthcoming report of the commission appointed by the comptroller. This report presented by the commission to the comptroller was transmitted by him to the legislature on the 23d of January, 1885. Comptroller Chapin, in a communication accompanying the commission's report, says that the forest problem "in its fullness affects the welfare of many sister commonwealths and of the nation at large. It is eminently fitting that in its solution the Empire state should lead the way."

The commission gave the subject very careful and extended consideration, personally visiting the region and examining the forests and making use of the knowledge and experience of trained experts in forestry, and as a result of a thorough investigation the report presents a clear, comprehensive, and elaborate review of the forest situation in this state, especially in relation to the northern wilderness, but also including the forests of Delaware and Ulster counties, which were examined by the commission. The report states that the total acreage of the Adirondack region is about 3,600,000 acres, and that, accord-

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ing to the records in the comptroller's office, the state then claimed title to 781,000 acres of unimproved or forest lands, which in Essex, Hamilton, and Herkimer counties were located in "large continuous bodies;" but usually state holdings were in small and widely scattered tracts scarcely exceeding a few hundred acres. After giving the boundaries of the Adirondack region substantially as stated in the State Park Commission's report in 1873, the commissioners say that the region is "crossed in the southeast by four distinct ranges of hills; of these the principal, the Adirondack range, contains the maximum elevation above the sea of over 5,000 feet, and contains the highest land in the state. . . . The whole plateau has a high elevation above the ocean; the mean average temperature is therefore low, while the whole region, with few exceptions, is destitute of deep or rich soil below the surface covering of decaying vegetable deposit." Referring to the unsuccessful attempts to devote this portion of the state to agriculture, the commissioners say that "a wise economy in the use of the natural resources of a country should recognize the fact that certain regions of the earth's surface are adapted by nature to remain covered with forests, and that any attempt to devote such regions to other purposes can only be followed by failure and disaster. The people of New York have not yet learned this lesson. . . . The dearly bought experience of the past fifty years has shown that, except along its eastern and southern borders, the Adirondack plateau is incapable of supporting an agricultural population, and that its real and only value consists in the forests which cover it." The commissioners reiterate the arguments presented in former reports concerning the value of the Adirondack region as a source of water supply for the principal rivers of the state. The commissioners further say that the evidence before them shows that, in conse-

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quence of the destruction of the forests, "the summer flow of the Adirondack rivers has decreased within the memory of men now living, from 30 to 50 per cent," many of the smaller streams being wholly dry during the summer months. In this connection the commissioners append a statement by the superintendent of the New York Central & Hudson River Railroad Company, that "when the railroad was first built up the Hudson water was taken from the river at low tide at Peekskill for the locomotives. Later, however, the water at this point became so impregnated with salt as to be unfit for use. And now (1885) salt water extends as far up the river as Tivoli (57 miles farther north and 44 miles south of Albany), showing, it is argued, that the volume of fresh water now coming down the Hudson is much less than formerly, and that since 1850 the amount has gradually decreased." In this connection I quote from the report of a committee on forest preservation appointed by the Brooklyn Constitution Club in the spring of 1885, approving a bill relating to forest preservation then pending in the legislature, the statement in relation to the Hudson river, that "the mean flow or volume of water has yearly decreased until now it is 4 feet less than it was forty years ago." While the question of preserving the forests as a source of water supply was deemed of the first importance, the commissioners say that "only second in importance to this is the part they play in making the Adirondack plateau attractive." I have already quoted from the act of Congress constituting the Yellowstone park the provision that it was to be for a "public park or pleasuring ground for the benefit and enjoyment of the people." This purpose in connection with the Adirondack region has already been noted in previous reports and executive messages; and, from the same point of view, the Sargent commission says that "many thousand persons visit every year

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the Adirondack lakes and mountains in pursuit of repose, recreation, and health. The whole region is one of the most accessible, salutary, and enjoyable summer resorts in the United States."

The evident reluctance to acquire additional land by ordinary commercial methods, which was expressed by Governor Cleveland in his message of 1884 and the report of the senate committee presented at the same session, was apparently shared by these commissioners, who say they are not "prepared to recommend the purchase or condemnation of wild lands by the state;" though they say "it will not be denied that the future permanence of these forests cannot be absolutely insured except through state ownership and control;" and further, that it must be conceded that, if the people of this state are convinced that the preservation of the Adirondack forests is essential to their future prosperity, there is but one way by which they can be certain of accomplishing that end; and that absolute control can be insured only by absolute purchase. But, despite all considerations to the contrary, which were conceded to have great weight in determining the problem, the commissioners say that the practical embarrassments in the way of any general state purchase seem to them decisive. "The enormous expenditure that would be required, and the danger of artificially enhancing the value of such lands for the sake of a sale to the state, have convinced the commissioners that the state cannot wisely enter upon any scheme of general purchase." We shall have occasion hereafter to observe that the policy which this commission was unwilling to indorse was specifically adopted by the legislature of 1897 on the recommendation of Governor Black, resulting in large purchases of forest preserve land, and that heavy appropriations were made for that purpose. It is due to the Sargent commission, however, to say that one of its

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chief objections to a purchase of land by the state was the fact that there was then no adequate or satisfactory management or control of the forests, and it seemed to them doubtful that such effective management could then be secured. They say that "state control of forests, in any proper meaning of the term, has never been attempted in the United States." "The state should first demonstrate its ability to protect the forests which it already owns, and develop a wise system of forest management applicable to these lands, before the question of the purchase of other lands of the same character can be seriously considered." On the general subject of administration, the commissioners say that "the management of the public forest must be sheltered from the effects of political change so far as it is practicable to do so, if the state desires to obtain the best results from its ownership. The care and improvement of forest property, in order to be effective, should be based upon some well-considered system, requiring in its development a long series of years, and demanding an administration of thoroughly trained, skilful, and enthusiastic officials." The commissioners thought that forest management should be vested in a nonpolitical commission, to be appointed by the comptroller for long terms, and who should serve without compensation.

The commission made a very important suggestion in relation to taxes, which was afterwards incorporated in the statutes, namely, that the state "bear taxes upon its lands in the Adirondack region;" observing that, while this "was an unusual course for a government to follow in respect to its own lands," the peculiar circumstances made the course obviously just in relation to Adirondack land. State land acquired in this region was to be held for the benefit of the people of the state; in many localities it would constitute a material part of the taxable

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property of a township, and, if withdrawn from taxation, the owners of the remaining real estate in the town would be obliged to bear all the expense of public administration, including the maintenance of highways, local courts, and officers, all to be used in connection with the protection of the public domain; and the state should, therefore, bear a proportion of the expense of the "local administration whose benefits it receives." The commissioners thought the state would, for the most part, continue to acquire forest lands by operation of the tax laws; but, to prevent a rapid increase of acquisition by this means, it was suggested that the law be so modified that timber could not be cut by the owner on these forest lands while taxes remained unpaid. This would have compelled the owners to bear their fair share of public burdens while removing the timber, and then, if they concluded to abandon the land, it should be done only for future taxes. Mr. Poucher dissented from that part of the report which recommended a forest commission. He thought that a "single responsible head should be appointed by the governor" for the purpose of administering the proposed forest laws.

The commission submitted three bills intended to carry its recommendations into effect. One established a forest preserve with a forest commission to be composed of three members appointed by the comptroller for terms of seven years. This bill also contained numerous details concerning forest administration; another bill, amending the Penal Code, was intended to prevent forest fires; and the third bill provided for the taxation of state lands in the forest preserve, and prohibited the private owner of forest lands from cutting or removing therefrom any timber after a tax became due until such tax had been paid.

The forest preserve established, 1885.—The time had

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evidently come for the "positive legislation" sought by Erastus Brooks in 1883, and the subject was now ripe for action. Thirteen years of continued discussion from the creation of the Yellowstone park and the State Park Commission in 1872, the various reports, messages, individual study, newspaper articles, and careful consideration by commercial and other semi-public bodies, had prepared the way for legislation which would be a substantial culmination of the long-considered plan for the preservation of the northern forests. The bills submitted by the Sargent commission were referred to the senate committee on agriculture and the assembly committee on public lands, which held joint hearings, and listened to arguments for and against the proposed measures. By special invitation, Dr. Hough presented what the senate calls a "most elaborate plan or system for the growth and protection of the state forests and woodlands, as well as the growth of forests upon lands of private owners," which the committee thought should be embodied in the reports and proceedings of the legislature. Dr. Hough recommended a forest commission to be composed of a chief and an advisory board of three members appointed by the governor and senate. At least one of the employees of the commission should be a "person educated in a school of forestry in Europe." This commission should have charge of all wild lands, whether in the Adirondack region or elsewhere. Land appropriated for new timber culture should be exempted from taxation for a limited period; and the scheme embraced several other suggestions not especially pertinent here. Dr. Hough presented a bill to carry his plan into effect, and the senate committee recommended the bill to the consideration of the legislature. The senate committee made its report on the 23d of March. Early in April the Brooklyn Constitution Club adopted a careful report on the subject prepared by

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one of its committees, recommending the enactment of pending legislation intended to preserve the Adirondack forest, but with the important amendatory recommendation that the state acquire, by purchase, land in addition to that already acquired by tax sales sufficient to make in the aggregate 2,500,000 acres, all of which should constitute a forest preserve.

The result of all this research, discussion, and deliberation appears in the law of 1885 (chap. 283) creating a forest commission and establishing a forest preserve. The act created a forest commission of three members to be appointed by the governor and senate, to serve without compensation except expenses, and to have general charge of the forest preserve. The forest preserve was defined as "all lands now owned, or which may hereafter be acquired, by the state of New York within the counties of Clinton,—excepting the towns of Altona and Dannemora, —Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster, and Sullivan." For convenience and to avoid repetition, it may be stated here that Oneida and Delaware counties were added by the act of 1890, and the external boundaries of the forest preserve have not since been changed. The act of 1885 provided that "the lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." These provisions were substantially included in the constitutional amendment of 1894. By an amendment to the forest preserve law, passed in 1890 (chap. 8), land owned by the state in cities and villages within the prescribed boundaries of the forest preserve, and lands, not wild lands, acquired by the state on the foreclosure of United States deposit fund mortgages, were not to be deemed a part of the preserve;

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and all such excepted lands might be sold and conveyed as provided by law. It will be observed that the legislature did not adopt the suggestion so frequently made that portions of the preserve be leased with special privileges. The forest commission was not specifically authorized to cut or sell timber. The act adopted in part Dr. Hough's suggestion in relation to instruction in forestry, by providing that "the forest commission shall take such measures as the department of public instruction, the regents of the university, and the forest commission may approve, for awakening an interest in behalf of forestry in the public schools, academies, and colleges of the state, and of imparting some degree of elementary instruction upon this subject therein;" and also for the distribution of tracts and circulars relating to timber culture. The statute contained numerous details relative to administration, the prevention of forest fires, and the duties of officers and employees.

Forest commission recommends leases of state lands.—The forest commission in its first report (1886) recommended that authority be granted it to lease portions of the preserve for specified and limited purposes. An amendment for that purpose was introduced in 1887, but not passed. The suggestion was renewed in a special report by the commission in 1888, and the adoption of the policy was urged in an elaborate argument, setting forth the conditions and reasons which induced the commission to believe that such a practice would be for the best interests of the state; but the legislature declined to authorize leases of forest lands.

Governor Hill's special message, 1890.—The subject of the forest preserve was again brought to the attention of the legislature by Governor Hill in 1890 in a special message, in which he said that the Adirondack region had become a great summer and winter resort and was "rap-

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idly becoming a nation's pleasure ground and sanitarium." The Governor suggested that "the limits within which lands are to be retained by the state for this purpose should be settled and defined, and should include the wilder portion of this region covering the mountains and lakes and around the headwaters of the several rivers that rise in that locality, including the Hudson river, and that all the lands outside of these limits should be subject to sale as other state lands are sold. If practicable, these lands could be exchanged for wild forest lands within the limits prescribed." The governor recommended the leasing of small parcels under suitable restrictions. He said the suggestion had been made to him that "a state park, from 50 to 70 miles square, can be obtained by the state in that region at comparatively trifling expense, and that when obtained, if judiciously and sensibly managed, it will prove of inestimable value and benefit to the whole country." The governor thought that "a broader and more enlightened policy" should be pursued in relation to the Adirondack region; and he suggested the appointment of a new commission to investigate the whole subject and recommend a plan for the creation of a state park in the Adirondacks, for leasing small parcels thereof for summer camps, cottages, and buildings, and for acquiring all the forest lands within the park limits.

The Governor's message was referred in the senate to the finance committee, which presented a special report approving the Governor's suggestions in relation to the establishment of a park and leasing or exchanging forest lands. The committee urged the creation of a park substantially in accordance with the Governor's suggestions, using the arguments already frequently cited in relation to the preservation of the Adirondack forests; but the committee doubted "whether the necessary territory could be procured at a comparatively trifling expense." The

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committee did not, however, concur in the Governor's suggestion for the appointment of a new commission, but thought that any new inquiry which might be deemed desirable in relation to the proposed park should be committed to the existing forest commission, which had already fully demonstrated its qualifications for the performance of such a task. The committee therefore presented a concurrent resolution, which was adopted by both houses, directing the forest commission to make the investigation suggested in the Governor's message, and report not later than the next session of the legislature.

I have already referred to the objections presented by Governor Cleveland, the comptroller's commission of 1884, and legislative committees against the proposed policy of purchasing lands to become a part of the forest preserve, and have noted that an important, if not a controlling, reason given by the Sargent commission of 1884, was the lack of adequate supervision of forests. The creation of a forest commission in 1885, and its efficient administration covering five years, apparently convinced the legislature of 1890 that it would be safe to begin buying land. Accordingly, by chapter 37, the sum of $25,000 was appropriated for the purchase of land in the Adirondack region by the forest commission with the concurrence of the commissioners of the land office, at prices not to exceed $1.50 per acre. Governor Hill, in a memorandum filed on approving the bill, said it was inadequate, but could do no harm, and was at least a "slight step in the right direction."

Forest commission's special report, 1891.—The forest commission submitted a report to the legislature of 1891 in compliance with the foregoing resolution, briefly reviewing former investigations which have already been noticed in this article. Referring to the proposed establishment of a park, the commission says that "it does not

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appear that the name 'park' is any better than that of 'preserve' for accomplishing the objects required; but the name appeals to a popular sentiment, and it seems to be taken for granted that the establishment of a park will be accompanied by fuller and more complete legislation, having in view the preservation of our forests;" and that the discussions in public journals and the testimony taken by the commission "demonstrate beyond question that the establishment of an Adirondack park is urged from all sections of the state with a force which cannot be ignored." Commenting on the scientific investigation of the subject of forest preservation which had been carried so far in this country and in Europe, and the results of which were so well known as not to need repetition, the commission says: "The people now well understand that we must save our forests if we would save our timber, our water, our farms, and our factories, as well as the health of our fast increasing population."

The commission estimated the present area of the Adirondack region at 5,600 square miles, or 3,600,000 acres. "This includes the areas of water (lakes, ponds, and rivers), overflowed lands, clearings, farms, and some villages and settlements. It also includes many outlying and detached parcels of land, which, though they may be wild lands, are not, on account of their location, suitable for inclosure within the limits of a park." The state had already acquired in the aggregate 765,036 acres, including water and flowed lands. After observing that this land was in widely separated parcels, from a quarter of an acre to 70,000 acres, the commission says that "the park could not be erected from such scattered tracts. There must be some scheme adopted by which an area could be consolidated sufficiently large to render the establishment of a park expedient." Referring to the Governor's suggestion to establish a park containing from 50 to 70

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miles square, which would include from 1,600,000 acres to 3,136,000 acres, the commissioners say that the smallest area suggested to them was 1,600 square miles or about 1,000,000 acres, and that the governor's suggestion that the park should include the wildest portions of the region covering the sources of the Adirondack rivers would require 2,250,000 acres, and that a "park of the smallest area before named (1,000,000) would not be sufficient to meet the essentials specified by the committee, particularly the preservation of the Adirondack forest" and the "protection of the vast commercial and manufacturing interests dependent upon them; nor would so small a park be a sufficient factor in the distribution of the rainfall of the Adirondack region, nor in climatic and sanitary effects;" nor would it "be sufficient to include the wilder portions of the Adirondack region covering the mountains and lakes at and around the headwaters of the several rivers that rise in that locality." The commission says that the proposition of Governor Hill and the finance committee, that "all the state lands outside the park limits should be sold, and that state holdings should be confined to the park itself," would mean the "abandonment of the forest preserve and of the whole system of forest preservation as established by the law of 1885," and that, if the park be intended to supplant the preserve, the park should embrace much more than 1,000,000 acres; but the commissioners thought that the proposition to abandon the forest preserve "could only have been made on the supposition that the park shall be practically coextensive with the Adirondack forest area proper, and that the suggested sale of state lands only referred to those outlying and detached parcels of land not belonging properly to the forest, and which from their separated situation were not suitable for park purposes." "The forest commission, however, does not deem it good policy at present

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to abandon the system of forest preservation and protection provided for by the laws of 1885, and in our opinion it should be continued, whatever area may be eventually determined for the park." After setting forth with some detail their reasons for immediate action in establishing an Adirondack park, the commission concluded its report with the recommendation that suitable legislation be enacted at once "for the establishment and management of a park in the Adirondack wilderness;" and that the state should, as fast as practicable, acquire title to all forest lands within the limits of the park; urging that the subject of forest preservation was "no temporary device affecting small interests within narrow limits, but a far-reaching measure, involving the prosperity of the whole state, and having regard to its welfare for all time." The commission said it had been unable to make a satisfactory appraisal of the land to be acquired, and therefore could not make an accurate estimate of the expense, but suggested that it would not exceed $3,500,000. The commission submitted a bill intended to carry its recommendations into effect.

Adirondack Park Association plan.—The consideration of this subject was not limited to public and official bodies; and while, as the commissioners say in their report, "the science of forestry, with all it involves, is to the American a comparatively new theme," it is nevertheless a theme which has for several years attracted wide attention. A valuable and important contribution to the literature of the subject was made in the spring of 1891 by the Adirondack Park Association, composed of representatives from all parts of the state, in a communication to the legislature urging the creation of a "state park and preserve" in the Adirondack region, with a bill embodying its recommendations. The bill contained a description of a proposed park in the forest preserve counties which

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included 2,238,000 acres of private land, which, if purchased unconditionally, would cost the state about $7,000,000, but, if purchased with a reservation permitting the owners to remove all pine, spruce, and hemlock of a specified size at any time within fifteen years, it could probably be bought for $3,000,000. That the subject of forest preservation received much attention at this session of the legislature is manifest, not only from the report of the forest commission and the communication from the Adirondack Park Association already cited, but also from the fact that in the assembly an investigation of the administrative methods pursued by the forest commission was instituted, resulting in a majority and minority report from the committee on public lands. The session ended without positive action, and no legislation was enacted intended to carry into effect the recommendations relative to an Adirondack park.

Adirondack park established, 1892.—The next legislature (1892) passed an act (chap. 707) establishing in the forest preserve counties a park to be known as the Adirondack park, to "be forever reserved, maintained, and cared for as a ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state and a future timber supply." The forest commission was authorized "to contract for the purchase of land situated within the county of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, St. Armand, and Wilmington in the county of Essex; the towns of Harrietstown, Santa Clara, Altamont, Waverly, and Brighton in the county of Franklin; the town of Wilmurt in the county of Herkimer; the towns of Hopkinton, Colton, Clifton, and Fine in the county of St. Lawrence; and the towns of Johns-

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burg, Stony Creek, and Thurman in the county of Warren."

This territory was all included in the forest preserve as defined by the act of 1885, and the new statute therefore in effect created a park within a park, or a park within the preserve. The forest commission was, with certain exceptions, authorized to sell lands in the forest preserve not in its opinion needed for park or preserve purposes. Land for the park might be purchased, reserving to the owner the right to remove, within ten years, soft wood trees of a diameter of 10 inches or more 3 feet from the ground. The forest commission was authorized to lease to campers for five years, on specified conditions, parcels of park land not exceeding 5 acres. The Adirondack Park Association in its proposed bill of 1891 included a provision prohibiting the further construction or extension of railroads in the park without the written consent of the park commission, the forest commission, and the attorney general. The legislature did not adopt this suggestion, but we shall hereafter have occasion to observe that it was included, in substance, in the constitutional amendment of 1894, and also the prohibition against leases of forest preserve land.

Governor Flower's message of 1893.—Governor Flower, in his annual message of 1893, said the preservation of its forests, and thereby the protection of its water courses, had become the established policy of the state; that the movement had been heartily approved by the people, and was of vital importance to the future of the state. Referring to the Adirondack park law of 1892, the Governor said it was estimated that the state then owned about 900,000 acres, "half of which was located in detached pieces around the edge of the forest, and could be sold at a price per acre sufficient to buy a larger number of acres within the limits of the proposed park." He

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thought this method of exchange "would not do for a permanent and exclusive state policy," but that the requisite quantity of land "should be acquired at once by right of eminent domain," which would be more economical than a purchase by driblets; but, if the land were not to be acquired by the state, the Governor thought that forest preservation could be substantially secured by contracts with private owners of land "whereby, in consideration of forest protection furnished by the state and exemption from state taxation, they and their grantees would refrain forever from removing the timber, except under certain conditions imposed by the state;" by which means the Governor thought hundreds of thousands of acres could be practically added to the state preserve at comparatively little expense. This suggestion was adopted and included in the act of 1893. The Governor proposed a reorganization of the forest commission, discontinuing it as a permanent body, and creating a temporary commission to establish a park and acquire land necessary for that purpose within a fixed time; the permanent administration of the park could be committed to a "bureau of forestry" to be established in the department of agriculture.

Revision of 1893.—The legislature of 1893 passed a statute (chap. 332) revising and combining the forest preserve act of 1885 and the Adirondack park act of 1892. The forest preserve was continued. The forest commission was authorized to sell certain timber and permit its removal. Wild forest lands owned by the state in the forest preserve were to be taxed the same as private lands. The forest commission was to be discontinued at the expiration of the terms of the incumbents, and its duties were to be transferred to the commissioner of agriculture. In other respects the new act

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for the most part continued the details of administration as stated in the original statutes.

The foregoing sketch reviews, perhaps with sufficient detail, the history of the initiation and development of the policy of forest preservation in New York, though many interesting features of the discussion have necessarily been omitted. The literature relating to this subject will well repay perusal by any reader who wishes to study the evolution of our state policy in relation to public lands. He will discover many fluctuations of opinion, resulting sometimes from a lack of sufficient knowledge producing a natural timidity in attempting untried policies, sometimes from cupidity manifested by the hurried removal of valuable timber from the Adirondack lands regardless of its effect on the future interests of the state, and sometimes from honest differences concerning the best plan for securing a reversal of the unwise original policy of disposing of the public lands for agricultural purposes where agriculture was impossible. From the beginning of the agitation on this subject it took eleven years (1872 to 1883) to obtain the first positive legislation relating to forest preservation. It took thirteen years to establish a forest preserve, and twenty years to define the Adirondack park. The general result appears in the act of 1893, and this presents to us the geographical and statutory situation concerning this important subject when the constitutional Convention of 1894 began its labors.

The constitutional amendment of 1894.—On the 31st of July Mr. McClure, at the request of the New York Board of Trade and Transportation, introduced the following resolution:

"WHEREAS, The preservation of the forests and watersheds of the state is of the greatest importance to all our

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people and to every interest within the borders of the state; therefore, be it

"*Resolved,* That the president of the Convention appoint a special committee of five members to consider and report what, if any, amendments to the Constitution should be adopted for the preservation of the state forests."

The resolution was adopted, and on the 2d of August President Choate appointed a select committee on the preservation of the state forests, with Mr. McClure as its chairman. August 23 the select committee presented a report, and submitted the following proposed amendment:

"The lands of the state now owned or hereafter acquired, constituting the forest preserve, shall be forever kept as wild forest land. They shall not, nor shall the timber thereon, be sold."

In its report the committee say "that the forest lands now owned and hereafter acquired by the state, and the timber on such lands, should be preserved intact as forest preserve, and should not, under any circumstances, be sold," and that other contiguous land should be purchased or otherwise acquired; but suggests that "any action to that end is more properly within the province of the legislature than of this Convention."

Mr. McClure, in opening the debate on the 7th of September, submitted the proposed section in the following form:

"The lands of the state now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands. They shall not be sold, or exchanged, or be taken by any corporation, public or private; nor shall the timber thereon be sold."

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Mr. McClure said the insertion of the clause "as now fixed by law" was intended to make permanent the description of the forest preserve as stated in the act of 1893, and to deprive the legislature of any power thereafter to limit its extent; and that the statute definition of the forest preserve should be adopted as the constitutional definition. The other amendments to the original section were intended to provide that forest preserve lands could not be sold or exchanged, nor taken by any corporation, public or private; and that no timber thereon should be sold. Mr. McClure had made a thorough study of the subject, and presented the results of his researches in an interesting and convincing argument. He said "the great men of our state, the men of public spirit generally, had forgotten that it was necessary for the life, the health, the safety, and the comfort, not to speak of the luxury, of the people of this state, that our forests should be preserved." He quoted from the forest commission the statement that there were in the northern forests 3,588,803 acres; that of these lands the state then owned 710,450 acres, and also 49,332 acres in the Catskill preserve. He reviewed, in part, the reasons for preserving the forests which had been presented in various reports and executive messages, and a synopsis of which has already been given in this article. He reiterated the assertion that forests were necessary for the health and comfort of the people, and also for the maintenance of the water supply needed in our canals and rivers. He added the suggestion that the city of New York would one day need the water stored in the Adirondacks. Mr. McClure thought that with the large revenues which the state was then deriving from the taxation of collateral inheritances and corporations it could afford to purchase additional land for the forest preserve, and no part of

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the forest preserve should be sold or exchanged for other land.

On Mr. Goodelle's motion, the words "remove or destroy" were added to the prohibition against disposing of timber, and at the suggestion of the select committee the word "leased" was inserted in the prohibition against disposing of the land. Mr. Floyd proposed to amend by providing that "lands without the lines of the Adirondack park as now determined by the forest commission may be exchanged for lands within such lines," and that "fuel may be sold to state lessees or residents within such park." He afterwards offered another amendment, in effect authorizing leases of forest preserve land as then provided by law. Mr. Forbes offered the following additional section:

"The legislature shall, by suitable laws, provide for the permanent preservation and protection of the forests in the state, and may provide for rebates of taxes on agricultural lands where forests are preserved or maintained in connection therewith."

Mr. Durfee also offered a similar amendment. Mr. Forbes proposed to extend forest protection to all parts of the state. The proposition to encourage private forest cultivation by the remission of taxes had been suggested by Dr. Hough as already noted. Mr. Crosby proposed an amendment incorporating the provision contained in the act of 1893, excepting from the forest preserve land owned by the state in cities and villages, "and lands, not wild lands," purchased by the state on the foreclosure of United States deposit fund mortgages. Mr. Crosby thought that, under the section as proposed by the committee, lands described in his amendment could not be sold by the state; but it may be

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said concerning this suggestion that the constitutional amendment proposed to adopt the definition of the forest preserve as stated in the act of 1890, which was then in force by virtue of the revision of 1893; and, since the exception was a part of the definition, lands included in the exception were not subject to the restriction imposed on other lands in the forest preserve.

I have cited statements from reports and other documents showing the diminution of water in the Hudson river resulting from the destruction of the Adirondack forests. Mr. McArthur, in a speech supporting the amendment, referred to the condition of the Hudson, and said that two days before he walked across the river at Fort Edward without wetting his feet. These amendments were all determined in the negative, and the section was adopted in the following form:

"The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private; nor shall the timber thereon be sold, removed, or destroyed."

Mr. McClure and the select committee enjoyed the honor, rare in that or any other convention, of having an important amendment adopted without dissent,—122 delegates voted for the amendment, and no votes are recorded against it.

This amendment, adopted near the close of the Convention, illustrates the tendency, already noted, to include in the Constitution subjects which are primarily of legislative cognizance, and which ordinarily might be left to the discretion of the legislature. With the establishment of the great principles relating to constitutional govern-

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ment already accomplished by early constitutions, the task of modern constitution-makers seems limited to the development of those principles to meet new conditions, or to the addition of subjects which have already been crystallized in statutes, and have thereby become distinct features of state policy. By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference. The amendments relating to prison labor and civil service are examples of this class of constitutional amendments, and also the amendment requiring bi-partisan local election boards; though this provision must be judged from a somewhat different point of view, for it is not, like the others, administrative, but in a sense fundamental, because it relates to the highest exercise of a citizen's political rights, and is also a concession to the doctrine that ours is a government by party.

Governor Morton, in his first annual message (1895), called attention to the subject of forest preservation as a means of protecting the "natural sources of water supply," and, observing that "peculiar significance had been given to this question in the recent constitutional convention, by the fact that the amendment providing for the keeping of the forest reservations forever as wild forest lands was urged by important commercial interests, and was the only amendment that was adopted without dissent," said that "due attention should be given to the necessary legislation to carry the will of the people into effect." The general acceptance of the new policy in relation to forest preservation, which in such a high degree had been consummated by the amendment of 1894, was doubtless expressed by Governor Roosevelt in his message of 1899 in the remark that "the forest reserve will be a monument to the wisdom of its founders."

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The forest preserve amendment was submitted to the people as a part of the revised Constitution, and could not, therefore, receive separate popular attention. What might have been its fate if submitted separately we cannot know; but it seems clear that the abrogation of legislative control of the forest preserve was not wholly satisfactory to the legislature. The forest preserve amendment took effect January 1, 1895. The legislature at the same session sought to restore prior statute provisions relating to leases, and to authorize the exchange of forest preserve lands, and accordingly agreed to the following amendment:

"The land of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. Except as authorized by this section, they shall not be leased, sold, or exchanged, or be taken by any corporation, public or private; nor shall the timber thereon be sold, removed, or destroyed. The legislature may authorize the leasing, for such term as it may by law fix, of a parcel of not more than 5 acres of land in the forest preserve to any one person for camp and cottage purposes. The legislature may also authorize the exchange of lands owned by the state situate within the forest preserve. The legislature may also authorize the sale of lands belonging to the state situate outside the forest preserve; but the money so obtained shall not be used except for the purchase of lands situate within the forest preserve, and which, when so purchased, shall become a part of the forest preserve."

This was a radical departure from the rigid policy proposed by the Convention. The amendment was again agreed to by the new legislature of 1896, and submitted to the people at the November election in that year. The vote on this amendment shows that the people were sat-

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isfied with the forest preserve provision as it came from the Convention; or at least that they were not ready to adopt the policy of leasing and exchanging forest preserve lands; 321,486 votes were cast in favor of the amended amendment, and 710,505 against it,—a majority of 389,019. Thus the people at the first opportunity gave their verdict for absolute forest preservation, and for restoring so far and as rapidly as possible the forest conditions which existed when the state became the owner of the forest lands.

Governor Black recommends the purchase of forest land, 1897.—The determination of the people, as manifested at the election of 1896, to adhere to the forest preserve policy adopted in 1894, evidently required a new departure in relation to the purchase of forest lands. I have already noted the fluctuations of opinion on this subject, and the reasons which actuated commissioners, as well as the executive, in opposing a general purchase of Adirondack lands by the state. Governor Black thought the time had now come to buy land, and thus make a real, instead of only a paper, preserve. Governor Morton, in his annual message of 1896, had approved the policy of purchasing Adirondack lands, saying further that, "unless these lands are acquired within a reasonable time, they can only be obtained at higher cost many years hence. The preservation of this vast wilderness in its present condition means the conservation of the greatest watershed in this state, and one of the most important in this country."

In his annual message of 1897 Governor Black said the preservation of the forests had already been too long neglected, that the state, either through indifference or false economy, had been stripped of its most valuable timber lands, allowed its water supply to be seriously im-

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paired, and the most wonderful sanatorium in the world to be defaced and partially destroyed. He said the state then owned only 841,000 acres in the Adirondack region, less than a quarter of the whole acreage, and owns only about 661,000 acres out of 2,800,000 acres in the proposed Adirondack park. "Of this proposed park more than 880,000 acres are held as private preserves, and more than a million and a quarter acres by lumbermen and others; so that of the proposed total area of 2,800,000 acres more than 2,000,000 acres are owned by private individuals. More than a million and a quarter of the two millions so owned are now subject to fire and axe, and the devastation wrought yearly is appalling and disgraceful. More than 450,000,000 feet of wood and timber are cut, and more than 100,000 acres stripped every year;" and, unless this devastation were stopped, the Governor thought the Adirondack region," in world, respects the most wonderful and valuable in the world will be practically destroyed. . . . Every year the loss to the state grows larger; . . . the land is steadily and rapidly increasing in value; . . . the enlargement of the canals will require more water, and the demand in every direction is increasing while the supply is steadily falling off." Referring to the recent appropriation of $1,000,000 "to preserve the beauties of Niagara Falls," the Governor said that subject was without "significance compared to the Adirondack forests;" and that "every consideration of health, pleasure, economy, and safety urges a speedy" change of policy, including appropriations adequate for immediately acquiring additional forest lands. "Any other course would be false and unwise economy."

Following Governor Black's suggestion, the legislature of 1897 enacted chapter 220, which created a "forest

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preserve board" of three members appointed by the Governor and senate, which board was directed to acquire for the state, by "purchase or otherwise, land, structures, or waters, or such portion thereof in the territory embraced in the Adirondack park," as they might deem advisable for the interests of the state, and, by a process of condemnation, to appropriate for the use of the state any land within the boundary of the park. To avoid the effect of an immediate change of title of property, which would thereafter have prevented the cutting or removal of any timber, the act authorized the owner of land acquired by the board to reserve, under specified conditions, "spruce timber thereon 10 inches or more in diameter at a height of 3 feet above the ground," and to cut and remove the same at any time within fifteen years. The act appropriated $600,000 for the purchase of land, and authorized the comptroller to borrow $400,000 more for the same purpose. The policy of the statute was continued by several subsequent appropriations.

In 1901 Governor Odell in his annual message, after remarking that the preservation of the forests, especially as a protection to the state's water supply, had received proper attention from the legislature and was of the greatest importance, said he thought that two boards, "one charged with the purchase of lands, and the other with their protection," might profitably be consolidated, and save a duplication of duties, and also of expense. Following this suggestion, the legislature of 1901 enacted chapter 94, which discontinued the forest preserve board on the 22d of March of that year, transferred its powers to a new forest commission, and prohibited the purchase of forest lands thereafter without the governor's consent.

Cornell University; experiments in forestry, 1898.— The policy of purchasing Adirondack lands to become a

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part of the forest preserve, inaugurated by Governor Black's message and the statute of 1897, led the Governor, in 1898, to recommend the further enlargement of the forest idea by instituting timber culture under the direct auspices of the state. In his message of 1898, after stating that under the act of 1897 over 250,000 acres of Adirondack lands had been purchased "at an average cost of $3.74 an acre, increasing the ownership of the state from 869,341 acres to nearly 1,120,000," Governor Black said he was "more than ever impressed with the importance of this subject, and of the necessity of the state's acquiring and preserving the great forests." He then advocated a scientific and intelligent cultivation of the forests, observing that "the science of forestry has demonstrated that trees of a certain age and maturity can be cut, not to the detriment, but to the advantage of those remaining. The life of a tree is measured, and, whether it is removed by man or falls by its own weight, its destruction is certain." It may be removed to the owner's profit and to the advantage of the remaining timber; trees are no exception to the rule that "nearly every product springing from the earth can be gathered, and nature will renew the supply. . . . The forests of spruce and pine can be cut over at intervals varying with conditions, and the remaining smaller trees will grow faster because the larger ones are removed. This process not only yields revenue and improves the forests, but it greatly increases the quantity of timber which the forests will produce. In the Adirondacks I understand that the yield of spruce timber to the acre is now about 2,500 feet, while in forests that have been cared for, where the cutting has been judiciously done, the yield is from 30,000 to 40,000 feet to the acre; from twelve to sixteen times as much. This larger yield from the cultivated forests occurs at intervals

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of comparatively a few years in length, while in the Adirondacks, neglected and misused, a single crop seems to have been considered the end." Referring to the ninety-one pulp mills in the state in which many millions were invested, the Governor said the "pulp industry, as well as the lumber trade, should be protected," because they were a decided benefit to all the people, furnishing pulp for paper and lumber for building purposes, and giving employment to thousands of men. "The process of state acquisition should go on, not only because the needs of all the people are greater than the needs of any, but because a wise pursuit of this policy will be followed by pronounced benefits to the state, to the industries I have named, and to those people feeding upon them. In Germany and France, and I understand to some extent in New Hampshire, scientific forestry has long been followed. The results have been productive beyond comprehension of those people who, in this state, have stood by and, without effort or protest, seen their magnificent forests gradually swept away." The Governor said "the present Constitution of the state prohibits cutting timber on state lands. This prohibition will sometime be changed, for its continuance, except under conditions which ought not to exist, would be unwise;" but "the Constitution should not be amended until the people have learned prudence instead of waste, and have equipped themselves with knowledge and experience adequate to the care of this great domain." Continuing the discussion relative to forest cultivation, the Governor said: "The knowledge necessary to the proper treatment of the woods must come largely through experiment. It cannot be had unless the means of acquiring it are provided. I believe the means can be secured best through the purchase by the state of a tract of ground covered with those trees which are to be the subject of experi-

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ment. Such a tract the state could set apart, and gain from it the knowledge which will enable it by and by to deal with the millions of acres it has already and will in the meantime acquire." The Governor predicted that the time would come when the state would "sell timber to the lumberman, spruce to the pulp mills, reap a large revenue for itself, and still retain the woods, open to the public, protecting the sources of water, growing and yielding under intelligent cultivation."

The Governor recommended that the management of the new project be placed in charge of the regents, or of the trustees of Cornell University, "or some similar body not subject to political change. . . . The state should pay such reasonable sum as may be needed to demonstrate the plan. Reports should be made to the governor and the legislature annually of progress and results. The income from the tract so acquired should be paid to the state, and the land itself should become the absolute property of the state and a part of the forest preserve at the expiration of the period named." The Governor believed such a plan "would be soon, if not at once, self-sustaining, for the trees now ready to be cut would produce immediate revenue, and such revenue would be repeated at short intervals. The benefits could be hardly overstated, and in this direction, as in many others, the wisdom of New York, entering upon a comparatively new and untried field, would finally be approved."

Governor Black's suggestion concerning forest cultivation was not new, but it was especially opportune. He was strongly fortified by scientific opinion and practical experience which had been developing through more than a quarter of a century, and he thought the time had come for the consummation of the plans which had so frequently been suggested in various reports and communications relative to the Adirondack forests, and

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which, at least in part, had already been incorporated in the forest statute of 1893.

I have already quoted from the report of the Seymour commission of 1873 the description of forest cultivation in Europe, and the suggestion that the Adirondack forest, if acquired, should be utilized by the state. I have also noticed the opinion expressed by Dr. Hough in his communication to the legislature in 1875, to the effect that it was impracticable to apply in this state the methods of forest cultivation which prevailed in Europe, "where large domains are owned by the public, and strongly centralized power can direct and control in matters of detail far beyond what should be advised or attempted with us." This reason has ceased to be especially pertinent, because the state now owns large forest domains, and it will probably be conceded that our government is sufficiently "centralized" to administer a scheme of forest cultivation. The special senate committee on forest lands, appointed in 1883, following the withdrawal act of that year, said, in a report submitted in 1884, that it had examined a large tract of land at the head of the Oswegatchie river, "whereon it was proposed to try the experiment of timber cutting under the supervision of a state commissioner. The testimony of experts tended to show that this could be made profitable to the state by the sale of mature trees without injuring the forest;" but the committee thought the subject should be left for consideration by future forest commissioners. Mr. Verplanck Colvin, superintendent of the Adirondack survey, in a report accompanying the senate committee's report of 1884, said that if all state lands could be retained from sale a permanent forest reserve would be secured in the Adirondack region, "which, while shielding the watershed from excessive evaporation, will at no

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distant date prove a source of permanent and substantial profit."

The Sargent commission, as already noted, gave the whole subject of forests very thorough consideration, and in its report of 1885 said, concerning forest cultivation, that "the Adirondack region, if the experience of other countries in forest management teaches anything, could be made to maintain and increase, under a wise and comprehensive policy, the annual output of lumber without serious injury to the forests as reservoirs of moisture or as health resorts for the people; and it is clearly in the interest of the owners of forest property, as well as of the people of this state, to encourage the adoption of any system of management which will insure such results. . . . The commissioners believe that under different circumstances the state might acquire the whole Adirondack forest by purchase; and that the price of such a purchase, if the forest could be efficiently managed by the state, would be returned directly and indirectly to the people a hundredfold." Referring to the general advantages of forest preservation, which were discussed at some length, the commissioners said that "the lumber product, however, would, during a long period of years and for the whole region, undoubtedly be much larger under uniform state administration than if cut by individuals without regard to the maintenance of the supply." But they thought it was hardly the function of the state to "become a lumber producer, except so far as lumber production is incidental to the protection of the forests and essential to public safety;" remarking further that the "protection of rivers is the aim and excuse for forest ownership by the state, that the production of lumber should be made secondary to this controlling purpose," and that the work of the forest executive would at the outset require a "careful study of

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business and scientific problems which are new in this country, the opportunity to conduct, without interruption, experiments stretching over several years, and a good knowledge of the varied relations of the forest problem." The senate committee on agriculture submitted at this session (1885) a bill prepared by Dr. Hough, which included a provision that "all income that may hereafter be derived from the state forest lands, from the sale of wood, timber, lumber, bark, or other forest products," shall be applied to the promotion of the interests of forestry in this state; and the forest commission was authorized to sell timber and permit its removal, and was directed to establish experiment stations "for determining questions of scientific and economical forestry." Dr. Hough's bill also provided for instruction in forestry in certain public schools and colleges, and this idea was incorporated in the act of 1885 as already noted.

Governor Hill, in his special message of 1890 relating to forest lands, from which I have already quoted, gave this aspect of the question some attention, and expressed the opinion that the Adirondack forests under the policy suggested by him, "instead of being an expense and burden to the state, are capable of paying all the expenses of their preservation, as well as of yielding a handsome revenue." The subjects included in the Governor's special message were referred to the forest commission which submitted a report in 1891, which has already been cited, and in which, referring to the foregoing statement by the Governor, the commissioners say that if forest lands are profitable to individuals they may also be profitable to the state; that "many of the European governments find their forest lands to be sources of large revenue;" that knowledge of scientific forestry was rapidly increasing; that within a few years "several of our lum-

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bermen have been in Europe to study the subject for themselves, and are practically working now in their own forests on scientific principles. . . . Many of our young men have been, and still are, studying forestry in academies of Germany and France, and their number probably will be rapidly increased as a demand for this knowledge increases;" that "there are already among our people a goodly number of educated practical foresters, well versed in the methods that they have learned in Europe," and that, "whatever may be the expenditure required, the commission feels confideut that, if the park be established and judiciously controlled under the plans herein suggested, the state will eventually not only be reimbursed for its expenditures, but will receive a considerable revenue from its woodlands."

I have already quoted from a communication from the Adirondack Park Association to the legislature of 1891, urging the purchase of Adirondack forest land. The association submitted a bill providing for such a purchase, and also providing for the sale of any "timber, bark, or trees on forest lands," saying that "there can be no question that within a few years the sales of timber from the park will more than meet the expenses of management and interest on its original cost, and furnish a sinking fund necessary to pay off all bonds issued for purchase money."

The revised forest law of 1893 (chap. 332) authorized the forest commission to sell "any spruce and tamarack timber which is not less than 12 inches in diameter at a height of 3 feet above the ground, standing in any part of the forest preserve, and poplar timber of such size as the forest commission may determine;" and in the Adirondack park article the commission was authorized to "sell the standing spruce, tamarack, and poplar timber, the fallen timber, and the timber injured by blight or fire,

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on any of the state forest lands, under such regulations and restrictions as the forest commission may prescribe: Provided, however, that no such standing timber, except poplar, shall be sold which shall measure 12 inches or less in diameter, at least 3 feet from the ground." Thus the state, after twenty years of public discussion, had adopted the policy of timber culture, or at least had manifested an intention to dispose of large timber which had apparently reached its maximum value, and so not only derive an income from forest lands, but make room for the growth of other trees. The legislature had, by this statute, declared its purpose to permit the sale of large timber substantially in accordance with the opinions of forest experts based on considerable European experience; but this policy was interrupted and abrogated by the constitutional amendment of 1894, and thereafter the state could not, without another constitutional amendment, make any direct experiments in forest cultivation. Governor Black's plan contemplated the purchase of forest lands by the state for the purpose of experimental forestry, and with a view of demonstrating the practicability of timber culture in the Adirondack region, not only as an element of forest preservation, but also as a means of producing revenue from the forests which would to some extent, if not wholly, reimburse the state for the expenses of acquisition and management. It was not easy to devise a plan which would put the Governor's scheme into operation. If the state should purchase the land directly, such land would, immediately on the transfer of the title, become subject to the constitutional inhibition against cutting timber, and such land could not be used for purposes of experimental forestry. The regents being state officers, it was deemed doubtful whether they could take title to a tract of land and hold it in suspense as against the state, whose agents they

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would be both as grantees and as managers of the property. It was therefore decided to use Cornell University as a part of the machinery necessary to carry the Governor's plan into effect. Because of the prohibition contained in § 9 of article 8 of the Constitution prohibiting gifts to corporations, it was thought that neither the necessary property, nor money for the purchase of property, could be given directly to Cornell University for the purpose of forest cultivation; but it was deemed proper, under the same section, to use Cornell University as a state agency in conducting experiments in forestry under the exception permitting the use of such institutions for "educational purposes." The legislature of 1898 therefore put Governor Black's suggestion into practical effect by the enactment of chapter 122, authorizing Cornell University to acquire not more than 30,000 acres of land in the Adirondack region, on which it was required to conduct "such experiments in forestry as it may deem most advantageous to the interests of the state and the advancement of the science of forestry; and may plant, raise, cut, and sell timber at such times, of such species and quantities, and in such manner, as it may deem best, with a view to obtaining and imparting knowledge concerning the scientific management and use of forests, their regulation and administration, the production, harvesting, and reproduction of wood crops, and earning a revenue therefrom." The university was also required to establish a college of forestry, which should, through its faculty, take charge of forest cultivation and management under the act. The state was to pay for the land purchased, and the title was to be held by Cornell University for thirty years, at the expiration of which time it was to be conveyed by the university to the state, thereupon to become a part of the forest preserve. Under this act, the state bought

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30,000 acres near Saranac lake for $165,000 and a school of forestry was established in connection therewith.

Governor Roosevelt in his annual message of 1900, after discussing the subject of forest preservation, and especially the prevention of forest fires, said: "We need to have our system of forestry gradually developed and conducted along scientific principles. When this has been done it will be possible to allow marketable lumber to be cut everywhere without damage to the forests," indeed, with positive advantage to them; "but, until lumbering is thus conducted, on strictly scientific principles, no less than upon principles of the strictest honesty towards the state, we cannot afford to suffer it at all in the state forests." "Ultimately the administration of the state lands must be so centralized as to enable us definitely to place responsibility in respect to everything concerning them, and to demand the highest degree of trained intelligence in their use." The Governor doubtless intended these remarks to be applicable only to conditions which might exist after the Constitution had been amended removing the prohibition against cutting timber on forest preserve land, and authorizing the legislature to institute a system of scientific forestry.

Governor Odell, in his message of 1902, after referring to the act of 1901 (chap. 94), which, among other things, vested in the Governor substantial control of the subject of purchasing forest land, said he was convinced that the "ultimate purchase of the entire preserve was of too great a magnitude to be hastily sanctioned." The Governor thought the policy stated in the act of 1893 and continued in the forest law of 1900 (chap. 20, § 223), authorizing contracts for the preservation of forests on private lands in consideration of the exemption of such lands from taxation, should be modified by reducing the minimum of diameter of trees to be cut

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from 12 inches to 10 inches, with the same provision as to exemption from taxation. The Governor furnishes the interesting information that "such land now owned by individuals consists of about 706,514 acres of forest land, 1,080,204 acres of lumbered land, and 107,767 acres of denuded, burned, and waste land." He thought it would cost $5,000,000 to purchase this land, and, if it were purchased under the present Constitution, "the result would be the destruction of the lumber and wood-pulp industries, which are among the most valuable we have. . . . The work in the Adirondacks should be pursued scientifically. Mature timber should be cut, and denuded land so far as possible replanted, and, if the agreement here outlined were entered into with individual owners for restriction of lumbering and the replanting of their lands, a continuous growth and source of supply would result, without fear of condemnation or encroachment." The Governor also thought that by leasing small camp sites revenue and protection would result, "and the Adirondacks would soon be converted into a health resort and a recreation park for all who might desire to enjoy it." Governor Odell recommended a constitutional amendment permitting scientific forestry and leases of state land and the change in the statute relating to contracts with private owners, expressing the opinion that "these suggestions, if adopted, would furnish revenue for the building of roads in the forests and for other items of expenditure made necessary in the care of the preserve, and would bring in almost all of the private lands without cost to the state." The constitutional amendment suggested by the Governor was substantially a repetition of the amendment which was rejected by the people in 1896; but the large additions to the forest preserve under the purchasing act of 1897, and the inauguration of scientific forestry by

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Cornell University under the act of 1898, had materially changed the situation in relation to the preserve.

In 1902 Senator Elon R. Brown introduced a constitutional amendment intended to abrogate the rigid provisions of the existing Constitution in relation to forest lands. The existing section was retained without substantial change, but provisions were added permitting the sale of soft wood trees 10 inches in diameter 3 feet from the ground, establishing a forest preserve fund to be composed of moneys received from sales of timber, and to be used exclusively for the extension of state forests, and authorizing the construction of roads, but prohibiting railroad franchises. This amendment was once passed in the senate by a vote of 26 to 12, and sent to the assembly; but it was subsequently recalled, and, on Senator Brown's motion, was amended by increasing the diameter of trees to be cut from 10 inches to 12 inches, and authorizing the sale and removal of "all dead and fallen timber of any kind," also by limiting the use of the forest preserve fund only to the "purchase of lands in the Adirondack park and to increase the forest growth," and providing that "a violation of this section may be restrained at the suit of the people, or, with the consent of the supreme court, of a citizen of the state;" but the amended amendment was finally rejected in the senate by a vote of 22 to 22. Senator Brown also introduced a new section (7*a*) intended to carry into effect the governor's suggestion relative to leases, by providing for leases of 2-acre lots in the forest preserve for terms not exceeding twenty years; but this was not passed. In the assembly Mr. Gherardi Davis introduced a forest preserve amendment differing quite materially from the Brown amendment. The Davis amendment authorized the cutting of timber "according to a system of scientific forestry" under supervision of the forest

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commission, also leases of forest land substantially according to the Brown amendment, and the construction of roads, prohibited steam railroads in the forest preserve, and required the proceeds of sales or leases to be used exclusively in the care, preservation, or extension of the state forests. This amendment also contained an important provision authorizing the legislature to sell forest lands outside the Adirondack park, and use the proceeds for the purchase of land within the park. The assembly committee on public lands and forestry reported the Davis amendment, omitting all the additional matter except that relating to leases, and also omitting that portion of the original section providing that forest preserve lands shall not be "leased, sold, or exchanged, or be taken by any corporation, public or private; nor shall the timber thereon be sold, removed, or destroyed." The assembly did not pass this amendment.

In 1903 Governor Odell referred to the subject again in his annual message, and said that the purchase of Adirondack land had been discontinued during the last two years, that he had been of the opinion that some definite plan should be adopted in relation to the purchase of additional forest land; and he recommended the creation of a commission "to inquire into and ascertain the ultimate cost and the benefits to be derived by the state." The legislature did not adopt this suggestion, but the senate authorized its committee on forests to investigate the subject and report at the next session.

On the 9th of March, 1905, Governor Higgins sent to the legislature a special message relating to the forest preserve. He expressed the opinion that the policy stated in the amendment of 1894 was "at variance with the previous policy of the state, which was that direct conservation and utilization of the timber crop should go hand in hand;" that it "absolutely prohibits on state lands the

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practice of scientific forestry, which, in other countries, not only improves the forest, but also increases its yield of timber, and makes it a source of revenue to the state;" and that "the economic use of the forest as a source of revenue through proper methods of cutting and reproduction, which should in no wise impair its other functions, has been sacrificed to its use for water protection and pleasure." He said this policy was diametrically opposite to that of the Federal government for the care of the forest preserves, from which timber may be sold either in small or large quantities, under careful regulations, intended to control the removal of mature timber, and thus make room for the growth of younger trees. The Governor was opposed to the adoption of the amendment already quoted, authorizing the removal of burnt timber. He recommended the rigid enforcement of laws against trespasses and trespassers on the forest preserve. He made no direct recommendation concerning forest cultivation, but recommended the adoption of an amendment which would permit the sale of land outside the Adirondack and Catskill parks. He estimated that 75,000 acres could thus be disposed of, the proceeds of which should be used for the purchase of additional forest lands within the limits of the preserve. No amendment relating to the forest preserve was proposed in the legislature of 1905.

The foregoing sketch—brief when compared with the whole quantity of literature on the subject—shows the beginning, development, and present condition of the agitation concerning the restoration of the Adirondack lands to the state, and their retention solely for purposes of forest preservation. Thirty years of discussion have produced important results, and from the 39,854 acres of forest lands which the state owned at the beginning of this period (1872) its forest domain has increased to

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1,436,686 acres, and the mistaken policy of rapidly disposing of public lands inaugurated one hundred and twenty years ago has been reversed, and the state has, at large expense, recovered its original forest lands, and has devoted them to the purposes for which they were evidently designed. Nine governors,—Cornell, Cleveland, Hill, Flower, Morton, Black, Roosevelt, Odell, and Higgins,—besides numerous commissions, legislative committees, private associations, commercial bodies, and public-spirited citizens, have given the subject patient and careful consideration; but it seems clear from recent executive and legislative discussion, and from official reports, that a permanent forest preserve policy for New York has not yet been established nor discovered, and that the people will probably again be called upon in the near future to devise and put into operation, under an appropriate constitutional amendment, a system of forestry, perhaps similar to the European systems which have long prevailed with such signal success, and which, with intelligent administration, will make the forest preserve practically self-sustaining, and at the same time afford adequate protection to the great sources of water supply which are of such inestimable value to the state.

Statistics showing at different times the acquisition and quantity of forest lands have already been given, and a summary of this part of the subject will doubtless be of interest to every citizen. Forest preserve land has been acquired by two general methods; namely, by purchase, which includes acquisitions by compromise of disputed titles, and by tax sales, including also bond resales and other indirect methods. According to information obtained at the office of the forest commission, the forest preserve, on the 1st of January, 1903, consisted of land acquired and distributed as follows: By purchase,—Adirondacks, 594,802 acres, Catskills, 44,895 acres, total by

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purchase, 639,697 acres; by tax sales,—Adirondacks, 740,477 acres, Catskills, 56,512 acres, total by tax sales 796,989 acres; making a total distribution of forest preserve lands as follows: Adirondacks, 1,335,279 acres, and Catskills, 101,407 acres,—in all 1,436,686 acres, or nearly 2,250 square miles. It should be noted that the Cornell tract of 30,000 acres, purchased by the state under the act of 1898 for purposes of experimental forestry, is included in the Adirondack statement, though the state will not become the absolute owner of the land until 1928.

From figures obtained at the comptroller's office, it appears that, prior to January 1, 1903, the state had expended for forest preserve lands in the Adirondacks under Laws 1890, chap. 37,—$23,134.50; Laws 1892, chap. 707,—$10,090.02; Laws 1893, chap. 332,—$665,781.35; and Laws 1897, chap. 220,—$1,629,195.73; for Catskill lands under Laws 1897, chap. 259, Laws, 1898, chap. 521, and Laws 1900, chap. 406,—$91,405.64; making an aggregate of $2,419,607.24 expended in the purchase of 639,697 acres of forest preserve lands. The expense of acquiring land by tax sale has not been given. This amount includes taxes lost by nonpayment, and also expenses incurred by the state in proceedings to acquire title under the tax laws.

Art. VIII. Corporations and Charities.

Several important subjects were added to this article by the Convention of 1894. The original article, as prepared by the Convention of 1846, included in the constitution proposed by that body provisions relating to the organization and powers of private and municipal corporations. Sections 10 and 11, relating to state and local aid to corporations, were added in 1874 on the recommendation of the Commission of 1872. Section

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11 was further amended in 1884; and these two sections are now 9 and 10,—the original § 9 relating to municipal corporations having been transferred to article 12. The last four sections of the present article—11, 12, 13, and 14—are new, embracing provisions relating to the state board of charities, and less fully to the state commission in lunacy and the state commission of prisons.

Banking corporations.—In the chapter on the Convention of 1846 I have considered the conditions which suggested several important constitutional provisions relating to the formation and powers of corporations, and have recounted the discussion which resulted in the original corporation article; and I there called attention to the fact that the work of that Convention on this subject had remained substantially unchanged. Of the eight sections relating primarily to private corporations, only one has since been amended: this, § 7, relating to the liability of stockholders of banking corporations, had manifestly become obsolete, at least in part, by the subsequent inauguration of the national banking system, and it therefore seemed to the Convention of 1894 that it should be amended to conform to new financial conditions.

On the 24th of May Mr. Marshall introduced an amendment stating in the following form a new § 7, which was reported favorably by the committee on banking:

"The stockholders of every corporation and joint-stock association for banking purposes shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association for all its debts and liabilities of every kind."

Mr. Augustus Frank, chairman of the banking committee, opening the discussion on the amendment, said

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it was intended to take out of the original section the provision relating to the issue of bank notes by state banks; that only national banks were then issuing currency; that the provision in the existing Constitution relating to the liability of bank stockholders "might seem to apply only to banks issuing currency;" that the provision had not only become useless, but it was used by insolvent banks to show that the stockholders should not be held individually liable, because it applied only to banks issuing currency. Mr. Marshall said the amendment was intended to state the same liability as that imposed on stockholders in national banks by the national banking act, and was in the same form; and that by the adoption of the amendment "our state banks would be on exactly the same footing of liability, and the depositors in the said banks would have the same degree of security afforded to them, as in the case of a national bank." Mr. Marshall called attention to the provisions of the revised banking law of 1892 declaring stockholders individually responsible, "equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation to the extent of the amount of their stock therein at par value thereof, in addition to the amount invested in such shares;" that it had been asserted as a defense to such liability that the act was unconstitutional as to banks which did not issue currency, for the reason that the legislature could not add to the liability of stockholders imposed by the Constitution. Mr. Marshall thought this situation should not be longer continued, but that the Convention should modify the existing provision by placing stockholders in state and national banks on the same footing. Replying to questions by Mr. McClure and Mr. Cookinham, Mr. Marshall said it was intended to make the stockholders liable twice on their stock; that, in addition to

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the amounts which they were required to pay on their investments, they were again to be liable to creditors for the par value of the stock. Mr. McClure thought the amendment was a discrimination against the stockholders of banks and in favor of stockholders of other corporations, and that one effect of the amendment would be that it would be found, when a bank became insolvent, that its stock was principally held by irresponsible persons. Mr. Hotchkiss said the object of making bank stockholders liable in the Constitution of 1846 was not to protect depositors, but billholders, as was apparent from the provision of § 8, making billholders preferred creditors; and that, by striking from § 7 the provision limiting it only to banks issuing currency, the Constitution would discriminate against state banks and in favor of other banks.

Mr. Frank, reiterating arguments already cited, said that bank stockholders were liable by statute, and one object of the amendment was to place this statutory liability beyond repeal by the legislature. Mr. Bowers objected to the Marshall amendment, saying that the relation between the bank and its depositors was that of debtor and creditor, and that the creditor of a bank was not entitled to any more consideration than a creditor of any other corporation. He said the existing Constitution did not give depositors any special consideration, but was designed to protect billholders who, for obvious reasons, could not personally know the condition of the bank, and were entitled to all possible protection while using bank paper as if it were gold or silver money.

Mr. Moore moved to add the following at the end of the pending section: "And all private banks now in existence, and all individuals doing a banking business and receiving deposits, shall be subject to examination by

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the banking department, and under its supervision." The clause "and receiving deposits" was added at the suggestion of Mr. I. S. Johnson. Mr. Marshall objected to the Moore amendment because a private banker was already liable to the full amount of his fortune, and because inspection of banks was not a proper constitutional subject,—it should be left to the discretion of the legislature. Mr. A. H. Green said the privilege of issuing currency was an important one, and it was proper that in such a case some state officer should see that the affairs of the bank were kept in proper condition; but a private banker enjoyed no special privilege, and his business should not be subjected to state inspection. Mr. Moore said that persons who trusted a private banker could not know the condition of his affairs, and his amendment was intended to afford proper inspection with a view of obtaining information for the benefit of the people. Mr. Moore's amendment was lost. Mr. Marshall's was adopted on third reading by a vote of 88 to 32.

Limiting municipal indebtedness.—Mr. Banks proposed the following amendment in relation to the limitation of city indebtedness: "In ascertaining the debt of any city its proportionate part of the county debt shall be counted." The amendment was reported by the committee on cities, and adopted by the Convention in the following form, and became a part of § 10 of article 8:

"All certificates of indebtedness, or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city (if there shall be any such debt), shall be included in ascertaining the right of the city to become otherwise indebted. Whenever hereafter the boundaries of any city shall become the same as

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those of a county, the power of the county to become indebted shall cease; but the debt of the county at that time existing shall not be included as a part of the city debt."

Charities.—The creation of a state board of charities in 1867 on the recommendation of Governor Fenton has already been noticed in a former chapter, and I have there given an account of the action of the Convention of 1867 concerning charities, including an article prepared by Theodore W. Dwight, and reported by the committee on charities, of which Erastus Brooks was chairman. The state board of charities had just been established, and the majority of the Convention thought the subject of charitable supervision had not developed sufficiently to warrant it in adopting the proposed article; but the twenty-seven years that had elapsed since that time had produced many changes and the material enlargement of this branch of public administration, and the proper regulation and supervision of our great system of charities were deemed a legitimate object of consideration and constitutional recognition by the Convention of 1894.

Mr. Lauterbach, on the 26th of June, introduced an amendment providing for a state board of charities of eleven members, one from each judicial district, with two additional members from New York, and one from Kings. The board was to have "supervision, visitation, and inspection of all charitable, eleemosynary, correctional, and reformatory institutions in the state, however organized, incorporated, or maintained." This amendment was referred to the committee on charities, which gave the subject extended and very careful consideration. Many charitable institutions were visited by the committee during the summer, and several hearings were held in connection with the committee on education, especially in relation to the subject of sectarian appro-

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priations. On the 21st of August the committee on charities reported five new sections which it proposed to add to article 5 of the Constitution, providing for a state board of charities, a state board of lunacy, and a state board of prisons. The provision relating to the state board of charities, afterwards greatly condensed in form, was evidently intended to vest in this board very comprehensive jurisdiction, for the section declared that it "shall supervise, visit, and investigate all reformatories, institutions for the deaf and dumb, the blind, epileptics, imbeciles and idiots, poorhouses, almshouses, orphan and other asylums, institutions, and agencies, whether state, county, municipal, or incorporated or private, that are of a charitable, eleemosynary, or reformatory character, which receive public or other aid that is raised or secured by taxation, or from any license fund, or which are exempted by law from any public burden or tax;" but not including institutions subject to the supervision of the proposed state board of lunacy or state board of prisons. The article also proposed the following provision:

"None of the institutions mentioned in this section, except those already authorized, shall hereafter receive any public aid, unless authorized so to do by said board of charities, and only for the care and support of such persons as may have been sent to such institutions by due process of law, or under such rules as may be established by said board of charities. The said board may revoke for cause the authority of any existing institution or any institution to be hereafter authorized."

The proposed state board of lunacy was given jurisdiction to "visit and investigate all state hospitals for the insane, including insane criminals, and all hospitals, asylums, homes, retreats, either public or private, established for the care or the treatment of the insane." The

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plan also provided for a state board of prisons, "who shall investigate all institutions (except reformatories and hospitals for insane criminals) used for the detention of persons charged with, or convicted of, crime, or detained as witnesses or debtors; and who shall have such other powers as may be conferred by law."

Before this report was actually considered by the Convention it was referred back to the committee on charities, which on the 7th of September reported a new charities article, which, with modifications, appears as §§ 11, 12, 13, 14, and 15 of article 8 of the Constitution. Section 11 was adopted substantially without change, except that the "board of lunacy" was changed to the "commission in lunacy." Sections 12 and 15 were adopted without change. Section 13 as reported was adopted with the following addition: "The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law." Section 14 was reported by the committee in the following form:

"Nothing in this Constitution contained shall prevent the payment of money by the state, or any civil division thereof, to the institutions mentioned in the foregoing sections, and therein made subject to the visitation and inspection of the state board of charities, for the care, support, maintenance, and education, other than the religious instruction, of inmates received and retained therein, pursuant to law and to rules established by said board; such rules shall be subject to the control of the legislature."

This section was the subject of a very animated debate, and was materially modified during its progress through the Convention.

The amendments submitted on the 21st of August were accompanied by a report in which the committee stated

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its reasons for including these subjects in the Constitution. The committee say concerning the state board of charities, that "among the new powers delegated to it will be the important and radical right to check the increase of additional institutions, to revoke the authority of existing agencies or those hereafter to be created, to receive money, to remove inmates from one institution to another, and, except in reformatories, to discharge inmates, and to put a check upon the power of the legislature to appropriate the moneys of the state, or to direct or authorize any civil division of the state to appropriate moneys to any charitable or correctional organization or corporation whatever, without the sanction of the state board of charities."

In the chapter on the Convention of 1867 I have quoted the plan reported by the committee on charities, which included a provision that a charitable institution should not receive state aid without the approval of the state board of charities, and have there referred to the objection urged against it by Martin I. Townsend, that 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. The committee on charities in 1894 evidently modified its view of the proper relative powers of the legislature and the state board of charities, for in the new article submitted on the 7th of September the board was not vested with power to control the legislature in making appropriations for charitable institutions. The report contains many interesting details relative to charities and charitable institutions, but it was based on proposed amendments which were materially altered before the charities committee was prepared to submit the subject to the Convention, and

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invite a discussion in committee of the whole. Consideration of the charities article was begun on the 14th of September, but in the meantime the education article had been considered, modified, and adopted, including a section prohibiting sectarian appropriations. The two articles, especially from the standpoint of appropriations to charitable institutions, were considered as closely related to, if not dependent upon, each other; and the final disposition of the charities article, especially in relation to the character and extent of instruction to be furnished to inmates of charitable institutions, was affected and determined by the adoption of § 4 of the education article.

Mr. Lauterbach, opening the charities debate, quoted the following proposed amendment which hac been introduced by Mr. Holls, by request, on the 22d of May:

"No law shall be passed respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall the state, or any county, city, town, village, or other civil division, use its property or credit, or any money raised by taxation, or otherwise, or authorize either to be used, for the purpose of founding, maintaining, or aiding by appropriation, payment for service, expenses, or in any other manner, any church, religious denomination, or religious society, or any institution, society, or undertaking which is wholly or in part under sectarian or ecclesiastical control."

This amendment was referred to four committees, namely, education, charities, legislative powers, and taxation. The reference to the last two committees was, however, apparently only nominal, but the first two, education and charities, gave the amendment very serious consideration. It required examination from two points of view, first as to its effect on education by limiting appropriations to certain institutions, and prohibiting

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the use of any public funds for sectarian instruction, and second, as to its proposed limitation of appropriations to charitable institutions, including those under sectarian control which were to be deprived of public support. Mr. Lauterbach, commenting on these aspects of the Holls amendment, said: "The phase of the proposed amendment which referred to moneys to be expended for education met with general approval, while those features of the amendment which caused it to be referred to the committee on charities caused serious doubts as to its propriety." Referring to the assertion which had been frequently made that the state was "upholding parochial schools and paying for tuition in denominational schools," Mr. Lauterbach said he thought that investigation by the committees on education and charities convinced them both that no such abuse existed; but, to avoid the possibility of such use of public funds, the committee on education thought the Constitution should contain a clear prohibition against sectarian appropriations, and § 4 of the education article was the result of that movement. Mr. Lauterbach thought that section was too broad if it would have the effect of limiting appropriations for any purpose to all institutions under sectarian control, and, as an instance, he cited the act of 1849, providing for payments by the comptroller to incorporated orphan asylums, except in New York, for the support of orphan children; and said it was understood that, when the object intended by that amendment should have been secured by its adoption, "the charities amendment should be so framed as to secure the certainty of public aid for the secular, but not for the religious, instruction of the inmates of charitable and correctional institutions." Accordingly, the committee on charities had prepared an amendment, "which, while not permitting the payment by the state, or any of its divi-

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sions, for any religious instruction, will secure the making of provision, not by the state itself, but by its counties, towns, and municipalities, for secular education of the inmates of those institutions." Mr. Lauterbach thought the amendment was properly guarded to secure the intended result, including the "certainty that parochial schools shall never receive public encouragement;" and, if the education article were to be adopted, it was absolutely essential to the well-being of the infant wards of the state, gathered in institutions, that the charities provision relating to secular education should also be adopted.

Mr. Lauterbach cited the act of 1875, chap. 173, prohibiting the commitment of a child under sixteen to a poorhouse, and requiring it to be placed in a family, or committed to an orphan asylum or other charitable or reformatory institution, which commitment, so far as practicable, should be to an institution under the control of persons of the same religious faith as the parents of the child; and said that there were some twenty thousand children in orphan asylums who were sent there partly under the policy inaugurated by this statute. In some cases where the institutions were conveniently located these children were sent to the public schools, in others it was more convenient to provide for their instruction in the institution itself; but children in correctional institutions were not usually deemed proper associates for other children in our public schools. Under the education amendment as adopted, no aid could be afforded in the support of children in these institutions. This condition accentuated the importance of an amendment which would permit appropriations for the support and secular education of these children.

Mr. Lauterbach then discussed § 14 relating to state or local aid for the support and education of defectives

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and juvenile delinquents. This section is important as defining the policy of the state concerning appropriations for these objects, and it has been the basis of much legislative and judicial consideration. It therefore deserves special study in connection with the views expressed by Mr. Lauterbach, because the opinion entertained by him, and by the charities committee which he represented, has a significant bearing on the construction and possible meaning and effect of the new provision.

First. "Nothing in this Constitution contained shall 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."

Mr. Lauterbach said the clause "nothing in this Constitution contained" was made as sweeping as possible so that it would not be affected by the new article on education, or the existing §§ 10 and 11 of article 8, relating to state or local appropriations. The general clause was a repetition of the latter part of the original § 10 relating to the same class of unfortunates.

Second. "Or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education of inmates of orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control."

The existing § 11 (now § 10) contained a provision similar in part, as expressed in the clause that "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." Mr. Lauterbach said the new provision was not intended to provide for the support of the institution, but of its inmates, and for

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their secular education, and they could thus be supported and secularly educated by counties, towns, and villages.

Third. "Payments by counties, cities, towns, and villages to charitable, eleemosynary, correctional, and reformatory institutions, wholly or partly under private control, for care, support, and maintenance may be authorized, but shall not be required by the legislature."

Mr. Lauterbach said these payments were not to be made for education at all. "There shall not be any direct payment made directly to the institution. Provision may be made for the education of its inmates secularly, but they shall not be able to receive funds for secular instruction, and then apply them to religious education; but payments may be received for care, support, and maintenance,—may be authorized, but shall not be required." Mr. Lauterbach thought this was an "admirable provision, irrespective of its educational features, or of its effect upon the educational amendment. It is intended to stop a prevailing abuse." The legislature can no longer compel localities to make appropriations for these institutions; they can only be authorized to do so.

Fourth. "No such payment shall be made for any inmate of such institution who is not received and retained therein pursuant to rules established by the state board of charities. Such rules shall be subject to the control of the legislature by general laws."

Mr. Lauterbach said this gave "absolute domination" to the state board of charities, "who shall make such rules and regulations in respect to the payment of money as they may see fit."

During the discussion Mr. Lauterbach, on behalf of the charities committee, proposed the following addition

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to § 13: "The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law;" and said it was "to enable the state charities aid association and the state prison association to continue to perform their functions just as they have done in the past, and not to have this amendment of the Constitution usurp that which they have so admirably done."

Mr. Choate, discussing the propriety of appropriating public funds to private charities, said that, if it were an original question, he would be in favor of prohibiting the application of any public money to any private charity; but the state, by the act of 1875, had deliberately entered "upon a scheme of using the agency of private charities for the purpose of taking care of these wards of the state, the helpless children who had nobody else to care for them;" and nobody questioned "the absolute duty of the state to provide for them in the way of care, maintenance, and of the same education that we give to other children of the state." Mr. Choate said there should be a power in the state that has never been exercised before, to go through those institutions at any time, and refuse aid to any child whose parents were able to support it, or to any child who was being kept in the institution after reaching an age and condition when he ought to be in a family or in a public school. He said this policy did not rest on any religious or sectarian ground; "it goes to the root of the matter," to save a great community from having its children pauperized; and we can venture to say in the Constitution that no dollar of public money shall be paid to any inmate of a private institution, especially to those children, except under such rules and regulations as the state board of charities shall create. With such a constitutional provision that board will lay down rules and regulations,

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doubtless saying "that no child shall be received in any of these institutions as the recipient of public money whose parents are able to take care of it, and that no child shall be kept there at public expense, except as a temporary refuge, and no longer than possible to have suitable provision outside, where it may take its place in society and be an attendant upon the public school." These rules would apply to every part of the state, and the abuses to which he referred would be rooted out. Mr. Choate thought there could not be two opinions about the matter of religious education. "The religion that a child is born in is the best for that child, at any rate until it can attain the years when it can think and act for itself. Let every institution, parent, and sect teach its own child its own tenets, and teach those at its own expense; but reading, writing, and arithmetic must be provided by the public." Replying to a question by Mr. Griswold, Mr. Choate said that, if the provision relating to rules to be made by the state board of charities were properly applied, no child could get into such an institution without their consent, and could not stay there a day longer than they should say he ought to be kept.

Mr. McDonough said the abuses to which Mr. Choate referred were not abuses of the institutions, but abuses of the law, and could be corrected by the law officers of the state. He said our courts had "decided that this is a Christian state, built up by religious people; and now you propose to attack them and condemn them. I, for one, will never vote to condemn religion or religious institutions, for they constitute the keystone of our liberties, our laws, and our country."

Mr. Hawley did not object to the doctrine of a divorce of church and state, but he did not consent, and never would consent, "to the idea that there is to be a divorce between religion and the state." He said it was abun-

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dantly settled by judicial authority "that this government is deeply ingrafted upon religion: that the religion and morality of the Bible are the fundamental law and the higher law of this government." He approved the fundamental idea of the charities article, but opposed the plan of incorporating three new commissions in the Constitution; and, to avoid possible extravagance in connection with their administration, and for their abolition at the discretion of the legislature, he offered amendments requiring the commissioners to serve without pay, and authorizing the legislature to confer on them "any powers not inconsistent with this Constitution which shall be deemed necessary for the effective discharge of their duties," and to abolish them; but the Convention declined to accept these amendments.

Mr. Peck thought that, under a proper administration of the new § 14, a common school system should be applied to the institutions which local subdivisions were authorized to aid; that the teachers and course of study should be subject to the approval of the department of public instruction, with sessions the same as any other common schools. He thought that otherwise there would be an inconsistency between § 1 of the education article, requiring a system of common schools, and this provision of the charities article, which substantially deprived children in institutions of the opportunities intended to be afforded by common schools.

Mr. Woodward thought the state should license teachers for charitable institutions, regulate the course of study to be pursued therein, and exercise full supervision over them so far as education is concerned; thus providing in these institutions the same common school opportunities which were afforded to outside children.

Mr. Root said that children in charitable institutions must be educated there. The Convention, by § 4 of the

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education article, had determined to prohibit "the payment of any money by the state, or any civil division, to any institution of learning or school;" but that provision must not be permitted to close "the gates of knowledge to the blind, the deaf and dumb, and the infants in the asylums." Section 14 was intended to provide for these unfortunates in the institutions to which they had been committed. "We must either set up institutions ourselves, which will take care of the orphans and dependents, or we must prevent our Constitution from precluding the civil divisions of the state from taking care of these unfortunates where they are supporting, maintaining, and educating them. . . . They must be educated. They are to be American citizens. The highest duty we owe them is that of educating them,—above even food, clothing, and shelter." Commenting on the third paragraph relating to payments to institutions, Mr. Root pointed out the distinction between that and the second paragraph, calling attention to the fact that the second paragraph conferred on municipalities the constitutional power to provide for the care, support, maintenance, and secular education of children in charitable institutions, and that by the third paragraph municipalities "may be authorized to provide for the care, support, and maintenance by payments to the institution; but the provision for the secular education is left in accordance with the general school system of the state. . . . Teachers are provided and paid at public expense. . . . The state, answering to the great principle which governs the educational article, provides education for these unfortunates, as it is required to provide education for all the children of the state. Money for care, support, and maintenance may be paid to the institution." Teachers, books, and school apparatus are paid for from the public treasury.

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Mr. Osborn moved to amend the article by continuing reformatories under the supervision of the state board of charities. His amendment was lost by a vote of 41 to 56. The Convention also rejected, by a vote of 29 to 90, the following new section proposed by Mr. Gilbert: "After the first day of January, 1905, no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or religious denomination, or in aid of any sectarian institution;" also, by a vote of 33 to 60, Mr. McKinstry's amendment to strike out all provisions relating to the proposed state board of lunacy; also Mr. I. S. Johnson's amendment to strike out the provision excepting from the jurisdiction of the state board of charities reformatories in which adult males convicted of felony shall be confined; also Mr. McDonough's amendment to add "secular education" to the objects stated in the fourth paragraph, for which payments to institutions might be authorized by municipalities; also Mr. Hawley's proposition to dispense with the state board of charities and the commissions mentioned in the first section, and provide for inspection, by the comptroller, of the institutions described in that section, leaving other provisions of the charities article substantially as reported by the committee.

There was much discussion of the charities article, involving many details and statistics, which, for obvious reasons, cannot be noticed here. The provision relating to the state board of charities received the chief attention of the Convention, and there was little debate on that part of the article relating to the commission in lunacy and the new state prison commission.

Prison commission.—In the report accompanying the original article, in which the powers and duties of the several commissions were defined with more detail than in the section finally adopted, the committee say that "the

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state board of prisons has no counterpart, and is intended to provide supervision and inspection, not only of the state prisons, but of the county jails and penitentiaries. . . . The superintendent of state prisons has, by the existing Constitution, duties that are solely executive, and with them there is no design to interfere; the power intended to be conferred, in respect to state prisons, on the board of prisons is not of an executive character, and is to be exercised over all institutions in which are confined adults who are charged with, or convicted of, crime, including county jails, the deplorable condition of which had been emphasized by the prison association."

Lunacy commission.—The committee, in its report, say that "in 1889 a commission of lunacy, consisting of three persons, succeeded to the single commissioner whose office had been created in 1873. The power of this commission exfends to visiting and supervising all institutions for the insane." During the debate Mr. Lauterbach said that provision had been made "for a state commission in lunacy which shall visit and inspect all institutions, either public or private, used for the care and treatment of the insane, not including institutions for epileptics or idiots." The jurisdiction of the present commission "is coordinate or collateral with the state board of charities, and the same institutions are supervised by both bodies, and a great deal of friction, which has done no good to the community, has resulted." The Constitution was intended to perpetuate only the commission's power of visitation and inspection, "subject entirely to the action of the legislature as to its personnel and its policy." Mr. Hawley thought the commission in lunacy had not yet passed the experimental stage, and that it had "no claim to immortality in the Constitution." Mr. Dean also opposed the plan of perpetuating the lunacy commission in

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the Constitution. Mr. Acker supported the amendment giving specific instances of administration which had resulted in preventing extravagance and correcting abuses in several institutions under the jurisdiction of the commission.

Several delegates were opposed to including three administrative boards or commissions in the Constitution, and, while approving state supervision of the institutions intended to be embraced in the charities article, believed that the legislature should be left free to establish, continue, or modify, in its discretion, such agencies as it deemed best for the purpose of supervising these institutions and administering the laws which might be enacted concerning them; but the general approval of the charities article in its final form as presented by the committee is manifest from the fact that it was adopted by a vote of 114 to 16. Since 1894 the legislature has passed several statutes intended to carry the new constitutional provisions into effect, and these statutes and constitutional provisions have received extended judicial consideration in decisions which are reviewed in notes to the appropriate sections in the fourth volume.

Miscellaneous suggestions.—Mr. Doty proposed to amend § 11 (now, § 10) by adding at the end of the provision, "This section shall not prevent such county, city, town, or village from making such provision for the aid oa support of its poor as may be authorized by law," the words, "but such provision shall be made and applied specifically and exclusively for such purpose and no other," intending to prevent legislation of the kind approved in the *Sheperd's Fold* v. *New York,* 96 N. Y. 137. Mr. Forbes proposed to prohibit special laws making appropriations for charitable institutions, and to require general laws relating to this subject.

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ART. IX. EDUCATION.

The Convention of 1894 found an educational system in two parts, which had culminated in the university law of 1892 and the common school law of 1894, besides numerous independent statutes relating to both departments. The Convention decided to include both branches of the system in the Constitution; and by the new education article the people have solemnly declared in favor of maintaining elementary, secondary, and higher education at public expense within limitations to be prescribed by the legislature. A review of the evolution of our educational system from its early beginnings will show that education in New York has often been obliged to travel a rugged road and surmount many difficulties while coming to its present high estate. Much has been written concerning educational development in this state. Students have examined the subject from different points of view, and their work has resulted in several independent histories, or historical articles, embracing distinct portions of the field; but a comprehensive history of education has not yet been written. The writer of such a history will find abundant materials in public documents and unofficial discussions relating to various aspects of the subject, which apparently have not been considered pertinent in preparing sketches relating to particular topics. It is manifestly impracticable to write such a history here; but, in considering the declaration of principles relating to education, stated in the Constitution of 1894, a review of our educational history should be given, sufficient to show the genesis and evolution of the policies which culminated in the education article of the Constitution. The development of the system has been somewhat irregular, resulting in two departments, with jurisdiction sometimes dependent or related, and sometimes distinct. It will doubtless be most convenient to

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consider the subject by periods, rather than by departments or branches of educational jurisdiction.

EDUCATION IN THE COLONY.

Early colonial history abounds in details relating to education, especially prior to the English conquest in 1664. The Dutch settlers manifested a persistent determination to continue the policy of education which had long prevailed with such beneficent results in the Netherlands, and we are, therefore, not surprised to find that the schoolmaster was deemed one of the most important functionaries in every community; and we can readily understand the solicitude manifested by settlers, as well as by the home government, for the proper instruction of the youth in the branches of knowledge so essential in maintaining the high character and reputation which the Netherlands had attained among the nations of Europe. These settlers came from a country where education was almost universal, and they were unwilling to suffer any deterioration in a policy with which they had long been familiar.

Douglas Campbell, in "The Puritan in Holland, England, and America," vol. 2, p. 340, calls attention to the early development of education in Holland, noting especially the action by the Estates of Friesland in 1582 when a decree was made "that the inhabitants of towns and villages should, within the space of six weeks, provide good and able Reformed schoolmasters, and those who neglected so to do would be compelled to accept instructors appointed for them;" and says that "this seems to have been the beginning of the supervision of education by the state,—a system which soon spread over the whole Republic." Mr. Motley, in his "Rise of the Dutch Republic," vol. 1, p. 75, speaking of a time not long anterior to the settlement of New York, says that the

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standard of culture in the flourishing cities of the Netherlands "was elevated compared with that observed in many parts of Europe;" that "the children of the wealthier classes enjoyed great facilities for education in all the great capitals. The classics, music, and modern languages, particularly the French, were universally cultivated. Nor was the intellectual cultivation confined to the higher orders. On the contrary, it was diffused to a remarkable degree among the hard-working artisans and handicraftsmen of the great cities."

So far as I have been able to discover, the so-called "Freedoms and Exemptions" granted by the Dutch West India Company to settlers in the New Netherlands June 7, 1629, contained the first official declaration relating to education in the colony. By § 27 patroons and colonists were required to provide for a minister and schoolmaster, "that thus the service of God and zeal for religion may not grow cool and be neglected among them."

Adam Roelansten seems to have been the first official schoolmaster in New York. According to Professor T. S. Doolittle, in an article on "School, College, and University," in "Footprints of Four Centuries" (1895), Roelansten came to New Amsterdam in 1633 in company with Everadus Bogardus, and established a school which has since been continued, and is, therefore, the "oldest existing school in America." Professor Doolittle also says it was the first public school in America, for it was supported by a tax of £4.

The Amsterdam Chamber, which, under the general control of the Assembly of XIX., had charge of affairs in New Netherland, and was therefore interested in the development of colonization by the Dutch West India Company, gave the subject of education early consideration, and in the summer of 1638, in a series of articles submitted to the States General relating to affairs in the

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colony, included a proposition that "each householder and inhabitant shall bear such tax and public charge as shall hereafter be considered proper for the maintenance of clergymen, comforters of the sick, schoolmasters, and such like necessary officers; and the director and council there shall be written to touching the form hereof, in order, on receiving further information hereupon, it be rendered the least onerous and vexatious." This evidently required taxation for the support of schools. The article was not approved in this form, but appears, in substance, in the new "Freedoms and Exemptions" of 1640, in the provision requiring the company to "provide and maintain good and suitable preachers, schoolmasters, and comforters of the sick."

Peter Stuyvesant was appointed governor of the colony in July, 1646, and entered upon his duties in May, 1647. In November following, he submitted to the council several propositions relating to public affairs, including one relating to a school, in which, after reciting that for lack of a proper place a school had not been held in three months, "by which the youth is spoiled," it was therefore proposed to provide a place where the youth could be kept "from the street and under a strict subordination." The council recommended this proposition to the consideration of the Nine Men, but they apparently did not act on the Governor's suggestion. Mr. Daniel J. Pratt, assistant secretary of the Regents, in his "Annals of Public Education in New York" (1872), p. 7, says that Jan Stevenson had been teaching in New Amsterdam for at least five years prior to Governor Stuyvesant's accession, and, therefore, that his suggestion probably related only to a public school in connection with the church.

A memorial by the Nine Men to the States General in 1649, relating to colonial affairs, proposed, among other

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measures of relief, a public school with at least two good teachers, "so that the youth, in so wild a country where there are so many dissolute people, may first of all be well instructed and indoctrinated, not only in reading and writing, but also in the knowledge and fear of the Lord." The director and council, through their secretary, replied to the memorial, saying, in substance, that a place for a school had been selected, and was in charge of a teacher; that other teachers kept school in hired houses; "so that the youth are not in want of schools to the extent of the circumstances of the country. 'Tis true there is no Latin school nor academy; if the commonalty require such they can apply for it, and furnish the necessary funds." The States General referred the memorial to a committee, who reported a provisional order for the government of the colony, including a recommendation that "the commonalty shall be obliged to cause the youth to be instructed by good schoolmasters." It seems that some of the directors protested against a portion of the order, and it was not ratified by the States General. In April, 1652, the company authorized the Director General to establish one public school with one teacher, and to appropriate 250 florins annually for this purpose.

The growth of the colony naturally required an increase in the number of schools to accommodate remote localities, and the policy which had begun in New Amsterdam (New York) was extended to meet conditions existing in outlying settlements. It may be interesting to note here, as an incident in the development of a city which has since become so great, that, according to the first survey and census (1656), it contained 120 houses and 1,000 inhabitants. The expense of maintaining schools was sometimes paid in part from the treasury of the Dutch West India Company, sometimes from excise

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moneys, sometimes apparently by general tax; and it also seems that during all this period the teachers derived a part of their income from direct payment by pupils, so that the schools, while public, were not free in the modern sense.

Provision for academic instruction seems to have been made as early as 1658 by the establishment of a Latin school; and an allowance was made for its support from the city treasury in addition to tuition to be paid by the pupils.

In colonial days religious and secular instruction were combined in the same course, and in the same school. The same person often performed the functions of minister and schoolmaster, and the youth were not only taught the rudiments of secular knowledge, but also received instruction in principles so essential to the highest character. The school was connected with the church, and the duty was imposed on public functionaries to see that the principles and polity of the established church were duly maintained. The union of church and state, which was not then deemed objectionable, found expression in the following ordinance, apparently the earliest of its kind, which was adopted by the Director General and council of New Netherland on the 17th of March, 1664:

"Whereas, it is most highly necessary, and most important, that the youth from childhood up be instructed, not only in reading, writing, and arithmetic, but especially and chiefly in the principles and fundamentals of the Reformed religion according to the lesson of that wise King, Solomon,—train up a child in the way he shall go, and when he is old he will not depart from it,—so that in time such men may proceed therefrom as may be fit to serve their fatherland as well in the church as in the state. This then being taken into particular consid-

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eration by the Director General and council of New Netherland, because the number of children is, through the merciful blessing of the Lord, considerably increasing here, they have deemed it necessary, in order that so useful and acceptable a work may be the more effectually promoted, to recommend and command the schoolmasters, as we do hereby, that they shall appear in the church with the children committed to their care and intrusted to them, on Wednesday before the commencement of the sermon, in order, after the conclusion of the Divine service, that each may, in the presence of the reverend ministers and the elders who may be present, examine his scholars as to what they have committed to memory of the Christian commandments and Catechism, and what progress they have made; after which performance the children shall be dismissed for the day, and allowed a decent recreation."

I have selected only a few incidents out of a mass of material relating to this subject, but they show the general policy during the Dutch period, and, if this policy had not been interrupted by the English conquest, we may reasonably believe that education would have made much more rapid advances during the remaining century of colonial history. The Dutch West India Company began the administration of the colony which it was permitted to establish here by invoking the direct aid of the minister and schoolmaster, and, by transferring to the new world the policy which had borne such rich fruit in the Netherlands, it sought to perpetuate in a new field the national life and spirit which had developed to such a high degree the civil and religious institutions of the Dutch republic. Mr. Campbell, in the work from which I have already quoted, points out the effect of Dutch influence on the English Puritans who migrated to Holland for conscience sake in 1608, finally moving to Ley-

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den in 1609, the same year in which Hudson first sailed into New York bay. The Pilgrims remained in Leyden eleven years, departing to New York a short time before the Dutch West India Company received its charter. The early settlements of Massachusetts and New York were nearly contemporaneous, and the ideas and policies of the early settlers relating to education were almost identical. These ideas, so far as the Massachusetts settlers were concerned, were doubtless due to their long association with their Dutch neighbors in Holland.

The transfer of New York from Dutch to English control, which took place in August, 1664, by articles of capitulation which defined the rights of the contending parties, had little immediate effect on the educational policy of the colony. The English apparently did not consider education an essential subject of public administration, and therefore little was done to foster schools at public expense. The Dutch policy was not directly interrupted, but instruction in the English language, as against the Dutch language, was particularly recommended and encouraged, and English teachers were licensed to teach schools in different parts of the colony, but usually without public aid. The colonial government, acting under orders from the Crown, tried to keep control of education as a prerogative of the Church of England. We find, accordingly, that by instructions to Governors Dongan, Sloughter, and Hunter, the Earl of Bellomont, and others, including Governor Tryon, who was in office at the beginning of the Revolution, schoolmasters were not permitted to teach in the colony without a license granted, at first by the Archbishop of Canterbury, and later by the Bishop of London. This policy seems to have been based on the act of 13 and 14 Car. II., chap. 4, in relation to uniform-

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ity of public worship, which contained a provision requiring schoolmasters to receive a license from ecclesiastical authority. It was the common, if not universal, custom to require teachers to devote a considerable portion of their time to religious instruction, including selections from the Scriptures, prayers, and the catechism; and in several instances the contracts with teachers specified in detail the religious services to be conducted in connection with the school.

During the first few years of English jurisdiction schoolmasters were also required to receive a civil license from the governor, but long before the close of the colonial period this custom seems to have fallen into disuse. While education was not discouraged, it was left largely to private enterprise, but under public control; and the schools were maintained, either directly or indirectly, by private contributions, which included the direct payment of tuition besides the fund administered by some society organized for this or a similar purpose.

It is a striking commentary on English colonial government in New York that only two statutes were passed directly relating to education, and these were not of a general character, and did not show any intention to establish a public school system. The first of these statutes, passed November 27, 1702, recited that the municipal authorities of New York had represented to the general assembly the importance of establishing in that city a free school "for the education and instruction of youth and male children," and provision was, therefore, made for a grammar school, and for instruction in the languages and other learning usually taught in such schools. The act authorized the appointment of one schoolmaster, who was to be "able, skilful, and orthodox," and directed that an annual tax of £50 be raised to maintain the school. The act was to continue in

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force seven years. The school projected by the act does not seem to have been opened until 1704, and the available records do not show how long it was continued, nor the degree of success which it attained. The act was not renewed. The next development of this subject appears in a statute passed October 14, 1732, authorizing Alexander Malcolm to conduct a school in New York for instruction in Latin, Greek, and mathematics. This school was limited to twenty youths apportioned among the several counties, and who were to be selected by prescribed public authorities. The school was free, and the expense was to be paid from moneys received for licenses to hawkers and peddlers. The act was limited to five years, and on its expiration in 1737 it was continued for another year, but was not again renewed. This seems to have been the last attempt to establish public schools during the colonial period.

But while the colony did not rise to its opportunity, and establish a public school system, education was indirectly encouraged, and in many parts was in a flourishing condition. This was due, however, almost entirely to private benevolence. Mr. Pratt, in his "Annals," points out that during the larger part of the colonial period education was under the direct supervision of the English Society for the Propagation of the Gospel in Foreign Parts. This society carried on an extensive educational work in the colony, established schools, appointed teachers, and often supported them out of its own treasury. It was directly encouraged by the civil authorities, and the result of its labors in promoting general education received the cordial approval of the government. The indifference of the government toward public education seems clear from a remark in a report to the society by Reverend George Keith, who had been sent to

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inspect the colonies, in 1702, in which report, speaking of New York, Mr. Keith says that "this province, though it hath a great number of inhabitants, could never yet obtain a public legally established school." It may be a coincidence worth noting that in November, 1702, when this report was made, the act was passed authorizing a grammar school in New York, and making provision for its support by tax; but this school was an experiment, was limited in its scope, and did not indicate any general policy to establish public schools.

But, while schools were, during the last half of the English colonial period, under the general care and supervision of the Society for the Propagation of the Gospel, the government, both directly and through the instrumentality of the church, kept its hand on the school system. I have already called attention to the fact that in the earlier years schoolmasters were required to receive a license from English ecclesiastical authority before they could be permitted to teach in the colony. This policy was continued, and it was expressly provided in the instructions to Governor Tryon, in 1771, that no schoolmaster coming to the colony from England should be permitted to teach without a license from the Bishop of London, and that other persons must be licensed by the governor. Here was public control, although there were no public schools in the modern sense.

The home government evidently felt some solicitude concerning education in the colony, for we find in the same instructions to Governor Tryon the following provision:

"It is our further will and pleasure that you recommend to the Assembly to enter upon proper Methods for the erecting & maintaining of Schools in Order to the training up of youth to reading & to a necessary knowledge of the principles of religion."

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This admonition was apparently neglected by Governor Tryon, and I do not find in the legislative history of that time any suggestion by him relative to education. It is quite probable that the political uneasiness which soon afterwards culminated in the Revolution, and which demanded the serious attention of the local government, prevented the Governor from trying to formulate a plan of public education. George Clinton was a member of the assembly during Governor Tryon's administration, and would doubtless have co-operated with the Governor in establishing a system of public education. Six years after Governor Tryon's appointment, General Clinton became governor of the new state, 1777, and five years later, 1782, when independence had been practically won, but before peace had been declared, he urged the legislature to adopt a general scheme for the promotion and encouragement of learning. His observations on this subject are quoted below in this article, in the section on "Education Under the First Constitution." The legislator had become the governor, and the honor of establishing a school system, which had been intended for Governor Tryon, was, by a great political revolution, transferred to Governor Clinton.

Kings College.—New York was far behind her neighbors in establishing a system of higher education. Harvard, William and Mary, Yale, Princeton, and the University of Pennsylvania, in the order named, were already established and flourishing institutions when the first college charter was granted in New York. It seems clear that the college project originated as early as 1703, in the proposition to raise, by subscription, money for the establishment of a college on the King's farm, not far from the present Trinity Church; but the plan apparently received little encouragement, and it was not until 1746 that definite action was taken with a view of

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establishing a college. In the section on lotteries, in a former part of this volume, I have cited the act of 1746, authorizing a lottery for the purpose of raising funds to establish a college. This was the beginning of legislation which terminated in the college charter granted by the council October 31, 1754, and under which the college was organized on the 7th of May, 1755. Its educational operations were practically suspended by the Revolution, when it was turned into a military hospital. Its reorganization under the name of Columbia College will be noticed in the next section. The story of Kings College during an interesting period covering practically twenty-one years may be found in several local histories, in Franklin B. Hough's "History of the University of New York," and in several publications relating to Columbia College.

EDUCATION UNDER THE FIRST CONSTITUTION, 1777–1821.

Education probably lost a place in the first Constitution in consequence of the hasty action of the Convention on that Sunday evening in April, 1777, when the delegates in attendance at Kingston—less than one third of the whole number—decided not to wait for the return of several prominent members who were absent, including the president and vice president, declined to consider additional topics which many thought should be included in the Constitution, and even refused to give the secretaries an opportunity to engross the instrument, but adopted it in its fragmentary form, and ordered it to be promulgated on the following Tuesday. More than nine months had elapsed since the Convention met under a commission from the people to frame a form of government for the new state, but less than six weeks had been given to the actual consideration of the Constitution. That story has been told, perhaps with sufficient

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detail, in former chapters, but it is an interesting incident, in connection with the beginning of our constitutional government, that the subject of education, which is now universally conceded to be of such great importance, failed to receive attention because of the unwilling absence from the Convention, at a critical time, of the far-sighted statesmen whose wisdom and prudence were so largely manifest in shaping our first great charter. John Jay, whose work on the first Constitution has been recounted in a former chapter, was called away from the Convention by the death of his mother three days before the close of its consideration of that instrument, and he was absent on the day of its final adoption. Nine days afterwards (April 29, 1777), in a letter written by him from Fishkill Landing to Gouverneur Morris and Robert R. Livingston, who were still at the Convention, and from which letter I have quoted in the chapter on the first Constitution, he indulged in some criticism on the Convention's action in adopting the Constitution without more deliberation, explained some provisions which had been adopted, and expressed regret that he could not have continued in attendance, saying that he would have been for a clause for "the support and encouragement of literature," as well as some other matters, though perhaps of less consequence.

In view of the influence exerted by Mr. Jay in framing the first Constitution, and especially when we remember that he would probably have received the aid of two able coadjutors, Morris and Livingston,—the three having usually worked in harmony,—we may reasonably believe that, if he had not been called away from the Convention, some provision in relation to education would have appeared in our first Constitution. If it had been incorporated in that instrument it would doubtless have continued in some form in subsequent Constitutions, and

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the state need not have waited one hundred and seventeen years for a constitutional declaration in favor of education.

Mr. Jay did not state the nature of the provision relating to education which he intended to submit to the Convention, and therefore, to quote a phrase frequently used by Mr. Grote in his "History of Greece," "we are not permitted to know" what the Constitution would have declared on this subject if Mr. Jay's ideas had been put into concrete form. Possibly it would have included only a formal declaration in favor of education, thereby asserting a general principle, but without indicating the method of its application. In the chapter on the first Convention I have quoted from the original draft of the Constitution the proposed paragraph in relation to religious toleration, closing with the provision "that, as the prevalence of religion and learning greatly contributes to the happiness and security of the people of every free state, the legislature of this state ought to afford them all proper encouragement." It is believed that Mr. Jay was the author of this provision, and it may therefore be deemed an expression of his original idea concerning a constitutional declaration relating to education; but the paragraph on religious toleration was materially modified during its discussion by the Convention, and in its final form did not contain any reference to education. This omission may explain Mr. Jay's desire, as expressed in his letter to Morris and Livingston, to include in the Constitution a clause providing for the encouragement of literature, and he apparently intended to propose an independent provision. A constitutional declaration on this subject would doubtless have had a potent influence in the inception and formation of an educational system. While the statesmen of our early history were, for the most part, educated men, and appreciated the value of

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education in shaping the character of every well-ordered community, it is a lamentable fact that for many years they neglected the subject of education as an element of public administration. When we reflect upon our present magnificent school system, it is worth while to remember that it has come up through great tribulation, and that it was not firmly established as an essential feature of government until thirty-five years after the organization of the state.

The silence of the first Constitution concerning education left the legislature free to act according to its own discretion without any constitutional limitation or suggestion, and to establish such a system of education as seemed most conducive to the welfare of the state. The Revolutionary War disturbed all elements of public administration, and those parts of the state which were occupied by the enemy were, of course, excluded from actual consideration by the new state government. That sturdy patriot, Governor George Clinton, did not wait for the war to close before giving his attention to the subject of education, but with characteristic promptness and good sense, in a speech before the legislature at a special session called in July, 1782, he earnestly commended to their consideration a project to establish some system of public education. Cornwallis had surrendered in the preceding October, and the patriots believed that the war was practically over, but peace negotiations had scarcely begun, and were not concluded until more than a year after this speech. Besides, it should not be forgotten that the enemy continued in possession of the city of New York more than two years after Cornwallis surrendered, finally evacuating the city November 25, 1783. It is a high tribute to the prudence and patriotism of our great revolutionary Governor that, at a special session of the legislature called at the suggestion of a com-

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mittee of Congress to devise means for a more vigorous prosecution of the war, he should look beyond the pending struggle, and prepare for the coming greatness of a new state by recommending a comprehensive system of popular education. In a speech which had to do chiefly with measures of immediate public necessity, we find these golden words:

"In the present respite from the more severe distresses and calamities of the war, I cannot forbear suggesting to you a work which I conceive ought not to be deferred, as the business of peace, the promotion and encouragement of learning. Besides the general advantages arising to society from liberal science, as restraining those rude passions which lead to vice and disorder, it is the peculiar duty of a government of a free state, where the highest employments are open to citizens of every rank, to endeavor, by the establishment of schools and seminaries, to diffuse that degree of literature which is necessary to the due discharge of public trusts. You must be sensible that the war has occasioned a chasm in education, extremely injurious to the rising generation; and this affords an additional consideration for extending our earliest care to their instruction."

This is the earliest official declaration I have found relating to this subject after the organization of the state government. It suggests a plan of general education, broad enough to include all educational institutions from the common school to the university. It is not surprising that the legislature did not at that time attempt to put the Governor's suggestions into practical form, for, until the power of the government could be extended to all parts of the state, local administration must necessarily be irregular and incomplete. The session of the legislature before which the Governor delivered the

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speech from which I have quoted was continued by adjournment through a part of the year 1783.

The university.—At the regular session of the legislature which convened in the city of New York in January, 1784, Governor Clinton again referred to the subject of education, and the first university law was then enacted. Reiterating in part the views expressed in his speech of July, 1782, the Governor said: "Neglect of the education of youth is among the evils consequent on war; perhaps there is scarce anything more worthy your attention than the revival and encouragement of seminaries of learning; and nothing by which we can more satisfactorily express our gratitude to the Supreme Being for his past favors, since piety and virtue are generally the offspring of an enlightened understanding." This speech was delivered on the 21st of January. A few days later a committee was appointed in each house to consider that part of the Governor's speech relating to education. The subject was worked out chiefly in the senate. In that body a committee was appointed composed of James Duane, who bore such a conspicuous part in the Convention of 1777, Alexander McDougall, and Lewis Morris. On the 19th of February, 1784, Mr. Duane introduced a bill "for establishing a university within this state." This bill is not printed in the senate journal, and I have not been able to find a copy of it; nor have I been able to discover any synopsis of its provisions. We do not know what kind of a university was to be established by it, what were to be its powers and functions, nor how it was to be administered. Whether the university features of the law finally passed were included in the Duane bill we do not know, but the record does state that the original bill was modified in committee of the whole after the presentation of a petition by the governors of Kings College for a revision of its

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charter. That petition was presented on the 30th of March, and recited "that the greater part of the governors of the said college have, since the commencement of the late war, died out or departed from this state, whereby a sufficient number of governors cannot be convened for the carrying on of the business of the said college agreeable to its charter; that many parts of the said charter are inconsistent with that liberality and that civil and religious freedom which our present happy Constitution points out, and that an alteration of that charter in such points, as well as extension of the privileges of the said college so as to render it the mother of an university to be established within this state, would tend to diffuse knowledge and extend literature throughout the state;" wherefore the charter was submitted for revision with the hope that the legislature would confirm to Kings College "such estate as was particularly appropriated for its use."

Now that the enemy had departed from New York, and peace was fully restored, it was but natural that the friends of the college should desire its reorganization; but, whether they were moved to action at this time by the pending bill to establish a university, or whether their sole motive was a revision of the college charter in accordance with the principles of the new Constitution and for the purpose of conserving free institutions, we do not know; but it is worth while to remember, as bearing on the new movement, that Governor Clinton and several other men, then prominent in public affairs, were also governors of the college, and therefore in a situation materially to influence any legislation which might affect it. That they did influence the result is manifest from the report of the senate committee of the whole, April 16th, changing the title of the Duane bill to read as follows: "An Act for Granting Certain Privi-

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leges to the College heretofore Called Kings College, for Altering the Name and Charter thereof, and Erecting an University within This State," and by making corresponding changes in the body of the bill. This bill was passed by the senate, and afterwards, with some amendments, by the assembly, and became a law May 1, 1784. Here at last was the beginning of a sincere effort to bridge the "chasm in education" mentioned by Governor Clinton in his speech of July, 1782, but it did not attempt a system of education on the broad plan suggested in that speech. The Governor urged education for all the people; the result was a scheme by which the state, through a so-called university, assumed control of our only college, and authorized the creation of additional seminaries of learning. The plan did not provide for popular education.

The first university law is accessible to every reader, and need not be quoted here. It vested the property, franchises, and administrative powers of Kings College in the "Regents of the University of the State of New York," who were created a corporation. The governor, lieutenant governor, the president *pro tem.* of the senate, the speaker of the assembly, the mayor of the city of New York, the mayor of the city of Albany, the attorney general, and the secretary of state were made *ex officio* regents, and the act appointed twenty-four additional regents. Each religious denomination in the state was also entitled to a regent, to be chosen by the clergy thereof. The act provided for a chancellor, vice chancellor, secretary, and treasurer of the university. The regents were vested with jurisdiction and control of the several colleges and schools which might compose the university. The regents were authorized to confer degrees and found schools and colleges in any part of the state; but such schools or colleges might also be

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erected "independent of the university." Any religious denomination was authorized to establish a professorship in the university. The name of Kings College was changed to Columbia College.

The regents assumed and exercised the management and control of Columbia College for three years, until the new university law of 1787. The first university law was passed on the 1st day of May, 1784. The regents, as trustees of Columbia College, at once assumed the duties of their office. It is an incident worth noting in this history that De Witt Clinton, then a youth of fifteen, was, on the 17th of May, 1784, admitted to Columbia College as the first student in its new junior class, and began there a long, useful, and brilliant career, which ended only with his death on the 11th of February, 1828, being then Governor of New York.

The first university law was found defective in several matters of detail, and was, accordingly, amended at the next session of the legislature by an act passed on the 26th of November, 1784. The new law, in addition to several other administrative provisions, appointed thirty-three additional regents, two of whom were John Jay and Alexander Hamilton. Mr. Jay, by this appointment, was placed in a situation which enabled him to suggest, and possibly put into concrete form, the ideas relating to education, which, as I have already shown, he intended to present to the Convention of 1777. He was regent six years at this time, and subsequently, 1795–1801, *ex officio* regent while Governor of the state.

It seems clear that the operation of the university law was not satisfactory to the regents, nor to the friends of Columbia College. The details of this situation do not belong here, but have been considered at length in publications relating to the university and the college. The dissatisfaction resulted in a reorganization of the univer-

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sity by the act of 1787, which materially altered its scope and powers. The number of regents was fixed at twenty-one; the governor and lieutenant governor were made *ex officio* regents, and nineteen others were named in the act; thereafter regents were to be chosen by the legislature on joint ballot, and all elective regents were to hold office during the pleasure of the legislature. The university was incorporated under the name of "The Regents of the University of the State of New York." Its general functions in relation to education were stated in the provision which required the regents to "visit and inspect all the colleges, academies, and schools which are or may be established in this state." They might also confer degrees, and incorporate colleges and academies. Freedom of religious opinion was guaranteed by the provision that "no president or professor shall be ineligible for or by reason of any religious tenet or tenets that he may or shall profess; or be compelled by any law or otherwise to take any test oath whatsoever." Columbia College was continued with twenty-four trustees, who were vested with general jurisdiction of its affairs.

The essential features of the act of 1787 have continued without change, and are the basis of the university law of 1892. It seems clear that the university plan was intended to include only colleges and academies or institutions of a similar character, for, while the committee of the regents, in its report to that body in 1787 relative to a revision of the law, suggested the establishment of public schools, the bill submitted by the committee did not include such schools, but was limited to colleges and academies. Nevertheless, I think it must be admitted that the term "schools," in that part of the act relating to the jurisdiction of the regents, indicates an expectation that schools other than colleges and

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academies might be established; and, if such schools had been established, they would, by virtue of the act, have been subject to the supervision of the regents; and therefore public schools subsequently established might, without legislation to the contrary, have been brought into the system contemplated by this act. This subject will be considered further in connection with the establishment of common schools.

Union College was chartered by the regents on the 25th of February, 1795. It was at first aided by grants of land and proceeds of lotteries, and soon became a flourishing institution. It will not be practicable to describe university development in detail during the period embraced in this section, but it may be noted, as incidents in this development, that statutes were passed authorizing the regents to confer medical degrees, establish medical colleges, and incorporate Lancastrian and other similar schools.

Gospel and school lots.—The university has been given precedence in considering the educational problem because it represents the first attempt to organize a school system, though limited in its scope to institutions of higher education. But state legislation relating to schools did not begin with the university law of 1784. I have already noticed the policy of the Dutch West India Company to maintain religion and education at public expense, and have referred to the practice of sending ministers and schoolmasters for service in the colony. The English, who succeeded to the Dutch rulers of the colony in 1664, evidently shared the same view of the duty of the government, and manifested a like purpose to give the established church control of schools by requiring schoolmasters to receive a license from ecclesiastical authority. The colonial records show that in some instances tracts of land in towns were set apart for

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educational purposes; but I do not discover any general policy concerning this subject. We probably get a glimpse of the prevailing opinion relating to public support of schools from the remark in a letter from Dr. Samuel Johnson, first president of Kings College, to Archbishop Secker, dated April 10, 1762, in which he observed that it was a "great pity, when patents are granted, as they often are, for large tracts of land, that no provision is made for religion or schools. I wish, therefore, instructions were given to our governors never to grant patents for townships or villages or large manours, without pledging the patentees to sequester a competent portion for the support of religion and education."

The founders of the state, deeming religion and education essential to the real welfare of society, had no difficulty in adopting the colonial policy which provided for the support of both, and therefore saw no objection to devoting public property to the support of the gospel and schools. Dr. Johnson's suggestion to reserve tracts of public land for these purposes does not seem to have been adopted during the colonial period. Agitation preliminary to, and culminating in, the Revolutionary struggle soon engaged public attention, and several subjects relating to public affairs were for the time pushed aside by the impending conflict. Lieutenant Governor Colden apparently did not believe that a collision between the colony and the home government was imminent; but he doubtless appreciated the effect of the pending agitation in New York and other colonies, for, in a letter to Governor Tryon, August 22, 1774, less than eight months before the battle of Lexington, recommending a royal charter for Kings College, after remarking that "the Dissenters from the Church of England have the sole education, not only in all the sem-

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inaries of learning in the New England colonies, but likewise in New Jersey and other colonies," he urged that "a seminary on the principles of the Church of England be distinguished in America by particular privileges, not only on account of religion, but of good policy, to prevent the growth of Republican principles which already too much prevail in the colonies." Republican principles were growing rapidly, and their growth might have been still further accelerated if general education had been fostered by appropriating public lands for its support, and organizing a general system of public schools.

The legislature of 1781 (whether independently or following Dr. Johnson's suggestion, we do not know) initiated the policy of appropriating public lands for the support of the gospel and of schools. By chapter 32, passed March 20, 1781, provision was made for raising two regiments for frontier service, and, for the purpose of encouraging enlistments, the state offered bounties of public land according to a prescribed scale, reserving in each township 500 acres for the support of the gospel, and 360 acres for the use of a school. The policy of appropriating public lands for these purposes was continued by acts passed in 1782, chap. 22, 1784, chap. 60, 1785, chap. 66, 1786, chap. 67, 1789, chapters 32 and 44, 1790, chapters 38 and 59, 1794, chap. 54, and 1801, chap. 69; but the quantity reserved varied under different statutes. Supervision of these lands was provided for, first in Onondaga county, by the act of 1798, chapter 48, under which moneys derived from such lands by lease or otherwise were to be used for the support of the gospel, or maintaining schools, or both, according to rules adopted by the freeholders and inhabitants at a town meeting; and, by the act of 1808, chapter 218, the provisions of this statute were extended to all towns

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containing such reserved lands. By subsequent statutes the method of supervision was changed, and the lands might be sold and the proceeds invested in securities for the original purposes. The extent of the aid afforded under this policy appears from a statement in the report of the superintendent of common schools in 1839, which shows that 47,620 acres of public land had been reserved as gospel and school lots. The aggregate receipts from these lands have been quite large, and in some localities have often provided a very substantial addition to the funds available for school purposes. Nearly all of this land has been sold, but there are now (1903) a few small lots which are still used for the support of common schools.

This policy is scarcely more than an incident in our educational development. It necessarily could have only a limited effect, for it obviously was not applicable to all parts of the state. In the article on forest preserve I have referred to the early policy of disposing of state lands at low prices for the purpose of encouraging agriculture and settling the unoccupied parts of the state. Those early land laws contain provisions for the reservation of gospel and school lots. They do not evince any general policy concerning public schools, and had no application in those parts of the state where public schools were most needed, namely, where the people then lived; but they indicated a purpose that found expression in several other statutes which will be noticed in the next section.

Common schools.—It has often been remarked that the state began at the top to construct an educational system. What the university might have been under the original Duane bill of 1784 if Kings College had not intervened, we do not know, but it seems clear that by the modification of the bill resulting in the first university

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law the energies of friends of education were diverted from the state as a whole to the care of Columbia College, and this engrossed a large share of their attention for three years. If the university had been erected on a broad foundation without reference to any particular institution, it could easily have been made the guardian of all branches of education, and could have had supervision of all schools. There would then have been no problem of unification. Governor Clinton's suggestion to the legislature in July, 1782, above quoted, is clearly broad enough to embrace a general system of public schools. He evidently contemplated a plan which should place education within the reach of all the people; and his reference to "seminaries of learning," in his speech of 1784, does not manifest a change of purpose, or an intention to limit education to the few. But the friends of Kings College (afterwards Columbia) were strong enough to seize the situation, and shape the educational policy for the immediate benefit of that institution. The new policy was an experiment, and its advocates discovered that it was a mistake. The scheme was too narrow, but fortunately it fell into the hands of men who looked beyond a single college and two or three academies to the larger field, and saw in every settled portion of the state hundreds of youth without adequate educational facilities. The committee of the regents who recommended a change of university organization in 1787 made the first direct reference to public schools as such. This committee included, among others, James Duane, its chairman, John Jay, and Alexander Hamilton. In this report, after considering questions relating to the college and academies, the committee say that "they feel themselves bound in faithfulness to add that the erecting of public schools for teaching reading, writing, and arithmetic is an object of very great importance,

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which ought not to be left to the discretion of private men, but be promoted by public authority. Of so much knowledge no citizen ought to be destitute, and yet it is a reflection, as true as it is painful, that but too many of our youth are brought up in utter ignorance. This is a reproach under which we have long labored, unmoved by the example of our neighbors, who, not leaving the education of their children to chance, have widely diffused throughout their state a public provision for such instruction." This report was presented to the legislature with a bill intended to carry into effect the recommendations of the committee relating to the college and academies, but apparently it did not contain any provision relating to public schools. Possibly the regents missed their opportunity by not including public schools in their bill for the reorganization of the university, but perhaps they did not deem it desirable to unite primary and higher education under one administration.

Reference should be made here to the act of 1791 (chap. 41) providing for a school in the town of Clermont, which I think is the earliest statute establishing a free common school in a settled portion of the state. The people of that town asked the legislature to authorize the use, for school purposes, of the surplus of excise moneys not needed for the support of the poor. The legislature accordingly authorized the use of such surplus for the purchase of a site, the erection of a schoolhouse, and the payment of the expenses of maintaining a school. A commission appointed to carry the act into effect included Robert R. Livingston, then chancellor of the state.

The regents again referred to public schools in their annual report of 1793, in which they say: "On this occasion we cannot help suggesting to the legislature the numerous advantages which we conceive would accrue

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to the citizens in general from the institution of schools in various parts of the state for the purpose of instructing our children in the lower branches of education; such as reading their native language with propriety, and so much of writing and arithmetic as to enable them, when they come forward in active life, to transact with accuracy and despatch the business arising from their daily intercourse with each other." In their report of 1794 the regents again urged the legislature to adopt a system of general education, reiterating in part the view expressed in their report of 1793. The legislature took no positive action on these suggestions, but in a speech at the opening of the session of 1795 Governor Clinton called attention to the importance of establishing public schools, observing that the benefits of the academies were confined chiefly to the children of the opulent, "and that a great proportion of the community is excluded from their immediate advantages." He says: "The establishment of common schools throughout the state is, happily, calculated to remedy this inconvenience, and will therefore re-engage your early and decided consideration." The regents, in their report of 1795, again referred to the subject, saying that they have supervision of two colleges and twelve academies, and that "these, with the establishment of schools for common branches of education, were the legislature pleased to grant it, must soon have the most beneficial effects on the state of society."

The legislature at this session (1795) passed a common school law (chap. 75), which appropriated £20,000 annually for five years "for the purpose of encouraging and maintaining schools in the several cities and towns in this state, in which the children of the inhabitants residing in this state shall be instructed in the English language, or be taught English grammar, arithmetic,

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mathematics, and such other branches of knowledge as are most useful and necessary to complete a good English education." Each city and county was required to raise by tax a sum equal to the amount apportioned to it by the act, and the whole sum thus made available for school purposes was to be apportioned according to a prescribed rule. Provision was made for commissioners in towns to supervise the schools, and also for trustees in different parts of the town, although districts as such were not specified. The town commissioners were required to make an annual statistical report to the county treasurer, who was required to transmit it to the secretary of state, by whom it was to be delivered to the legislature. There was no general supervision of schools, and no uniform plan for licensing teachers. Colleges and academies were expressly excluded from the operation of the act. The statute expired by its own limitation in 1800, and was not renewed. But the legislature of 1801, instead of enacting another common school law, provided for a lottery for the purpose of raising $100,000, one half of which was to be used by the regents for the support of institutions under their supervision, and the other half was to be paid into the state treasury to be used for the support of common schools as the legislature might direct.

In 1802 Governor Clinton earnestly urged the legislature to take some measures to continue the system of common schools, saying that "the failure of one experiment for the attainment of an important object ought not to discourage other attempts." In 1803 and 1804 the governor renewed his recommendation for the establishment of common schools.

Governor Morgan Lewis, who was elected in 1804, continued the executive policy of his predecessors in respect to schools, and at the extraordinary session held

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in November of that year urged the adoption of a liberal common school policy, saying, among other things, that "in a government resting on public opinion, and deriving its chief support from the affections of a people, religion and morality cannot be too sedulously inculcated." He said common schools should be established in every village, and the indigent should be educated at the public expense. On the 4th of February, 1805, Governor Lewis sent a special message to the legislature urging the adoption of a liberal policy concerning education. He recommended that 1,500,000 acres of unappropriated land then owned by the state be devoted to educational purposes. He thought $1,000,000 might be realized from this land, and suggested that it be divided into farms of convenient size, and sold on easy terms. He also recommended that the fund thus to be established be placed under the supervision of the regents, aud that the interest should be used in the support of colleges and common schools, and "perhaps of academies," under the general direction of the legislature: that the state be divided into school districts by the regents, who were also to appoint three trustees in each district, who should erect schoolhouses, employ teachers, use state funds allotted to them, and levy and collect taxes for any additional sums which might be needed for school purposes. The Governor said his opinions on this subject were the result of twenty years of experience as a trustee of Columbia College, and he believed that great credit would redound to the state if the general plan suggested by him could be put into practical operation. The Governor's suggestion was important, especially in view of modern experience, for it advised one comprehensive scheme of educational administration, making the university the head of the system. This was reasonable, and at that time feasible. The regents had taken an active interest in promoting

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public schools, but had not asked for official supervision of them. The Governor's plan was apparently too large for the legislature. No serious consideration seems to have been given to that part of it relating to university supervision, and the school fund suggestion was modified by appropriating only 500,000 acres for this purpose, instead of all unoccupied public land. The suggestion that the regents appoint district trustees was probably unnecessary, and would have proved impracticable in operation, especially as the common school system developed; but that might have been modified by authorizing the election of trustees by the people, leaving them still subject to the supervision of the regents. If this plan could have been adopted in 1812, when the common school law was enacted, and if the whole subject of education had been placed under the jurisdiction of the regents, with a superintendent to be appointed by them, unification would have been complete, for all elements of our educational system would have been under one central authority. There was probably a constitutional objection to this plan so far as the appointment of a superintendent was concerned, for the reason that, under the Constitution as interpreted by the Convention of 1801, his appointment must have been made by the Council of Appointment; but even if so appointed, he might have been made subject to the general control and supervision of the regents, and might have been required to exercise his functions subject to their direction; and, when the Constitution was changed in 1821 by the abolition of the Council of Appointment, the appointment of a superintendent could have been vested directly in the university. The method of choosing a superintendent and local school officers was a mere matter of detail. What was most needed at the outset was a combination of interests and a concentration of super-

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vision. The suggestion made by Governor Lewis covered both these points, and, if it had been adopted in spirit, if not in form, the state might have been spared much unhappy experience in connection with the dual system of educational supervision.

The Governor's message was referred to a joint committee of both houses. The committee thought the Governor's suggestions were of the utmost importance, and deserved the strictest attention by the legislature; but, while approving the objects of the Governor's plan and the motives which inspired it, the bill submitted by the committee included only that part of it relating to a common school fund. This bill was passed on the 2d of April, 1805, and set apart 500,000 acres of unoccupied land for the purpose of establishing a common school fund. This fund, which here had its beginning, has since 1821 been under the direct protection of the Constitution. In a former chapter I have given an account of the movement initiated in 1885 by Comptroller Chapin to abolish this fund and apply it to general state purposes. The creation of this fund was apparently the only direct result of Governor Lewis's plan to establish a general system of education. For several years the legislature seemed unwilling seriously to consider a comprehensive system of public education. Governor Tompkins, in 1810, and again in 1811, urged legislative action in this direction, reiterating the arguments of his predecessors in favor of popular education, and finally, in 1811, the legislature appointed a commission to consider the subject and report at the next session. This commission submitted to the legislature of 1812 an elaborate report, in which they argued at great length the importance of a general diffusion of knowledge among the people. This report is now curious reading,—curious because it seems scarcely comprehensible that so recently

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it should have been necessary to present arguments in favor of educating our youth; and it discloses a singular condition of public affairs, when, in respect to the importance and value of general education, statesmen admitted everything, but did nothing. The commission submitted a bill, which, with modifications, was passed at that session, and became chapter 242. This act placed the common schools on an entirely different foundation from that of the act of 1795, and shows that the subject had been carefully studied during the preceding twelve years, when the state was without any common schools. The act provided for a superintendent of common schools, for distribution of the interest of the common school fund, authorized the election of town commissioners and inspectors of schools, required teachers to be examined and licensed by the inspectors, provided for school districts in towns, and required a local tax for school moneys in addition to the fund distributed by the state.

Gideon Hawley was the first superintendent of common schools. The act of 1812 was modified in 1814 and by other subsequent statutes, and revised in many important particulars by the act of 1819, chapter 161. The legislature of 1821, by chapter 240, abolished the office of superintendent of common schools, and transferred its powers and duties to the office of secretary of state.

At the close of the first constitutional period the common schools had been in existence only nine years. The growth of the common schools during this short time is indicated by the facts stated in the first report of the secretary of state (1822), acting as superintendent of common schools, from which it appears that there were, in 1821, 6,865 school districts, that the number of children taught in 1821 (983 districts not reporting)

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was 332,979, and the superintendent estimated that 375,000 children had received instruction in schools of the state, including seminaries and city schools. The report of the regents shows that at this time there were three general colleges, Columbia, Union, and Hamilton, besides two medical colleges, one in New York and one at Fairfield, and certificates had been granted for a college at Ithaca and another at Geneva. The colleges had, together, 472 students, and the medical colleges 263. The reports from academies under university supervision (eight out of forty-one not reporting) showed an aggregate attendance of 2,447 students.

EDUCATION UNDER THE SECOND CONSTITUTION, 1822–1846.

The Convention of 1821 gave only brief attention to the subject of education. Its consideration seems to have been limited to the common school fund. This was made perpetual, and protected by the Constitution, but its foundation was enlarged in accordance with the recommendation made by Governor Lewis in his special message of February, 1805, from which I have quoted in the preceding section. The committee on miscellaneous provisions reported the following paragraph relating to this fund:

"The proceeds of all the lands belonging to this state, not otherwise appropriated, which shall hereafter be sold or disposed of under the authority of the legislature, together with the fund denominated the common school fund, shall constitute and remain a perpetual fund, the interest of which shall be inviolably appropriated and applied to the support of common schools through this state."

On motion of Rufus King land reserved or appropri-

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ated for public use, or ceded to the United States, was excepted from the provision. The section was opposed by several delegates, but there seemed to be a very decided preponderance of opinion in favor of it. It appeared from a recent report by the comptroller that the state then owned about 970,000 acres which would be subject to the provision of the section. Most of this was in the Adirondack region, and was regarded as of little value, except a portion of it which might be available for iron mines; and other parts were said to be covered with valuable timber. Mr. J. R. Van Rensselaer, who opposed the reservation of this land, preferred a constitutional provision setting apart a fixed sum of money annually to augment the common school fund, and said that, while the section apparently made liberal provision for common schools, the practical result would be small because the land was worth but little; and he thought no man would be willing to take the whole tract as a gift, and be compelled to pay taxes on it for thirty years. The provision was adopted and included in the Constitution of 1821.

In his annual message of 1823, Governor Yates said the provision of the new Constitution relating to school lands needed legislative attention, that most of these lands were unproductive; and he submitted the question "whether the wise and patriotic intentions of the framers of our Constitution will be best promoted by allowing them to remain in their present state, or to direct a sale of the whole or a part, equal to a principal rendering an interest sufficient to make good the annual deficiency in the present school revenues." These school lands have, for the most part, since been included in the forest preserve. In the article on the forest preserve I have set forth the policy of the state in relation to the disposition of public lands and the subsequent reversal of

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that policy, resulting in the establishment of the forest preserve. Had the forest preserve idea taken form sixty years earlier, large tracts of land, almost given away by the state and afterwards recovered at considerable expense, might have been continued as a part of the unbroken Adirondack wilderness, and the schools might have been more economically maintained by direct taxation.

There was considerable legislation relating to schools during the second constitutional period. Much of it relates to administrative detail, but several statutes involve questions of policy which should be considered in the development of our educational system.

Governor De Witt Clinton, in his message of 1825, considered educational questions at some length. He thought the state was capable of supporting a population of fourteen millions, and he urged the augmentation of the common school fund to a sum which would enable the state to keep pace with "the progress of population and the requisitions for instruction." He recommended the instruction of teachers and the distribution of useful books. He thought the number of colleges should be limited, and suggested that the authority of the regents in respect to college charters should be only recommendatory, leaving to the legislature itself the power to create corporations; which policy he believed would be wise, for the reason that endowments, if any, must be granted by the legislature, and it would also be "most conformable to the spirit, if not to the letter, of the Constitution."

In 1826 Governor Clinton renewed his recommendation in relation to instruction of teachers, and urged the establishment of a seminary for the education of teachers in the monitorial system of instruction. He considered "our common schools as the palladium of our freedom,"

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and noted with special gratification a recent arrangement between the corporation of the city of New York and the Free School Society, by which "these establishments are to be converted into public schools, to admit the children of the rich as well as of the poor."

In 1827 Governor Clinton renewed his suggestion in relation to instruction of teachers, and the legislature passed an act, chapter 228, "to promote the education of teachers" and for other purposes, and the regents were authorized to distribute a specified appropriation among academies for the instruction of pupils who had for at least six months in each year pursued prescribed classical studies, or the higher branches of English education, or both. The same act made additional appropriations for common schools. I think this is the earliest statute providing specifically for the instruction of teachers in public schools; and, instead of adopting the suggestion made by Governor Clinton in 1826, that an institution be established expressly for this purpose, which suggestion was put into practical form eighteen years later (1844) by the establishment of the Albany Normal School, the legislature adopted academies as instrumentalities for the instruction of teachers in the common schools. A significant feature of this policy should not be overlooked, namely, that, while academies and common schools were not under the same supervision, the regents were by this act charged with the duty of prescribing a course of study intended to qualify persons to become teachers in common schools; and these studies were to be pursued in institutions under exclusive university supervision. The legislature at the same session, 1827, made provision for aiding the New York Institution for the Instruction of the Deaf and Dumb, and clothed the superintendent of common schools with authority to visit and inspect the institution, and

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supervise the expenditure of the appropriation. The legislature of 1830 provided for an additional number of state pupils for this institution, to be selected by senate districts, and to be under the supervision of the superintendent of common schools. The institution was, by the same act, entitled to share in the distribution of the literature fund in the same manner as academies, and was required to make an annual report to the regents; thus introducing a dual supervision into this institution, making it for some purposes a common school, and for other purposes an academy.

A perusal of the educational history of this period shows that the legislature had frequently been asked to prescribe particular text-books for use in the schools. This policy had been deemed unwise and I think these requests had been uniformly denied. The legislature of 1833, while adhering to the spirit of the policy, deemed itself justified in departing from it to the extent of recommending for use in the public schools Washington Irving's "Life of Columbus," abridged by the author. This legislative action, however, was not taken by statute, but by concurrent resolution, reciting that, "in the opinion of the legislature, the work entitled 'Life of Christopher Columbus, by Washington Irving, abridged by the same,' from the national character of the subject, the fidelity and interest of the narrative, and the purity and elegance of the style, is eminently fit to be used as a class book in the common schools;" and the legislature therefore recommended that the "trustees of the several school districts take the necessary measures to introduce the same into the schools under their charge with as little delay as circumstances may permit;" and the secretary of state, as superintendent of common schools, was directed to transmit a copy of the resolution to the trustees of the several school districts.

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The foregoing act of 1827, which was intended to facilitate the instruction of persons qualified to teach in the common schools, apparently did not produce the desired result. The governors continued to deplore the lack of competent teachers for the common schools; and during this discussion the suggestion was made that a high school be established in each county town, where persons could qualify themselves to become teachers. This suggestion does not seem to have received any legislative attention. In his annual message of 1834, Governor Marcy considered the want of competent teachers a "manifest defect" in the common school system, and reiterated the arguments of his predecessors for a distinctive legislative recognition of the policy of state aid in preparing teachers for the common schools, and, in this connection, said that, while common schools should receive the first consideration, "seminaries of a more elevated rank ought also to be sustained and cherished for many reasons, and for this particularly, that upon them we must, in a great measure, depend for competent teachers of the common schools." The legislature at this session, by chapter 241, made a decided advance on the act of 1827 by specifically appropriating all the annual revenue of the literature fund above $12,000, to be distributed by the regents, in their discretion, among academies, for the purpose of "educating teachers of common schools," under regulations to be prescribed by the regents. The regents took prompt action under this act. The act was approved on the 2d of May, and on the 22d of the same month the regents appointed a committee consisting of John A. Dix, Jesse Buel, and John Lorimer Graham to report a plan for carrying the provisions of the act into practical operation. This committee made an elaborate and interesting report, reviewing the history of the movement for improving the quali-

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fications of teachers in the public schools, pointing out the superiority of several foreign school systems in this respect, and recommending a plan for the practical application of the provisions of the new statute. The amount available being somewhat limited, the committee recommended that only one academy in each of the eight senate districts be designated, in which to establish a department for the instruction of common school teachers; and a course of study was prescribed to be pursued by persons desiring to become members of that department. This report was adopted by the regents, and communicated to the legislature in their annual report of 1835.

The importance of this new movement was emphasized by an act of the legislature passed in 1835 (chap. 34), which required the superintendent of common schools to send two copies of the committee's report to each school district in the state. The legislature, by the act of 1834, reaffirmed the policy initiated in 1827, of vesting in the regents supervision of the instruction of common school teachers. The practical operation of the original statute had been only partially successful, and a department for the instruction of teachers had been established in only three academies, though with very satisfactory results. The committee deemed the new act of 1834 the real beginning of the policy of educating common school teachers.

The years 1834 and 1835 were marked by great activity in several departments of public administration. In the article on prison labor I have described the movement to abolish the labor of convicts, culminating in 1834 in the presentation to the legislature of petitions representing 20,000 persons, and an act creating a commission to examine the whole subject; on whose report the legislature of 1835 enacted

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a very important prison law. The legislatures of 1834 and 1835 also gave special attention to canals, inaugurating the project for the enlargement of the Erie canal, which occupied the attention of the state for twenty-seven years. At the same time careful consideration was given to the subject of education, as appears from the governors' messages, the action of the regents, and also show that in 1835 the assembly committee on col- the statutes already cited. The legislature proceedings leges, academies, and common schools, in a general report on the subject of education, recommended the creation of a new department, to be known as the "department of public instruction," to be under the charge of a new officer, to be called the secretary of public instruction, to be chosen by the legislature for a term of three years. He was to be the superintendent of common schools, and, in addition, was to be *ex officio* chancellor of the university, trustee of the state library, and commissioner of the canal fund. He was vested with the right of visitation of all colleges and academies under the supervision of the regents, and he was especially charged with the duty of examining academies in which teachers were instructed. All reports from colleges and academies were to be made to the secretary as chancellor, and by him submitted to the board of regents; and local commissioners of schools were required to include in their annual report a statement of the qualifications prescribed by them for teachers in the schools under their jurisdiction. The committee submitted a bill to carry its suggestions into effect; but the plan did not take shape until nineteen years later (1854), when a department of public instruction was permanently established. The plan of 1835 would have united the two departments for all general purposes, and would have made the new secretary the official head of the whole educational

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system. The regents would still have possessed power to grant charters to colleges and academies, and would still have continued to exercise general supervision over these institutions; besides, they would have been required to take an active interest in common schools in the performance of their duty in relation to the instruction of teachers. It can scarcely be said that at this time there were two educational departments. The whole system seems to have been treated as a unit; there was supervision of the higher institutions, but substantially no state supervision of common schools. These schools had grown up as local institutions under the supervision of local officers, except in some instances where city administration of schools was under one head. With a common school system representing almost 900 towns or wards, and nearly 10,000 separate schools, it seemed to the legislative committee, whose report I have cited, that supervision ought to be provided beyond that which could reasonably be expected from an important state officer whose other duties made large demands upon his time and attention; and, while commending in the highest terms the "enlightened zeal" shown by the secretary of state as superintendent of common schools, the committee believed that the increasing magnitude of the interests involved required a new state department with a new officer clothed with power and dignity commensurate to the large responsibilities devolved upon him as the head of the system. Another school law of 1835 should be noticed, namely, the act authorizing districts to raise money to establish district libraries.

Governor Marcy, in his message of 1837, commenting on the act of 1834 providing for instruction of teachers in common schools, said that eight academies had been designated for this purpose, and were conducting special departments under the supervision of the regents. He

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said "there would seem to be a fitness in giving the immediate direction and supervision of these departments to the same authority that superintends the common schools." He thought the legislature should not yield to the recent suggestion of creating a separate department of public instruction; but, if the secretary of state were to be given supervision of the instruction of teachers, a deputy might be provided to aid him in this work. The Governor referred to the act of Congress of 1836 providing for a deposit of funds in different states,—afterwards known as the United States deposit fund,—and said this state would thereby obtain the use of more than $5,000,000. He recommended that the income be used for the support of academies and common schools, and that a definite amount be added annually to the capital of the common school fund.

Governor Marcy, in 1838, discussing the results of the plan of establishing in certain academies a department for the instruction of teachers, said that the demand for teachers could not be supplied by this means, and suggested the propriety of establishing a normal school in each county. The legislature, at this session (1838), passed an act (chap. 237) appropriating the income of the United States deposit fund. The act adopted the suggestion made by Governor Marcy in his message of 1837, and repeated in 1838, that $110,000 be appropriated for the support of common schools; and, in addition to this amount, required the distribution of $55,000 annually for three years for school district library purposes; and after that time this appropriation might be used for libraries or for teachers' wages, as determined by the district. The act also appropriated $28,000 to be added to the literature fund. Several colleges were also to be aided for a limited time, and

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the surplus of the income was to be added to the capital of the common school fund.

Governor Seward, in his message of 1839, considered at some length various questions relating to public education, observing that the common school system was only partially successful in agricultural districts, and that it was represented to be "altogether without adaptation to cities and populous villages." The growing need of adequate supervision was manifest from the discussion of this subject, which was continued in his message. He did not concur in Governor Marcy's objection to the department of public instruction. Governor Seward thought a "department of education" should be established, "to be constituted of a superintendent appointed by the legislature and a board to be composed of delegates from subordinate boards of education to be established in the several counties. The state board might exercise a general supervision with power of visitation of the colleges, and the county boards the same power in their respective counties." He thought the plan already established in relation to departments in academies for the instruction of teachers was the only practicable manner of introducing normal schools into our country. Governor Seward evidently did not anticipate the modern system of normal schools.

The need of supervision of schools beyond that afforded by local officers was recognized in the statute passed at this session, authorizing the superintendent of common schools to appoint in each county persons "to visit and examine into the condition of the common schools," and report to him concerning their condition. The legislature at the same session passed a school district library law, providing for the distribution of a portion of the income of the United States deposit fund, and placing district libraries under the general super-

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vision of the superintendent of common schools, who might also, on request, select a library for any district.

Governor Seward, in his message of 1841, was especially gratified at the development of the district library plan, saying that the libraries already contained an aggregate of about one million volumes, and that fully half a million dollars would be expended for libraries during the five years limited by the law.

The legislature of 1841, by chapter 260, authorized in each city and town a separate school for colored children, which was to be under the supervision of school officers, and share in the distribution of public funds the same as school districts. The same statute authorized boards of supervisors to appoint a deputy superintendent of schools for a county, and an additional deputy if the county contained more than 200 school districts. This seems to have been the germ of the modern office of school commissioner. The deputy superintendent was given general supervision of the common schools of the county or of his district, and he was authorized to examine teachers and issue to them "certificates of qualification in such form as shall be prescribed by the superintendent;" and such a certificate entitled the holder to teach in any school in the county. His authority in respect to licensing teachers was practically the same as that which had been conferred on town inspectors by previous statutes. Certificates granted by inspectors were required to be in the form prescribed by the state superintendent. The deputy was to administer his office subject to general rules to be prescribed by the superintendent, and was required to make an annual report to him. The superintendent was also authorized to appoint a general deputy.

An important change in school administration was made in 1842 by chapter 142, under which the secretary

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of state became *ex officio* a regent of the university. This officer, as superintendent of common schools, thus became directly connected with the administration of educational affairs by the regents, and was enabled to exercise in some degree supervision over the instruction of teachers carried on in the departments established for that purpose in academies.

The act of 1841, creating the office of deputy superintendent, imposed very important duties on that officer in relation to common schools; and the state superintendent was authorized to prescribe "general rules and regulations" for his guidance. The examination of teachers, and their qualifications, were proper subjects to be included in the superintendent's regulations. The act of 1842, making the state superintendent *ex officio* a member of the board of regents, gave him a voice in the government of the teachers' departments in certain academies, and afforded him an opportunity to suggest courses of study and preparation for the purpose of supplying teachers competent for the schools under his separate supervision. While the superintendent became a member of the board of regents for all purposes, his chief interest as a regent was doubtless in that part of the functions of the board relating to the instruction of teachers.

The legislature of 1843, by chapter 133, abolished the office of commissioners and inspectors of common schools, and created the office of town superintendent of schools, to be chosen annually by the people. The same statute authorized the state superintendent to issue teachers' certificates, which could be used anywhere in the state, and were valid until revoked. This act completed the policy of supervision by superintendents, including the state superintendent, deputy county superintendents, and town superintendents.

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Governor Bouck, in his message of 1844, said the new administrative policy had received general approbation, and that conventions and associations held in almost every part of the state by the friends of education indicated a salutary concentration of interest and direction of effort.

I have quoted Governor Seward's opinion in 1839, that it would not be practicable to establish separate normal schools. But this subject developed quite rapidly. The act of 1842, making the state superintendent *ex officio* a member of the board of regents, had united the two departments of education, so far as this could be accomplished, by conferring on its officials jurisdiction in the same subjects. This plan of joint supervision of the subject of teachers' qualifications had been in operation less than two years when the legislature of 1844 decided to establish a separate normal school, and by chapter 311 provided for a normal school at Albany. The state superintendent and the regents were jointly vested with its supervision and control; $9,600 of funds previously devoted to the instruction of common school teachers were appropriated for the new school, and a further annual appropriation of $10,000 for five years, from the literature fund, was made for the same purpose. These appropriations were made payable to the superintendent. The state superintendent was made *ex officio* a member of the governing board of the school, which was to be appointed jointly by the regents and himself. Normal schools afterwards established were placed under the exclusive general supervision of the superintendent; but, in considering the joint supervision under this statute, it should be borne in mind that the instruction of teachers had been for several years committed to the regents, and that the superintendent had no direct control of the subject prior to 1842. This instruction, as already

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noted, beginning in 1827, was carried on in academies under university supervision, and was maintained from the literature fund. It was only natural, therefore, that the legislature of 1844 should apply existing conditions; and, inasmuch as instruction of teachers was then under the joint supervision of the regents and state superintendent, it was deemed reasonable to place the new enterprise under the same joint supervision. The regents were already working out a policy in relation to this subject, and for this purpose were using a part of the literature fund which was primarily under their control. The new normal school was therefore treated from the outset as an academic institution; and by subsequent statutes its supervision has been exercised jointly by the regents and the superintendent of public instruction. In 1890 the regents changed the name of the institution to "New York State Normal College."

The legislature of 1844 materially enlarged the university's field of operation and usefulness by transferring to it the custody, supervision, and control of the state library. The library was organized in 1818 for "the use of the government and people of this state." It was to be kept at the capitol, and was originally placed under the supervision of the governor, lieutenant governor, chancellor, and chief justice of the supreme court, who were made trustees for this purpose. In 1824 the secretary of state, attorney general, and comptroller were added to the board of trustees of the library. The act of 1844, chapter 255, transferred the state library to the university, and the regents were made trustees. This library has become one of the great institutions of the state, and it is an element of incalculable value in public education.

The second constitutional period covers twenty-five years. The growth of our educational system clearly

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appears by a comparison of its condition at the end of this period, 1846, with its condition at the end of the first period. The report of the superintendent of common schools covering 1846 shows that there were then 1,731 unincorporated, select or private schools, and 11,008 school districts; that 742,433 children had been taught in the common schools during the year, and 64,767 in other schools,—in all 807,200; and that there were 703,399 children between five and sixteen years of age. The report also shows that there were 1,203,139 volumes in the school district libraries.

The report of the regents covering 1846 shows that there were then nine general colleges and universities, including four incorporated by the legislature in 1846; that there were two medical colleges and two medical departments in other colleges. That there were 801 students in the general colleges and 862 medical students, and that there were 180 academies under university visitation, including three departments in other schools, and that 22,077 students had attended these institutions at some time during the year. These figures show that all our educational institutions had largely increased in number, influence, and usefulness since the close of the first constitutional period.

EDUCATION UNDER THE THIRD CONSTITUTION, 1847–1894.

There was considerable legislation concerning schools during the third constitutional period, but most of it, like earlier legislation, related only to details of administration, and therefore has no place in this article. In previous sections I have shown the initiation and development of policies relating to education, and have cited numerous statutes showing the application of these policies in unfolding our educational system. It seems

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clear from legislative action, executive messages, official reports, and private discussion, that the school system was not satisfactory at the close of the second constitutional period. The lack of a sufficient number of qualified teachers, and the absence of adequate supervision, were apparently deemed the chief defects at the opening of the third period. The state superintendent's power of supervision had been gradually enlarged, but was still quite limited. Deputy superintendents had been provided in counties, and the office of town superintendent had been established; but the policy of supervision by county superintendents was of short duration. The office was established in 1841 and abolished in 1847, and the functions of town superintendents, especially in relation to the examination and licensing of teachers, were correspondingly enlarged.

In the chapter on the Convention of 1846 I have briefly recounted the work of that Convention on the subject of education, resulting in the adoption of a section relating to educational funds, and without including any other constitutional provision concerning schools. The common school fund, the literature fund, and the United States deposit fund were perpetuated, with the provision that "the revenues of the said common school fund shall be applied to the support of common schools; the revenue of the said literature fund shall be applied to the support of academies; and the sum of $25,000 of the revenues of the United States deposit fund shall each year be appropriated to and made a part of the capital of the said common school fund."

Free schools.—Our schools have always been free in the sense that they were open to all resident children between specified ages, but they have not always been free in the modern sense that they are to be wholly supported by general taxation, for, during some portions

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of our history, parents were required to contribute to the expense of maintaining the schools in addition to the sums raised by taxation for the same purpose. This method of parental contribution was known as the rate bill. It was frequently quite burdensome, and often had the effect to reduce the aggregate school attendance. Besides, under some school laws, the rate bill policy created an unfortunate classification of children, namely, if parents were unable to pay the rate bill the children were classed as indigents; and, under some statutes, if the parents did not pay, even if able to do so, the rate bills charged against them were paid out of funds raised by taxation, and thus persons not actually indigent were classed as such by operation of the law.

The first common school law (1795) provided for genuine free schools. It was intended to afford an opportunity to all resident children over four years of age to receive instruction in the "English language, or to be taught English grammar, arithmetic, mathematics, and such other branches of knowledge as are most useful and necessary to complete a good English education." The state contributed a specified amount, and each town or city was required to raise by taxation a sum equal to one half the amount apportioned to it from the state fund. These two sums, combined, constituted the local school fund from which school expenses were to be paid each year. There was no rate bill. The statute not only provided for free common schools, but in the city of New York the school fund was applicable to the support of charity schools, including those in which white, colored, or Indian children were taught. This act expired in 1800, and was not revived.

The act of 1812, chapter 242, by which the present school system was inaugurated, also provided for free schools to be maintained by taxation, but with the limita-

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tion that the offer of state aid must have been accepted at a town meeting; in which case a sum equal to the state apportionment was to be raised by a town tax, and the town might raise an additional sum. The sums so apportioned and raised constituted the local school fund. There was no rate bill. This act was revised and repealed in 1814. By the new act the town had no discretion in relation to taxation for schools; but a sum at least equal to the state apportionment was required to be imposed by the supervisors, and the town might, by vote, raise an additional tax for the same purpose. The statute introduced the rate bill, which was used in collecting money for teachers' wages in excess of the amount available from funds apportioned by the state or raised by local tax. Poor persons might be exonerated from the payment of teachers' wages. The rate bill was continued by the revision of 1819 and by the Revised Statutes of 1828, and this feature of the school law was in force when the Constitutional Convention of 1846 was chosen. Prior to that time, however, several special free school laws had been enacted, but as a general rule parents were required to pay a special and additional tax for the instruction of their children if the public money was not sufficient to pay teachers' wages.

It was doubtless these special acts, and a growing sentiment in favor of schools supported wholly by taxation, that prompted a resolution which was offered in the assembly of 1846, requesting the committee on colleges, academies, and common schools to report on the expediency of providing free schools in all cities, and also in all incorporated villages with a population of 10,000 or upwards. The committee approved the principle of the resolution, but thought an opportunity should be afforded to the people to examine it more fully before its adoption by the legislature; and advised postponing

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action on the resolution for the further reason that a constitutional convention was about to meet which might deem it expedient to deliberate on the subject of education. That Convention did deliberate on the subject, and in the forenoon of the day before final adjournment adopted the following section 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;" and also a companion section relating to taxation, both of which were to be submitted to the people separately, and not as a part of the Constitution. In the afternoon of the same day the Convention reversed its action, and struck out the free school sections by a vote of 61 to 27. The debates do not disclose any reason for this sudden change.

The movement for free schools which had found expression in several local statutes prior to the Convention of 1846 evidently received a new impetus from the action of that Convention, though it finally decided not to submit the proposition to the people. Numerous petitions were presented to the legislature of 1849 for a general free school law. The legislature responded to these petitions by enacting a general free school law which provided that "common schools in the several school districts in this state shall be free to all persons residing in the district, over five and under twenty-one years of age;" and that "free and gratuitous education shall be given to each pupil" in all public schools. All school expenses were to be paid from public money or taxation. The act was to be submitted to the electors at the succeeding general election, to determine whether it should become a law. The Convention of 1846, in considering this question, designed to submit a free school section separately, and the legislature of 1849 followed the course

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which the Convention would have taken if the project had not been abandoned. A free school law was deemed such a radical departure from the existing policy of the state that it seemed proper to submit it to the people before making it a fixed feature of our educational system. At the November election in 1849 the law was approved by a vote of 249,872 to 91,951. These figures show that the proposed free school amendment of 1846 would probably have been approved by the people. The law took effect January 1, 1850. It contained details of administration which proved unsatisfactory, and some 300 petitions were presented to the legislature of 1850 asking for the repeal or amendment of the law. This subject was considered in both houses, and in the course of its deliberations the assembly requested the opinion of Attorney General Chatfield as to the constitutionality of the law in view of its provision requiring a submission to the people before it could take effect. The attorney general thought this submission was valid, and that the law had become fully operative. The legislature at this session passed another law submitting to the people the question of a repeal of the free school law of 1849. That question was voted on at the November election in 1850, resulting in 184,208 votes for the repeal and 209,347 against it.

In the meantime the constitutionality of the act of 1849 had been attacked in the courts in a case which ultimately reached the court of appeals. That court, in June, 1853, in *Barto* v. *Himrod,* 8 N. Y. 483, 59 Am. Dec. 506, decided that the act was unconstitutional because depending for its validity on the affirmative action of the people. The court say that "laws must be enacted by the legislative bodies to which the legislative power is committed by the Constitution. They cannot devest themselves of the responsibility of their enactment by a reference of the question of their passage to their con-

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stituents." This decision was important as a statement of constitutional power, but it had little practical effect, for the reason that the statute in question had already been repealed by the legislature of 1851.

Governor Hunt, in his message of 1851, commenting on the free school movement and the popular approval of the act of 1849, said the vote in 1850 against its repeal should doubtless be considered a reaffirmation of the principle of the law, but not of its provisions; and he thought the legislature should, by proper laws, accomplish the free school design without injustice to any citizen. He said "the free school law imposed a tax on property for the maintenance of schools, without reference to the direct benefits derived by the taxpayer," that the operation of the act had produced "oppressive inequalities and loud complaints;" and he urged a revision of the law for the purpose of removing these objections. The legislature at this session enacted another free school law (chap. 151), which took effect in the ordinary way. This statute re-enacted the provision already quoted from the act of 1849 making schools free to resident children between five and twenty-one years of age; but it restored the rate bill which had been abrogated by the act of 1849.

Governor Clark, in 1855, recommended that schools be made entirely free. He thought the rate bill ought to be abolished, observing that "those who are unable to pay this assessment are relieved at the public expense, and thus become the recipients of public charity." He said this policy continued to strengthen the idea "that education is a matter of charity, and not a matter of right." The revised school law of 1864 (chap. 555) continued the rate bill.

Governor Fenton, in 1867, recommended that the rate bill be abolished. The legislature adopted this suggestion, and by chapter 406 abolished all rate bills. Thus the obnoxious rate bill passed out of our common school

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system, and the schools became really free. An experience of fifty years (1814–1864), excepting the short interval covered by the unconstitutional law of 1840, had at last convinced the people of the incongruity of trying to maintain the so-called system of free schools, and at the same time requiring parents to make an extra contribution for school expenses which amounted substantially to the payment of tuition. The beneficent results of the change of policy were at once apparent. Governor Fenton referred to the subject in his message of 1868, and said he had been informed by the superintendent of public instruction that the law of 1867, which abolished rate bills, was "producing a very large increase in the aggregate number of pupils at the schools, and greater regularity in their attendance."

The legislative policy in relation to free schools, doubtless expressing popular opinion, having been declared by the act of 1867, it was likely to be permanent, and probably did not need constitutional protection; but the Convention of 1867, as already noted in a former chapter, deemed it proper to include a free school provision in the Constitution, and therefore adopted 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," but it will be observed that this was not so broad as the provision once adopted by the Convention of 1846, or the provision incorporated in the Constitution by the Convention of 1894.

The Commission of 1872 considered, but did not adopt, propositions relating to compulsory education, and also providing for free instruction in the common schools. The legislature of 1876 passed a free school amendment, which is quoted in a previous chapter; but it was not agreed to by a subsequent legislature, and therefore was not submitted to the people.

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Supervision.—We come now to a topic which in recent years has provoked most animated discussion. Our educational system, beginning in two separate sources, has chiefly developed along independent lines represented respectively by private and public schools. Each branch has had a supervision distinct from the other, though sometimes supervision in particular cases has been joint and mutual. The growth of our educational system could scarcely have been anticipated by the founders of our public and private schools. If the question of constructing a school system were new, statesmen and educators would make a serious effort to combine all educational interests under one general administration. The remark is frequently made now that this ought to have been done at the outset; that it was easy in the beginning to devise a plan of supervision that would embrace all branches of education, and develop them all in one harmonious system. This generation can readily appreciate the importance of combination and consolidation of educational interests under a single administration; but it is worth while to remember that the founders of our educational policy did not have our experience. Advocates of an absorption of the whole educational system by the regents think it would have been easy to vest the regents with control of the whole subject when our school policy was inaugurated in 1795; and that if, when the first common school law was enacted, the whole subject had been placed in charge of the regents, and this policy had been continued, we might have had a magnificent educational system, guided and controlled in all its parts by one central authority, and producing even more beneficent results than have come from a dual development covering nearly a century. If the statesmen of our early history could have anticipated the future, they probably would have created a state board of education instead of

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the regents, and would have vested in the board general control of all educational institutions, public and private.

I think it is not difficult to discover good reasons for the action taken by the founders of our educational policy,—especially if we place ourselves in their situation and consider the subject according to their experience and from their point of view. It has already been shown that there were no public schools at the close of the colonial period. The last century of colonial history is almost destitute of any effort to establish and maintain public schools. Two exceptions, namely, the act of 1702 and the act of 1732, both of limited scope and short duration, only accentuated the general policy, which was to leave education to individual effort. Under this idea, the government was absolved from any responsibility concerning education. If the people desired schools they could have them by paying for them; the government did not interfere. This was the educational inheritance which came to the new state; but it became evident to the statesmen of that period, as expressed by Governor Clinton in several messages, that a voluntary system of education was not adequate to the needs of a free people. The state was familiar with education only from the standpoint of private support. Kings College, which had received a colonial charter in 1754, had only a short experience before its work was interrupted by the Revolution. This was the only educational institution inherited from the colony. Its functions had been suspended, its interests demoralized, and its forces scattered by the Revolution, and it could not resume its work without a reorganization which would bring it into harmony with the new order of things incident to a free state. Yet the statesmen who first gave their attention to the subject of education did not begin with Kings College. They began with the project to establish a state university without reference

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to any particular institution; but, as already shown, the friends of Kings College took advantage of the situation to press the claims of that institution, urging that it be made the "mother of an university" if one were to be established, with the result that the regents of the proposed university were made in fact the trustees of the reorganized Kings College under the new name of Columbia. Thus the first educational statute created a university without instructors, without students, without any educational appliances, except as the new Columbia College afforded opportunities for the exercise of the powers originally vested in the regents. It seems clear that the promoters of that first scheme intended to establish only a private educational institution; they did not intend to inaugurate a public school policy, but, by rehabilitating the existing college, and providing for the incorporation of other private institutions, they limited the scope of educational effort to private schools; consequently that first legislation has no public characteristics.

Another important consideration bearing on the inception of our educational policy should not be overlooked, namely, the regents under the first university statute were not public officers. They were appointed by the legislature; but, under the first Constitution, the legislature had no general power of appointment. It was required to appoint the state treasurer and delegates to Congress, and each house was authorized to choose its own officers; beyond these the legislature had no power to appoint public officers. Section 23 of the first Constitution provided that "all officers other than those who by this Constitution are directed to be otherwise appointed shall be appointed" by the Council of Appointment, composed of the governor and four senators chosen by the assembly. Regents were not included in the exceptions made by this section. The legislature might create offices, but could not fill

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them by direct appointment. It might, and sometimes did, create offices, prescribe their duties, and require them to be performed by existing public officers. Illustrations of this class are the act of 1785 making certain officers *ex officio* commissioners of the land office, the act of 1818 by which certain officers became trustees of the state library, and the act of 1821 by which the secretary of state became *ex officio* superintendent of common schools. The first university statutes were evidently not intended to create public offices, nor to impose public functions on the persons named as regents. The original act in terms created a corporation, and the regents became *ex officio* trustees of another private corporation, namely, the new Columbia College. They were charged with the administration of this educational institution, which was supported wholly at first by private bounty, and, though it afterwards received public aid, the character of the institution was not thereby changed. In addition to these considerations, it should be noted that the first university statute authorized the clergy of religious bodies to appoint regents. It is not to be supposed that the authors of the act intended to delegate to voluntary religious societies the power to appoint public officers. These clerical regents became members of a private corporation. The first university statute was a valid exercise of legislative power when considered with reference to its evident purpose, which was to create a private educational institution. The revised university law of 1787 was of the same character, but the direct power of the regents as trustees of Columbia College was abrogated. They were, however, vested with so much power over colleges and academies that they might in certain cases choose a president of a college or the principal of an academy.

The legal status of the regents under the first Constitution was that of members of a private corporation.

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As such they might be and were required to perform certain public or semi-public functions incident to the main purpose of the statute, which was to promote higher education. They could and did receive, hold, and administer public property and funds for educational purposes; but they did this in the capacity of a corporation, and not as public officers.

Coming now to the first common school law of 1795, it is reasonable to inquire why the legislature did not charge the university with the duty of administering that law, thus at the outset placing the common school system under the general jurisdiction of the regents. One reason may, I think, be found in the fact that the university was created for private educational purposes only. With the existing experience in public affairs under a new state government, it was probably not deemed expedient to vest in this corporation the power to superintend a common school administration intended to reach all parts of the state and affect all the people, which must be maintained, at least in part, by public taxation, which would require a large number of public officers with varying responsibilities, and which would necessarily involve the exercise of the highest governmental powers. The university had to do with private educational institutions; the state was about to try an experiment in public education. It was only natural, therefore, that it should initiate the new policy by means of public officers either appointed for this purpose, or by using existing officers and imposing on them new duties in respect to public schools. The university might have been given the right of visitation, and might have been clothed with limited supervisory or advisory functions; but the new scheme could scarcely have been put into operation without the aid of public officers.

In organizing the first common school experiment the statesmen of 1795 used instrumentalities with which they

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were familiar. Township government was a colonial inheritance. It had developed through a century and a half, from crude beginnings, on models borrowed from the old world, and had become an essential feature of colonial administration. It was recognized and perpetuated in the first Constitution, and the people of a town were, by that instrument, guaranteed the right to elect their own officers. The maintenance of schools in the colony, so far as they had been the subject of public concern, was worked out through local administration; and each township or other organized locality exercised the right to maintain schools independent of other localities, and apparently independent of any central authority. These small self-governing communities were the almost inevitable result of the settlement of the new country by people who brought with them the customs and traditions of England and the Netherlands. Besides, the pervasive influence of New England ideas should not be overlooked in studying conditions in New York immediately after the close of the Revolution. This influence was particularly noticeable in the Constitutional Convention of 1821, where 48 delegates were natives of New England. The intimate relations between New England and New York, which had grown up during the latter part of the colonial period, afforded an opportunity for free interchange of ideas, and the mutual formation of policies suitable as foundations for independent states. These policies were not always alike, but they represented the same great principles. In New York, as well as in New England, the people acted through a town meeting or other similar assemblage of citizens in small localities. The towns had an organized government, and resort was naturally had to them for the machinery needed to establish common schools. These schools were intended for the people of each town, and the township was therefore naturally used

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as the territorial unit in working out the plan. But I think it may fairly be assumed that the New England township school policy had its influence in shaping the New York statute. This is expressly asserted by Azariah C. Flagg, superintendent of common schools, in his report of 1832, in which he says that "the school system of New York has been formed by combining the advantages of the different plans of supporting common schools which prevail in the New England states," and that Connecticut had a state school fund, but in Maine and Massachusetts schools were made a town charge. Massachusetts, in 1789, six years before our first statute, had enacted a common school law in which each town was directed to maintain public schools. There was no central administration; the whole subject, including taxation, was committed to the people of a town, who might, for convenience, divide the town into districts for school purposes. The New York legislature of 1795 constructed our first school law on this model. The general features of the two laws were quite similar. Both took the town as the basis of school administration and taxation, and local officers were made responsible for the enforcement of the law. Supervision was meager in both cases. There was no central supervision under either law, though the New York act required reports indirectly, through the county treasurers and secretary of state, to be made to the legislature; but no state officer was vested with any jurisdiction over the local schools. The Massachusetts statute was also silent concerning state supervision. In one other respect the acts were quite different, namely, New York contributed funds from the state treasury for the support of local schools, while in Massachusetts the schools were maintained wholly at local expense; but supervision was practically the same under both statutes. Nor should we forget that the New York public school policy, so far as it

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had been expressed in statutes prior to 1795, was based on the township idea. I have pointed out in a former part of this article that the statutes relating to gospel and school lots, beginning in 1781, provided for setting apart a specified number of acres for these purposes in each new township carved out of public lands, thus laying the foundation of a school fund in each town. The law of 1791, providing for a public school in Clermont, also illustrated the township idea. The act of 1795 applied and put into practical form the principles of these former statutes, by providing specifically for schools, school districts, school officers, school taxation, and local school supervision. It is a noteworthy feature of our school system that this policy of local supervision persisted through numerous important changes and developments, and was not abolished until 1856, sixty-one years after the first school law was enacted. As late as 1850, when a proposition to repeal the free school law of 1849 was under consideration, the senate committee on literature strenuously defended the policy of local supervision, saying, among other things, that "town meetings are time-honored auxiliaries of freedom;" and, in opposition to a proposed plan of state taxation for school purposes, the committee urged the continuance of local taxation, because they believed it would "keep alive a local interest in each particular school." The situation as presented to the statesmen of 1795 amply justified the policy of local supervision, and it is not surprising that a plan of state administration was not then adopted.

The revival of the common school plan in 1812 included local supervision, but also introduced an element of state supervision by a superintendent of common schools, who was required "to digest and prepare plans for the improvement and management of the common school fund and for the better organization of com-

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mon schools," to superintend the collection and expenditure of school money, furnish to the legislature information relating to schools, and to perform such services in relation thereto as might be required by the legislature. This inaugurated the policy of supervision by a state officer, which has continued to the present time. His powers and duties have been materially increased from time to time, but he has always been the state's representative in public school administration; but not always alone, for in some schools his supervision has been shared with the regents. The transfer of the department to the office of the secretary of state in 1821, its administration by him until 1854, when the office of state superintendent of public instruction was created, are only incidents in the history of our school policy. The department has been continuous, and its history has been unbroken since the appointment of the first superintendent in 1812. It is frequently said that the department of public instruction was established in 1854. This is accurate so far as a distinct department is concerned, but that was not the origin of the department of public education; and, even while school affairs were under the general supervision of the secretary of state, this branch of his duties was considered a department of education, and was frequently referred to as such in executive messages and official reports, and the act of 1854 only restored, under another name, the policy of supervision by a separate officer which had been established in 1812. There seems to have been a determined policy from the outset to keep public and private schools under separate administrations. There have been periods in our school history when these administrations might have been united. The plan proposed in 1835, to establish a state department of public instruction, with a secretary of public instruction, who should also be chancellor of the university, would have

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united the two departments at a time when the interests of the two were so closely related that the combination might have been made without serious disturbance. It may be noted here that the chapter on schools, in the Revised Statutes, is entitled "Public Instruction," and the office of superintendent of common schools is continued, though its duties were to be performed by the secretary of state. This chapter also included the university, continuing its powers practically as defined by the act of 1787, but without any attempt at unification of jurisdiction with the common school department.

In the previous section I have considered the subject of the instruction of teachers, and the use of academies for this purpose, under the supervision of the regents, culminating in the act of 1844 establishing the State Normal School at Albany, under the joint supervision of the regents and the superintendent of common schools. The normal school policy was greatly enlarged during the present period, and a few statutes relating to this subject will now be noticed. The policy of providing opportunities for the instruction of teachers by means of institutes, which have now become a permanent feature of our common school system, was inaugurated in 1847 by chapter 361, which provided for a teachers' institute in each county. These were to be called on the request of the town superintendents, and were to be under the direction of an advisory committee composed of three superintendents, to be appointed for this purpose by the county clerk. This committee had authority to call the institute and employ lecturers on subjects relating to the qualifications of teachers and the conduct and discipline of common schools. The expense was payable from the state treasury. The act of 1849, chap. 174, authorized the regents to pay $250 to one academy in each county for the instruction of at least twenty pupils for four months in

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the "science of common school teaching." The act of 1853, chap. 402, provided for instruction of teachers in academies. In 1854 Governor Seymour quoted and approved a suggestion made by the secretary of state as superintendent of common schools in his last annual report, that state scholarships be established "in our higher institutions of learning, for the purpose of educating young men for principals of union and high schools." The Governor suggested that students be selected from assembly districts, and that the state contribute to the expense of their education. In 1863 (chap. 418) a training school for primary teachers was established at Oswego, subject to the supervision and general direction of the superintendent of public instruction.

Governor Fenton, in 1865, reviewing the history of education for the preceding year, suggested the propriety of "making more ample provision for an annual supply of thoroughly qualified teachers," and, while creditable provision for this purpose had already been made, he thought this was manifestly inadequate to supply so great a demand. He renewed this suggestion in 1866, and the legislature of that year passed a general law relating to normal schools. The Governor, lieutenant governor, secretary of state, comptroller, state treasurer, attorney general, and superintendent of public instruction were appointed a commission to receive proposals for the establishment of four additional normal and training schools. The details of this statute are not important here, but it should be noted in relation to the subject of supervision that the superintendent of public instruction was required to appoint a local board for each normal and training school, and was vested with general jurisdiction of its affairs. Eleven normal schools have since been established, all of which are under the general supervision of the commissioner of education.

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Usually the supervision of the two departments has been kept separate, but a striking exception to this rule, and which has produced significant results, was the act of 1853 (chap. 433) providing for union free schools. It was the policy of the act to encourage the establishment of schools by the union of two or more districts, or parts of districts, in one school, under the immediate supervision of a board of education. But the act provided for union schools in another sense, for, while the schools were in their general character common schools, not differing from schools established in single districts, an academic department might be established in each such school, and thus there would be the union of elementary and academic instruction in the same schools, and the schools would thus become common schools and also academies, according to the course of study pursued in each department. The academic department was under the general supervision of the regents, and pupils were to be admitted according to rules to be prescribed by them. In other respects the board of education had the "superintendence, management, and control of the school." An academy in the district might be transferred to the control of the board of education, and thereupon it should become the academic department of the union school. The act also authorized academic departments in free schools organized under any other statute. The act did not specifically give the superintendent of common schools any supervision over a union school, but laws relating to the powers and duties of trustees of common school districts were made applicable to boards of education. The revised school law of 1864 (chap. 555) included union schools, which were made subject to the visitation of the superintendent of public instruction, and he was "charged with the general supervision of its board of education and their man-

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agement, and the conduct of all its departments of instruction," and he might at any time, in addition to the annual report, require from boards of education a report on any subject pertaining to school affairs. He might also remove members of a board of education. This gave the regents and the superintendent of public instruction some supervision of every union school with an academic department. In most instances the academic department is not separated from other parts of the school, but it is in the same building, and the whole school is under one local administration. Prior to the unification law of 1904 the general supervision was vested in the superintendent, but the regents had jurisdiction of the academic part of the school. Both distributed money to the school, both had the right of visitation and inspection, resulting in double supervision, inspection and distribution of public funds. Probably it should be said, however, that this practice did not necessarily occasion any confusion, because reports relating to the academic department, including students, library, and apparatus, were made directly to the regents, while all other reports were made to the superintendent; but I think it cannot be denied that administration will be much simplified with all elements of the school under one state department.

The mutual and interdependent relations between branches of education—elementary, academic, and collegiate—were carefully considered in a report by Henry Howe, read at a meeting of the State Teachers' Association in August, 1848. Briefly reviewing the history of education, noting, among other things, the fact that in the early days schools were maintained by voluntary support, and that these were succeeded by public schools established by law, the report states that common schools, academies, and colleges necessarily sustain to one another mutual relations, and create mutual interests. "The dis-

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trict schools looked to the institutions above them for teachers, the academical schools supplied also the colleges with students, and the colleges in return supplied those schools with teachers."

Henry S. Randall, secretary of state and superintendent of common schools, in his report covering the year 1853, submitted to the legislature of 1854 by his successor, Secretary Leavenworth, urged the separation of the powers and duties of superintendent from those of secretary of state, and the creation of a new office. He specially recommended that the superintendent of common schools be elected by the people, and that he be vested with general jurisdiction and supervision of common schools. Governor Seymour, in his annual message of 1854, also recommended the separation of the office of superintendent of common schools from that of secretary of state, saying that a "distinct department devoted to the interests of education is calculated to give more prominence to the subject, and elevate it in public estimation." He said that "every effort should be made to harmonize our system of instruction,—to do away with the impression that our colleges and academies are institutions of learning, distinct from, if not in some degree antagonistic to, our common schools."

The legislature of 1854 adopted Governor Seymour's recommendation in part, and by chapter 97 created the office of superintendent of public instruction, to be chosen by the legislature for three years. He was practically the successor of the former superintendent of common schools; but the act specifically required him to "visit as often as may be practicable such and so many of the common schools, academies, and other literary institutions of the state as he may deem expedient; to inquire into the course of instruction, management, and discipline of such institutions, and to report the results of such visitation

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and inspection annually to the legislature, with such recommendations and suggestions as he may deem suitable." He was made *ex officio* a member of the board of regents and chairman of the executive committee of the State Normal School. This statute enacted several important features of the bill proposed by the assembly committee on education in 1835, which has been noticed in the previous section. That committee proposed a secretary of public instruction. The new act designated him as superintendent. The assembly committee proposed to make him *ex offcio* chancellor of the university. That suggestion was not adopted. The committee, in 1835, proposed to give this officer the right of visitation of all colleges and academies, and require him to report to the legislature concerning their condition and the system of education and discipline therein. It will be observed that the act of 1854 required the superintendent to visit the academies and other literary institutions of the state, and to inquire into their course of study, management, and discipline. To this extent the suggestion made in 1835 was adopted in 1854, and the superintendent was given the right of visitation and inspection of all schools. By this act he had the right of visitation of institutions under the general supervision of the regents. There was really more double supervision of colleges and academies under this act than there was of union schools under the act of 1853.

Governor Clark evidently shared the views entertained by Governor Seymour and the educators of that time concerning the relations between common schools, academies, and colleges. In his annual message of 1855 he considered this subject at some length, saying that "the connection of our common schools with the higher institutions of learning, with academies and colleges, making them all, in fact, parts of one great system, cannot fail to

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contribute essentially to their elevation, and bring the means of a thorough and complete education within the reach of all. . . . The time has come when higher purposes and broader views may be entertained in regard to our system of state education; and that our academies may be brought into a more direct and important connection with the general plan, and thrown more widely and more freely open to the advantages they are intended to confer," and that it would be highly desirable to bring the colleges of the state into harmonious connection with such a plan, so that they might become more directly recognized as members of our general system of state education, and as essential to its completeness and perfection. The superintendent's right of visitation of colleges and academies continued ten years, but this provision was omitted from the revised school law of 1864.

In 1856 Governor Clark recommended the abolition of the office of town superintendent and the creation of local boards of education. He thought our school system should extend "free academical instruction to every child desirous of its benefits."

Governor Clark, in his messages of 1855 and 1856, had urged the enactment of laws providing for more thorough supervision of schools. The legislature of 1856, acting on this suggestion, passed chapter 179, which created the office of school commissioner in each assembly district, except in the counties of New York and Kings. He was given general power of visitation, inspection, and supervision of common schools in his district. The act in this respect was quite similar to the act of 1841 creating the office of deputy superintendent. Governor Clark had suggested that the restoration of the office of county superintendent might not be acceptable, but this law practically restored that office under another name. The commissioner was authorized to grant teachers' li-

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censes and hold teachers' institutes. Like the county superintendent, the commissioner was made subject to rules to be prescribed by the state superintendent. This act also abolished the office of town superintendent of common schools.

The legislature of 1864, by chapter 555, revised and consolidated the general acts relating to public instruction. The office of superintendent of public instruction was continued, and he was to be *ex officio* a regent of the university, a trustee of the People's College and New York State Asylum for Idiots, and chairman of the executive committee of the State Normal School. He was given supervision of the Oswego Training School, and was charged with the duty of visitation of the Institution for the Instruction of the Deaf and Dumb, the New York Institution for the Blind, and all similar institutions then or afterwards incorporated. In 1875 (chap. 567) the superintendent of public instruction was made *ex officio* a trustee of Cornell University.

The university.—The act of 1853, chap. 184, conferred on the regents general power to incorporate universities, colleges, academies, and other institutions of learning, and to amend or repeal their charters. An important addition to the powers of the regents was made by the act of 1882, chap. 367, which prohibited the incorporation of any literary or scientific college or university under the act of 1848, chap. 319, without the approval of the regents. A general revision of the laws relating to the university was enacted in 1889, chap. 529. The university law was again revised in 1892.

The third constitutional period ended in 1894 with the adoption of the fourth Constitution, which included and perpetuated the university. Its practical operations have, since that time, been materially enlarged, and the scope of its functions and usefulness is constantly increasing.

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I have given a brief statement of the condition of institutions under university supervision at the close of previous constitutional periods, as indicated by statistics gleaned from reports submitted by the regents to the legislature. The year 1894 marks the close of a century of university expansion since the beginning of our common school history, and the astonishing growth of university institutions and the field of higher education is strikingly shown by a comparison of the conditions existing in 1794 with those which appeared in 1894, when the fourth Constitution was adopted. Thus it appears from a short report submitted by the regents to the legislature, dated February 25, 1795, covering 1794, that in the latter year the university had supervision of one college, Columbia, with 140 students, and that Union College had been that day incorporated. The same report shows that there were then 12 academies, 7 of which had reported showing 436 students. The results of a century's growth appear in the following statistics for 1894:

Colleges of arts and sciences: For men 22, with 3,334 students; for women 8, with 2,117 students; for men and women 5, with 2,292 students.

Professional and technical schools: Law 7, with 1,486 students; medicine 15, with 3,420 students; pharmacy 3, with 487 students; dentistry 3, with 413 students; eye and ear 1, with 21 students; veterinary 2, with 233 students; theology 12, with 669 students; pedagogy 3, with 530 students; engineering 2, with 565 students; other colleges 13, with 8,268 students.

Making, in 1894, 96 universities and colleges, with 23,835 students, as against one college and 140 students in 1794.

In 1894 there were 123 academies, with 10,978 students; and 314 high schools and academic departments, with 34,058 students; making, in 1894, 437 academic in-

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stitutions, with 45,036 students, as against 12 in 1794, with 436 students reported from 7, and a probable attendance not exceeding 600.

The library statistics are equally significant. No libraries were reported in 1794. In 1894 each collegiate and academic institution had a library, and there were also 62 public libraries; making in all 595 libraries, with 2,036,567 volumes.

The regents in 1894 distributed to academies and high schools $96,666.44, and to public libraries $10,351.92. The fund subject to apportionment by the regents has been largely increased since 1894.

Statistics of the common schools at the close of the third constitutional period also show a remarkable development of our public school system. In 1794 there were no public schools except the school in the town of Clermont, which had been authorized by the act of 1791. A comparison is therefore made with the year preceding the beginning of common schools under the act of 1795. The history does not cover an entire century because of the interregnum from 1800 to 1813. From the official report of the superintendent of public instruction, it appears that in 1894 there were, in towns, 11,121 school districts, and, in cities, 658,—in all, 11,779. That there were 25,896 teachers engaged at the same time, and that 32,929 were employed at some time during the year. That 1,124,998 children attended the public schools at some time during the year, and that there were then 1,932,325 children of school age. The state tax used that year in support of schools amounted to $3,989,887.95, and the local tax for the same purposes amounted to $13,117,459.76. The total expenditure was $22,576,356.96 for all school purposes. There were then 799,096 volumes in school district libraries. The growth of the union school policy is shown by the fact that in 1894 there were 501 schools in this

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class, and that in 1904 the number had increased to 690. It also seems that while there were in the state 1,932,325 children of school age, all the schools, public and private, showed an aggregate attendance of only 1,159,811. Deducting this number from the aggregate school population, it seems that, in 1894, 772,514 persons of school age did not attend public school. It should not be inferred, however, that all this number received no instruction. There are many flourishing private schools which do not appear in any official reports, and the aggregate attendance in these schools is quite large. It should also be remembered that the school age in 1894 was from five to twenty-one years. It is well known that for various reasons a large number of young persons leave school at from sixteen to eighteen years, and while, under the rule then in force, they were counted as a part of the school population, they had for practical purposes passed into the adult class. Soon after 1894 the school age was reduced to eighteen years, and the school census thereupon showed a decline of about 300,000 in the aggregate school population. If those who had passed out of practical school life be added to those in private schools the number of persons composing the legal school population, who were apparently not receiving instruction, would be materially reduced. It should be further suggested, in connection with this topic, that while, prior to 1894, a compulsory education law had been enacted, it was not so effective as it has become since that time; and the percentage of nonattendance is much smaller now.

Several subjects included in the foregoing sketch are further considered in notes to article 9, in the fourth volume.

THE CONVENTION OF 1894.

On the 22d of May—the first day the Convention met

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after its formal organization on the 8th—Mr. Holls introduced an amendment prohibiting the passage of any law respecting the establishment of religion or preventing the free exercise thereof, and also prohibiting aid to sectarian institutions. This amendment was considered by the committee on charities, and is quoted at length in the article relating to that subject. Afterwards Mr. Emmet and Mr. Cornwell introduced similar amendments, Mr. Emmet's containing the additional provision that "all other sectarian institutions to which persons are committed by any court or magistrate in this state, and which receive compensation for the maintenance of such persons from the state, or from any county, town, village, or other civil division, shall be subject to systematic supervision and inspection by the state." Mr. Sandford introduced the following amendment relating to the university:

"The regents of the university of the state of New York are hereby continued, and shall consist of the present life members and their successors, who shall have such powers as they now possess and such further powers as may be conferred upon them by law. As vacancies occur they shall be filled in the manner now provided by law. The term of office of regents hereafter elected shall be ten years. At the expiration of the term of office of the present incumbent, the superintendent of public instruction shall be elected by the regents of the university of the state of New York in the same manner and for the same tenure as the secretary of the university is now elected."

This was doubtless intended to accomplish unification by merging the department of public instruction in the university. This is apparent from the provision which made the superintendent an officer of the university of the same rank as its secretary. This would have given

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the regents jurisdiction and complete supervision of the whole educational system.

Mr. Phipps offered the following amendment:

"No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian, denominational, or parochial school."

Mr. Peck offered an amendment continuing the university as then organized, and also continuing the department of public instruction, and providing for the election of a superintendent by the people for a term of four years. Mr. Gilleran proposed the following addition to the section on school funds:

"No part of said funds or the income therefrom, or any property, funds, or moneys of the state, or a political division thereof, shall be used for the purpose of founding, maintaining, or aiding, by appropriation or otherwise, any school or other educational institution not wholly under the control of the state or such political division."

Mr. Sandford proposed the following:

"No public money shall ever be appropriated for the support of any school not under the exclusive control of the officers of the public schools. Nor shall any denominational tenet, doctrine, or dogma be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of the state."

Mr. C. H. Truax offered the following amendment:

"No pecuniary aid or support shall be given by the state or any civil division thereof to any school or educational in-

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stitution not constituting a part of the public school system of this state."

President Choate appointed a committee on education, composed of seventeen members with Mr. Holls as chairman. On the 23d of August the committee reported an education article in four sections. The proposed 3d section, relating to school funds, was continued from the former Constitution without change. The other three sections were new, and introduced new principles into our Constitution. For convenience these sections will be considered separately.

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

In a previous part of this article, and also in former chapters, I have considered the action taken by other conventions and the legislature concerning a proposed constitutional provision for common schools, and have given a sketch of the principal features in the development of the common school system. It was the evident purpose of this section to deprive the legislature of discretion in relation to the establishment and maintenance of common schools, and to impose on that body the absolute duty to provide a general system of common schools.

The committee on education in its report made the following statement concerning the common school section:

"The present Constitution is silent upon the vital point of the establishment and maintenance of a system of free common schools. It may be urged that no imagination can picture this state refusing to provide education for its children, and for this reason the declaration which your committee have reported in § 1 might, no doubt, be

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omitted without endangering the stability of our present system of education. But the same reasoning would apply to many other matters though fundamental; and it is a significant fact that within the last half century of constitutional revision no other state of the Union has considered it superfluous or unwise to make such an affirmation in its fundamental law. Your committee, therefore, recommends the adoption of § 1 as an explicit direction to the legislature to provide for a system of free common schools wherein all the children of this state may be educated. This requires, not simply schools, but a system; not merely that they shall be common, but free, and not only that they shall be numerous, but that they shall be sufficient in number, so that all the children of the state may, unless otherwise provided for, receive in them their education. No desire to confine the new Constitution to the narrowest possible limits of space should prevent the adoption of an enactment declaring in the strongest possible terms the interest of the state in its common schools. Whatever may have been their value heretofore, and language has been strained to the utmost in applying to them terms of praise, their importance for the future cannot be overestimated. The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before; and, in view of the state's policy as to higher education, to which reference will presently be made, too much attention cannot be called to the fact that the highest leadership is impossible without intelligent following, and that the foundation of our educational system must be permanent, broad, and firm if the superstructure is to be of real value."

In opening the debate Mr. Holls said of the 1st section that of all the states "New York, New Jersey, and Dela-

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ware are the only states which to-day have not a similar analogous provision in their fundamental laws." Mr. Campbell proposed to qualify the section by making it apply only to children "whose education is not provided for by their parents or guardians," intending, he said, to incorporate in the Constitution the principle that the "parent of every child in this state is charged with the duty of educating that child, and has the right, proceeding from that duty, to provide the means by which his duty shall be performed." He quoted Chancellor Kent's remark that this parental duty was a "sacred trust given to parents by their Creator, and a right which they have by the law of nature." Mr. Campbell said our free public schools were the schools of the people in the most intimate sense, because they sprung spontaneously from the people before the foundations of the government. "If parents choose to educate their children at any other than the public schools, they cannot be compelled to send them to the public schools." Mr. Holls opposed the amendment, saying that the section as it stood did not interfere "directly, or by implication, with the sacred right of the parent and the family first to educate their children if they wished to do so." Mr. Campbell's amendment was not accepted. Mr. Gilleran proposed to state the section in the following form: "The legislature shall provide for the maintenance and support of a system of free common schools which shall be open to all the children of this state." Mr. Hill thought this amendment was unnecessary, observing that the section as reported made "it imperative on the state to provide adequate free common schools for the education of all the children of the state, if the children or their parents or guardians desire to avail themselves of such schools." The amendment was lost. The Convention also declined to adopt the following additional provision offered by

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Mr. Carter: "Such schools shall be under the supervision of a superintendent of education, who shall be elected by the electors of the state. His term of office shall be four years, and he shall have such powers and duties as are now possessed by the superintendent of public instruction, subject to change or modification by the legislature."

§ 2. The university.—The corporation created in 1784 under the name of the Regents of the University of the State of New York shall be continued under the name of the University of the State of New York. It shall be governed, and all its corporate powers exercised, by not less than nine regents.

The committee, in its report, says that this section "gives constitutional recognition and permanence to the University of the State of New York, leaving its powers and duties, as heretofore, entirely under the control of the legislature. We believe that the adoption of this section is prayed for with practical unanimity by the most competent educators of the state, and that it will be a long step forward in the line of educational progress." "The section simply crystallizes into a constitutional mandate the settled policy of the state for over one hundred years." The committee expressed the opinion that education works downward, and not from the common schools up. "Universities are older than all schemes of public education, and out of the universities have come most of the men whose influence has been effective in establishing great systems of popular schools."

Mr. Hawley proposed to amend the section so that the powers of the university might be "increased, modified, or diminished by the legislature." He thought the section as proposed prevented any alteration of the university's powers by the legislature. Mr. Choate supported Mr. Hawley's amendment, concurring in the opinion that

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without this amendment the legislature could not modify the corporate powers of the university. He thought that as a general constitutional principle the state ought to have absolute control of all institutions of learning which are subject to the supervision of the regents. Mr. Hawley's amendment was adopted.

Mr. Cookinham proposed the following addition to the section: "The regents of the university shall also have power to appoint and remove the superintendent of public instruction." He thought this would take the school system out of politics. Mr. Kellogg thought there was no call by the people for this change. Mr. Holls, while favoring the principle of the amendment, and regarding the argument in favor of it as unanswerable, thought the subject should not then be considered, and hoped that the section as reported by the committee and amended by Mr. Hawley would be adopted. He said the board of regents asked to be recognized in the Constitution, but did not ask for more. The legislature could at any time transfer to the regents the power to choose the superintendent of public instruction. Mr. Durfee proposed to modify the Cookinham amendment by omitting the provision authorizing the regents to remove the superintendent. Mr. Moore opposed the Cookinham amendment, preferring "to create a great officer to be elected by the people, who should be the head of the board of regents and at the head of the educational system of the state,—an officer of the people." Mr. Platzek thought there would be danger to the school system, and also to the proposed new Constitution, "if we intrust or confer on the board of regents the power to select the superintendent of education." The university and the department of public instruction occupy different fields, and should be kept separate. Mr. Root favored the principle of the Cookinham amendment, but believed that the committee

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on education had adopted a reasonable compromise between two extreme views, and therefore thought the report of the committee should be approved without change. Mr. Cookinham withdrew the amendment.

Mr. McIntyre moved to strike out the 2d section. He objected to perpetuating the university in the Constitution, believing that unification could be most surely accomplished by a board of education, with a representative from each judicial district, with power to elect a superintendent of public instruction, and have absolute charge of the entire educational system, from the kindergarten to the university. If the regents were left out of the Constitution the legislature could at any time unify our educational system. Mr. Towns thought the university should be protected by the Constitution, saying that "it is from above that the impetus to education and advancement must come, and not from below." "The higher education sheds its light from above." Mr. Deyo supported Mr. McIntyre's motion. The whole subject of higher education should be left to the discretion of the legislature, and that body should not be fettered by any constitutional prohibition.

Mr. E. R. Brown, a member of the committee on education, said the discussions before the education committee during its consideration of the article showed that the common schools and also the higher schools were in an unsatisfactory condition, due largely to the want of unity in our educational system. He said the committee adopted the 2d section by a majority of one in a full meeting of the committee; that the majority of the committee did not believe that unification could come through the board of regents as then organized. Mr. Gilleran objected to perpetuating any corporation in the Constitution. Mr. Hirschberg, a member of the committee, opposed the motion to strike out the section. He

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said it seemed to the committee desirable "that something general and organic in its nature should be embraced in the Constitution, recognizing the fact that the state guaranteed education to its citizens." That was the reason for the 1st section. The 2d section was not intended to fetter or embarrass the legislature, but merely to "recognize and continue that which was the basis and the safeguard of higher education, and continue it in existence during the life of the Constitution." Mr. Goodelle thought that, if the material interests of the state—the canals, salt springs, forests, and elections—were to be protected by the Constitution, the Convention could not consistently refuse to protect also the great interests of education by perpetuating in the Constitution the head of the educational system. Mr. Root said that, if the superintendent of public works and the superintendent of prisons, heads of two great departments, could have a place in the Constitution, certainly the university, one of the greatest educational institutions in the world, should also have a place. Mr. Holls believed that the Convention could do nothing to elevate common schools, "more important and of greater permanent value than to give this constitutional recognition to higher education." Mr. McIntyre's motion to strike out the university section was determined in the negative, but the record does not show the vote.

§ 3. **Education funds.**—(This section was continued from the former Constitution without change.)

§ 4. **Sectarian instruction.**—Neither the state, nor any subdivision thereof, shall use its property or credit or any public money in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. This section shall not apply to schools

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in institutions subject to the visitation and inspection of the state board of charities.

In its report accompanying the article the committee on education say concerning this section that in its opinion "there is no demand from the people of the state upon this Convention, so unmistakable, widespread, and urgent, none, moreover, so well-grounded in right and reason, as that the public school system of the state shall be forever protected by constitutional safeguards from all sectarian influence or interference, and that public money shall not be used directly or indirectly to propagate denominational tenets or doctrines. . . . The arguments in favor of such a provision are, in our opinion, conclusive; and the objection that it will result in making the schools 'Godless,' or that such a constitutional prohibition would imply on the part of the people enacting it hostility, or even indifference, to religion, seem to us to be both groundless and absurd. In adopting this section the Convention will, in our opinion, most effectively aid all that is highest and best in religion, for, by establishing the principle that state education must necessarily be secular in its character, the field is left open beyond question or misunderstanding for religious teaching in the family, the Sunday school, and the church." Referring to the question whether the words "denominational tenets or doctrines" would in any way interfere with the reading of the Bible in the public schools, the committee say that in its opinion "the words proposed by us cannot with any reasonable interpretation or construction be taken to prohibit the reading of the Bible in the public schools." Commenting on the exceptional case in which the public money might be used in connection with the sectarian school or institution, namely, for "examination or inspection," the committee say that this

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does not affect the principle, "except in so far as it emphasizes even more strongly the interest and latent power of the state with regard to all institutions of learning." The committee was unanimous in the opinion that the "connection between denominational higher institutions of learning and the university of the state of New York is of the greatest advantage, not only to the institutions, but to the state, so long as this connection involves no further public aid than is incidental to examination and inspection. . . . Heretofore no distinction has been made between sectarian and nonsectarian academies and high schools in the distribution of the proceeds of the literature fund. . . . This part of the state's assistance is, in our opinion, contrary to the sound principle of separation of church and state, and will be absolutely prohibited by the adoption of our proposed amendment." This practice being "contrary to public policy in the highest sense, its discontinuance is demanded, not only for the sake of the state, but of the institutions and churches themselves;" but this does not mean that university supervision must necessarily be discontinued. Regents' examinations and certificates may be continued under the exception permitting "examination and inspection;" and the committee say that these words were introduced so that there might not be any question as to the authority of the university to continue such examinations.

In previous chapters I have given a sketch of the development of the policy of prohibiting public aid to private corporations, and have referred to the action of several conventions and legislatures and the Commission of 1872 in relation to this subject, resulting in the adoption of § 9 of article 7 in 1846, and of §§ 10 and 11 of article 8 in 1874. It will be remembered that § 10 excepted from the prohibition against state aid the fund or

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property held by the state for educational purposes. Numerous instances have been cited showing the early legislative practice of aiding corporations organized for a great variety of purposes, without special attention to educational institutions. Colleges and academies received many large donations from the state, which were deemed legitimate and were often urged by the executive for the purpose of fostering education beyond the opportunities afforded by public schools. Many attempts have been made to check appropriations to sectarian institutions, and amendments on this subject similar to those proposed in the Convention of 1894 had been previously suggested. The subject was, therefore, not new in this Convention, but had often been considered and widely discussed from various points of view. The proposition involved in these amendments marks a radical change of opinion concerning the legitimate function of public education.

I have already pointed out that in the first half of our state history there seemed to be no objection to combining religious and secular instruction in public schools. This practice was not only deemed unobjectionable from a social or political standpoint, but religious instruction was regarded as absolutely essential in a proper scheme of education designed to qualify youth for the duties of citizenship in a republic. In the section on education in the colony I have cited instances of joint religious and secular instruction, and have pointed out that the same person was often both minister and schoolmaster, and as schoolmaster taught the catechism and imparted other religious instruction and observed religious customs in connection with secular education. During the temporary reoccupation of New York by the Dutch in 1673 they took occasion to reassert the home religion, and by ordinance provided that "the sheriff and magistrates

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shall, each in his quality, take care that the Reformed Christian religion be maintained in conformity to the Synod of Dordrecht, without permitting any other sects attempting anything contrary thereto." This affected schools as well as ordinary religious observances. The Dutch and English adopted substantially the same policy in relation to religious instruction in schools. It already appears that education in the colony after the English conquest was for the most part under the direction of the Society for the Propagation of the Gospel in Foreign Parts, which was an English church organization; and the requirement that teachers be licensed by ecclesiastical authority has also been cited. Illustrations of the practice relative to religious instruction in schools are furnished by contracts made with schoolmasters in Flatbush in 1681 and 1682, which required the school to be opened with "the morning prayer, as it stands in the catechism, and closed with the prayer before dinner; in the afternoon it shall begin with the prayer after dinner, and end with the evening prayer. The evening school shall begin with the Lord's prayer, and close by singing a psalm." Instruction in the common prayers and catechism was especially required on Wednesdays and Saturdays. The Flatbush contracts are quoted in Mr. Pratt's "Annals," from which it appears that the contract in 1682 was signed by the constable, overseers, and consistory; which shows the combined secular and religious authority under which the school was maintained.

The following Standing Order of the Society for the Propagation of the Gospel in Foreign Parts clearly manifests its policy in relation to religious instruction in schools. Schoolmasters were required "to consider the end for which they are employed, *viz.*, the instructing and disposing children to believe and live as Christians. In order to this end, that they teach them to read truly

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and distinctly that they may be capable of reading the Holy Scriptures and other pious and useful books, for informing their understanding and regulating their manners. That they instruct them thoroughly in the Church catechism; teach them first to read it distinctly and exactly, then to learn it perfectly by heart, endeavoring to make them understand the sense and meaning of it by the help of such expositions as the society shall send over."

The statesmen in control of public affairs at the foundation of the state were familiar with the practice in relation to schools, namely, that for the most part schools were a matter of private concern, and supported by private bounty; that there was no general colonial policy in relation to education, though some localities did give occasional public aid to schools; and also that schools were expected to provide both secular and religious instruction. I have already cited the statutes in relation to gospel and school lots which were enacted at the beginning of our state history. It is a noteworthy fact, to which I have already called attention, that in 1781, several months before Cornwallis surrendered, the legislature, in a statute passed to encourage enlistment in the Revolutionary Army, and offering bounties of public land for that purpose, reserved in each township 500 acres "for the support of the gospel," and 360 acres "for the use of a school." Later statutes continued this policy.

Governor George Clinton, in his speech of 1802 urging the re-establishment of the common school policy, said the "advantages to morals, religion, liberty, and good government arising from the general diffusion of knowledge are universally admitted." Again, in 1803 he said the diffusion of knowledge was essential to the promotion of virtue; and that "education, by correcting the morals and improving the manners, tends to prevent those evils

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in society which are beyond the sphere of legislation." Governor Lewis, in his speech to the legislature of 1804, took strong ground on the subject of education, saying, among other things, that "in a government resting on public opinion, and deriving its chief support from the affections of a people, religion and morality cannot be too sedulously inculcated." In 1810 Governor Tompkins urged the legislature to consider "means of instruction for the rising generation; to enable them to perceive and duly to estimate their rights; to inculcate correct principles and habits of morality and religion; and thus to render them useful citizens." Again, in 1811 he commended to the attention of the legislature "the promotion of learning, and the consequent advancement of the cause of morality and religion." The Commission of 1811, in its report to the legislature of 1812, urging it to establish and maintain popular education, said that, if the subject be regarded as connected "with the cause of religion and morality merely, its aspect is awfully solemn;" but it was a subject "intimately connected with the permanent prosperity of our political institutions. The American empire is founded on the virtue and intelligence of the people." Governor De Witt Clinton, in his speech of 1822 considering public education, said "the first duty of a state is to render its citizens virtuous by intellectual instruction and moral discipline, by enlightening their minds, purifying their hearts, and teaching them their rights and obligations." In his message of 1827, discussing the "cultivation of education" and observing that in the old world "seminaries for general education are either not provided, or but imperfectly supplied by charity and Sunday schools," he said we should "spare no exertion and shrink from no expense in the promotion of a cause consecrated by religion and enjoined by patriotism."

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We get a view of the prevailing custom in relation to religious instruction in schools from a report to the assembly of 1838 by its committee on colleges, academies, and common schools, denying a petition for the enactment of a law prohibiting religious exercises in public schools. The committee argued the question at considerable length; and the principles enunciated in the report are so important that a brief synopsis of them cannot fail to interest the student of our institutions. Several persons had presented a petition for the enactment of a law prohibiting "the practice of praying, singing, reading the Bible, and other religious exercises" in schools, academies, and seminaries receiving public aid. The petitioners regarded this practice as a "violation of the law of equality and the right of conscience, as aiding to propagate and enforce peculiar religious opinions at the public expense, and leading to, if not actually forming, a union of church and state." The committee reviewed the history of our school policy, saying that, for the sake of self-preservation, the state found it necessary to maintain a system of public education. But, while schools were thus provided, attendance was not compulsory, and parents could send their children or not as they might prefer. It seemed that some parents, on sending their children to the common school, found there the practice of devotional exercises, "which they deemed highly offensive and objectionable," and these objections are stated as follows:

1. "That the Christian religion is thus supported or aided at the public expense." The committee answered this objection by saying that it was not true. That the teachers were paid for teaching, not for praying, and that no part of their compensation was for the latter service.

2. "That the rights of equality and the rights of con-

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science are thereby invaded, inasmuch as the unguarded minds of their children are thus exposed to be contaminated." On the second point the committee said that the majority in a community had the right to determine the form of proceedings and the course of instruction in the school, subject to the requirement that the "form or ceremony insisted on is in itself decent and becoming, and not in hostility to the main purpose" of the school. The committee said the practice was not prescribed by any state authority, and was wholly within the discretion of the towns and districts. "A majority of the parents sending children to a public school, acting for their children, as they have a right to do, may rightfully agree and direct that the proper business of the school shall be opened or closed, or both, daily, with religious exercises. . . . The practice is innocent and decent, and we know of no principle on which a minority, voluntarily associating with them in pursuit of an object in which they are all agreed, can properly dictate to the majority the conventional terms on which the body shall proceed." The committee said the petitioners asked for a law to "prevent a majority, associated and meeting for the purpose of instruction, from indulging in social prayer and reading the Bible as a devotional exercise."

On the subject of prohibiting the use of the Bible in schools, the committee said the use of the Bible as a class or text book was "indispensable to a good system of popular instruction." The existence and continuance of popular government are always dependent on the existence and continuance of popular intelligence and virtue; but popular education must be placed under the care and patronage of the government; "it is not enough that the government shall provide for the support of education; it is bound, so far as it can, to see that its bounty is so applied as to produce the result at which it aims;" and

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it should, therefore, prescribe a proper course of study. This subject was then under the jurisdiction of the inhabitants of a community who chose six inspectors, who had power to employ teachers and prescribe a course of instruction. "Moral instruction is quite as important to the object had in view in popular education as intellectual instruction; it is indispensable to that object. But to make such instruction effective it should be given according to the best code of morals known to the country and the age; and that code, it is universally conceded, is contained in the Bible. Hence the Bible, as containing that code, and for the sake of teaching and illustrating that code, so far from being arbitrarily excluded from the schools, ought to be in common use in them." The committee thought that any system of education "which overlooks the training and informing of the moral faculties must be wretchedly and fatally defective. . . . The moral powers must be informed and cultivated in our schools. Children must be instructed in moral truth, and be taught to feel habitually the force of moral obligation; and, to do this according to the best standard, the use of the Bible for that purpose cannot be dispensed with. . . . If the minority may rule in regard to the use of this book, and forbid the teaching of its code, they may do the same thing in regard to any other book or any other subject." The committee thought that instruction in morals according to the Christian code was not an infringement of the religious rights of any individual. "Religious freedom consists in a man's professing and enjoying what religious faith he pleases, or in the right of rejecting all religion; and this freedom is in no degree invaded when the morals of the Bible are taught in public schools." The committee, while expressing the opinion that the "Christian code of morals should be taught in our schools as an indispensable part

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of our system of popular instruction," believed that the Bible should be studied, not only for its moral principles, but also "as a history and as a classic;" and they urged "the indispensable necessity of preserving to the people the right to employ the Bible as a means of invaluable secular instruction in all the public schools and seminaries."

The subject of religious instruction in schools received early attention in the city of New York. The act of 1842, hereafter cited, contained provisions relating to sectarian instruction, and the legislature of 1844 passed chapter 320 in relation to schools, which contained the provision that "no school shall be entitled to a portion of the school moneys in which the religious sectarian doctrine or tenet of any particular Christian or other religious sect shall be taught, inculcated, or practised, or in which any book or books containing compositions favorable or prejudicial to a particular doctrine or tenet of any Christian sect, or which shall teach the doctrine or tenets of any other religious sect, or which shall refuse or permit the visits and examinations provided for in this act;" and school officers were charged with the duty of enforcing the prohibition against sectarian instruction. The act also provided that "nothing herein contained shall authorize the board of education to exclude the Holy Scriptures without note or comment, or any selections therefrom, from any of the schools provided for by this act; but it shall not be competent for the said board of education to decide what version, if any, of the Holy Scriptures without note or comment shall be used in any of the said schools: Provided that nothing herein contained shall be so construed as to violate the rights of conscience as secured by the Constitutions of this state and the United States."

The foregoing provisions relating to religious instruc-

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tion and the use of the Bible in schools were continued in the revised school law of New York of 1851, the consolidation act of 1882, in the Greater New York charter of 1897, and in the revised charter of 1901.

The modern demand that the school fund be divided, and a portion of it used in support of private schools not under state control, was considered by the assembly committee on colleges, academies, and common schools in 1853. Certain Roman Catholic citizens of New York, Utica, Syracuse, Oswego, Auburn, Rome, and elsewhere had presented a petition to the legislature "praying for the passage of a law authorizing the establishment of schools where their children may be instructed in religion, without which they deem education more pernicious than useful, and for granting such schools a portion of the school fund and taxes proportioned to the number of children attending said schools." In its report the committee said it had examined the history of our common school system in order to discover "the secret of its prosperity, and the principles that will guide it in its future triumphant career towards an ultimate state of perfection." The committee then cited several circumstances in the development of the system which have already been noted in this article, and quoted executive and other opinions concerning public education. From our educational history the committee deduced the principle that it is not only the right, but the duty, of the state to furnish and superintend the system of public education. The committee said this system was "eminently catholic" and had been distinguished by "its entire exemption from everything like a partisan or sectarian character, from its inception down to the present day," without participating in or ministering to the peculiarities of any party or any sect; that one chief element of the success of the system had been the refusal of the government to listen to the

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suggestion of fractionating this system in favor of, or against, any political party, or any religious sect or denomination; and all affinity with systems of faith or sects, whether religious or political, had been sedulously avoided. The committee said the fathers of our school system, "in their wisdom, seem to have left the religious education, the sectarian discipline, the instruction in religious creeds and religious practices, where they rightfully belong,—to the genial influences of the domestic fireside; to the family altar; to the church; to pastoral instruction, the Sabbath school, and the Bible class; or to such other means outside of the schoolhouse as the judgment or taste of parents or guardians should dictate." This condition indicates a decided change from the practice described and sustained in the report of the assembly committee on education in 1838 in relation to the use of the Bible in public schools. The committee then went on to say that, "had the founders of this system, at any stage in its progress, parceled out the bounty of the state for the support of common schools in favor of those based upon the peculiarities of any party or sect, or upon any of the arbitrary or conventional distinctions that prevail in civilized society, your committee believe that its strength would have been frittered away, and lost amid the jealousies and contentions it would have engendered;" that "it would have added a new, if not a fearful, element to the bitterness of religious and sectarian controversy,—a controversy which this circumstance alone would have directed with crushing force against the utility and suitability of our present great system of primary instruction. . . . The genius of our institutions is pre-eminently that of universal religious toleration, and it should never be overlooked for a moment in our legislation upon the management of the common schools of the state. . . . Granting this

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privilege to one sect would open the door for applications for every sect and denomination in the state; and, in view of their number, the conflicting and contradictory nature of their tenets, we should regard as suicidal the attempt to embrace them in the system of our common schools, or sustain them by its funds;" such a policy would open the "flood gate of ruin in our common school system, which future legislation would hardly be able to restrain; for, under our system of religious toleration, no resting place would be found until our magnificent school fund was subdivided among every denomination in the state." The first step in fractionating the school fund should be viewed with the "utmost anxiety and alarm as a fatal blow struck at the prosperity and utility of a system of primary education." The committee recommended that the prayer of the petitioners be not granted.

In 1840 Governor Seward called special attention to the large number of orphan indigent or destitute children, and children of immigrants, who for various reasons were deprived of the ordinary opportunities of the schools, and said he did not hesitate "to recommend the establishment of schools in which they may be instructed by teachers speaking the same language with themselves, and professing the same faith." He referred to the subject again in his message of 1842, stating that in the city of New York 20,000 children were without school instruction. He thought that one of the chief causes of this condition was the fact that public schools in New York were under the control of an association which had the power to choose school officers, and that thereby the people of the city did not enjoy the same privileges in relation to schools that were accorded to the people of other parts of the state who had a right to choose their own school officers. He recommended a thorough re-

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form in school administration in New York, restoring to the people the right to control the education of their own children in public schools by themselves choosing the officers who should manage these institutions, including a central board of education. He thought this would bring into the schools a large number of children whose parents believed that their rights of conscience had been violated by the existing methods of conducting the schools.

The legislature of 1842 adopted Governor Seward's suggestion, and passed an act (chap. 150) which provided for the election of school commissioners, trustees, and inspectors by districts in the city of New York, applying, so far as practicable, the school law in force in towns. Several private institutions under sectarian control were made district schools for the purposes of the act, and entitled to share in public school money, and were placed under the general jurisdiction of the board of education. The act provided that no school "in which any religious sectarian doctrine or tenet shall be taught, inculcated, or practised shall receive any portion of the school moneys." The act was amended in 1843, and the whole subject revised by the foregoing act of 1844.

The policy of using private institutions in connection with the public school system was further declared by the legislature of 1847, which, by chapter 485, appropriated $3,000 to be paid to incorporated orphan asylums, for the instruction of inmates at least four months in a calendar year in specified studies, under the care of qualified teachers. The institutions were subject to the inspection of local school officers, and were also required to make an annual report to the state superintendent of common schools. The act was silent concerning religious instruction in such asylums. Another act passed in 1850 (chap. 261) provided that, except in the city of New York,

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schools in incorporated orphan asylums should participate in the distribution of the school moneys, and for that purpose should be deemed common schools, and subject to the rules prescribed for such common schools; but should continue under the immediate management and direction of the society. The policy of these statutes was continued by the legislature of 1862 in the act, chapter 258, which provided that "industrial schools established and maintained under the charge of the Children's Aid Society" in the city of New York should participate in the distribution of the common school fund the same as common schools and subject to the same conditions, and, by the act of 1869, chap. 366, the same rule was extended to the school established under the charge of the Nursery and Child's Hospital.

When the section on sectarian instruction was taken up in the Convention of 1894 Mr. Choate moved to strike out the last sentence relative to institutions under the jurisdiction of the State Board of Charities. He thought this exception would nullify the first part of the section, and defeat its real purpose. Mr. Lauterbach offered the following substitute for the last sentence: "This section shall not apply to orphan asylums or correctional institutions in which education is incidental only." He thought with the exception in its original form "the legislature might put every institution, including parochial schools, under the supervision and jurisdiction of the State Board of Charities, and in this manner state or local funds might be applied to parochial or sectarian or denominational schools." Mr. Marshall proposed to state the substitute in the following form: "This section shall not prohibit secular instruction to the inmates of any orphan asylum, or of any institution to which children may be committed by judicial process, in which education is incidental only." Mr. Forbes proposed the fol-

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lowing addition to § 4: "This section shall not apply to corporations organized under general laws applicable to all orphan asylums or institutions for the care and maintenance of dependent persons under sixteen years of age, committed thereto under the provisions contained in said general law. Such general laws may be repealed or amended." Mr. Choate's amendment, striking out the last sentence, was adopted; all the others were rejected.

Mr. Cassidy offered the following substitute for the section, which was adopted in committee of the whole by a vote of 61 to 56:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning not wholly owned or controlled by the state or a subdivision thereof."

On Mr. Root's motion, the Convention disagreed with the report of the committee of the whole, and, by a vote of 71 to 68, recommitted the education article to the committee on education, with instructions to report the 4th section in the following form:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

This restored the section to the form in which it had been originally reported by the committee on education,

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with the addition of the clause "or authorize or permit either to be used directly or indirectly," and omitting the last sentence, which had been stricken out on Mr. Choate's motion.

Mr. Cassidy, in discussing his amendment, said he was opposed to the proposition reported by the committee on education because he believed it "unconstitutional, a surrender to bigotry and fanaticism, and at war with the generally accepted doctrine of separation of church and state." He said the principle contended for was that, if "the state shall not make a grant to a school simply because it is a religious school, so it should not refuse a grant on that ground." The church is a civil, as well as a religious, corporation, "and the state may make grants to it for civil reasons, the same as to a peculiar secular organization." He thought the state should make grants, for educational purposes, to denominational academies, as well as to those which were undenominational. The state has nothing to do with the school, except with its civil character and the nature of the secular instruction given therein. "The state has no right to discriminate in the matter of grants between two schools which render the state the same secular service, because of religious or ecclesiastical character or relations." Mr. Cassidy said no one had yet defined "denominational tenet or doctrine." Mr. Peck said there can be no class in any community which deserves public education more than those children who are kept in charitable institutions. He thought they should have religious training during their tender years. The common school money ought to reach these dependent children. Replying to a question by Mr. Countryman, Mr. Peck said he thought it would be more economical to employ a teacher in the institution than to take the children out and send them to a public school.

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Mr. McDonough said there was a total annual saving to the public by parochial schools of $2,445,000; that the Catholics were also paying their taxes for the public schools, and that they were "not asking much when they ask, in common with other denominational institutions of the state, that the children sent to their institutions by the state shall be provided with a proper system of education." Mr. C. B. McLaughlin was opposed to any division of the common school fund. The school fund should be used exclusively for education in the common schools. Mr. Towns said it would be folly to commit children to charitable institutions if only their material interests were to be provided for, and that since 1875 it had been the declared policy of the state that children in such institutions should have, not only "food and raiment," but should be instructed in the elementary principles of education. Mr. Hirschberg thought the subject should be included in the charities article which was yet to be considered by the Convention. Mr. Vedder said that inmates of these institutions, though denominational, should be educated "by taxation raised by the people; but let the education be secular and under state or public domination." He concurred in Mr. Hirschberg's suggestion, that the subject belonged in the charities article. Mr. Holls said the principle of the section was that "instruction by the state must be secular;" but this does not mean that it is irreligious. "The state exists for one purpose, religious communities for another. . . . If the state can teach any religion, it must, in all honor and justice, teach all religions; and this means that it must decide what is religion, and what is true religion. Secularity is the only true principle, and hence the best policy for the state." Mr. Root said the principle of this section—the separation of church and state—was the greatest principle which this Convention had an op-

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portunity to declare, and that it should not be cut down by any proviso to protect any private interest. "I believe," he said, "that every true American, of whatever religion, would be for this section as it stands now. It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between church and state." The article was ordered to a third reading by a vote of 77 to 60.

On third reading Mr. Peck moved to add the following to § 4: "This section shall not prevent the legislature from making provision for the secular education of the blind, the deaf and dumb, juvenile delinquents, orphans, and other dependents, or legally committed children, inmates of charitable institutions, by the employment of persons duly qualified according to law, as teachers of public schools, to give instruction in such institutions during usual school hours."

Mr. Foote proposed to modify the section by providing specifically that "no creed, doctrine, or tenet of any religious sect or denomination shall be taught in schools or institutions of learning receiving such maintenance or aid;" continuing the first part of the section as in the Cassidy substitute. He thought the only "proper basis for an amendment of this kind is one to provide for public money for public schools only;" his amendment prevented the teaching of religious dogmas in public schools. Mr. W. Sullivan proposed to extend the prohibition of the section, and make it applicable to schools in which any religious doctrine or tenet, whether denominational or undenominational, is taught, or in which "any religious service or exercise, whether distinctively denominational or not, is conducted." All the amendments were rejected, and the education article, including § 4 in the form proposed by Mr. Root, was adopted by a vote of 108 to 37.

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Art. X. Local Officers; General Provisions.

This article was, in the main, satisfactory to the Convention, and it therefore received little attention. The office of coroner was abolished as a constitutional office, leaving it subject to the control of the legislature; official terms of county officers were changed in certain counties, and the annual legislative session was required to begin on the first Wednesday instead of the first Tuesday of January.

Coroner.—Mr. Dickey proposed to amend the section by omitting the word "coroner." Mr. Porter proposed to continue the office of coroner, and to require the incumbent to be a physician and surgeon in active practice for five years. Both amendments were referred to the committee on county, town, and village officers, and the Dickey amendment was reported favorably. Mr. Dickey, debating the amendment, said it had been generally approved, and was indorsed by many newspapers and medical societies. He thought the office answered no useful purpose, and occasioned additional expense in criminal investigations. He said a coroner's verdict was not binding on anybody. By eliminating the office from the Constitution the legislature would be at liberty to abolish it, and provide a reasonable substitute. Mr. Hottenroth thought the amendment ought to require the legislature to provide an officer to perform the coroner's functions. Mr. Lester said this was unnecessary, as the office would still continue by virtue of the statutes, even if omitted from the Constitution. The amendment was adopted by a vote of 97 to 40. Laws 1898, chap. 334, regulated the number of coroners; Laws 1899, chap. 464, abolished coroners' juries except in five counties; and Laws 1902, chap. 577, abolished coroners in Erie county.

Changing official terms in certain counties.—Mr. Man-

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tanye offered an amendment to § 1, containing a provision authorizing boards of supervisors, or the common council of a city where the county and city were conterminous, to change the term of an officer named in the section from three years to two or four years, but requiring the term to end in an odd-numbered year. After the amendment had been adopted striking out the word "coroner," the section was further amended, on motion of Mr. Jesse Johnson, by providing that, in the counties of New York and Kings and in any other county conterminous with a city, officers named in the section should be chosen once in two or four years, as the legislature might direct. Coroners having been omitted, Mr. Johnson's motion included sheriffs, county clerks, district attorneys, and registers. The section in its final form was adopted by a vote of 93 to 32.

Annual legislative session.—Mr. Gilbert offered an amendment requiring the legislature to meet on the first Wednesday of January instead of on the first Tuesday, as required by the existing Constitution, and abrogating the provision authorizing the legislature to fix a different time for its annual meeting. The amendment was referred to the committee on legislative powers and duties, and reported favorably. Mr. Gilbert, in explaining the amendment, said it was intended to "avoid desecration of Sunday by caucus work on that day." The amendment was adopted by a vote of 123 to 7.

Miscellaneous suggestions.—Mr. Tibbetts proposed to abrogate the provision making sheriffs ineligible for a second consecutive term. Mr. R. M. Johnston proposed to amend § 3, in relation to the duration of an office, by abolishing life tenures and prohibiting the future creation thereof. Mr. McKinstry proposed to amend § 2 by authorizing the legislature to provide for woman suffrage

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in the election of local officers. I have already cited the act of 1901, chap. 509, which conferred on women the right to vote on tax questions in towns and villages. This was only a part of the reform sought by Mr. McKinstry's amendment. Mr. McKinstry also proposed to amend § 1 by prohibiting county treasurers from holding any other office, and making them ineligible for a second consecutive term. Mr. Parmenter offered an amendment to § 2, requiring the legislature specifically to designate the authorities in counties, cities, towns, and villages who should be vested with the power of appointment. Mr. Holcomb proposed to amend § 2 by providing that incumbents of new offices should either be elected by the people or appointed by the governor. Mr. Becker proposed to amend § 1 by authorizing the governor to remove an officer only "for good cause shown." Mr. Roche, adopting the Dickey amendment, omitting coroners, proposed to include county treasurers in § 1. His amendment also added to the section a provision requiring officers named in it to be paid by salaries which could not be increased or diminished during their term of office, and that all official fees and percentages should be paid into the county treasury. The amendment also provided for the election of a county comptroller except in a county conterminous with a city. Mr. A. H. Green proposed to abolish the office of commissioner for loaning the United States deposit fund, and to transfer his powers and duties to the state comptroller.

Art. XI. Militia.

Edmund Burke's observation that "education is the cheap defense of nations" must, like most aphorisms, be received with some qualification. It is only a partial truth, and probably was not intended to express a condition in which military power would not be needed,

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but rather to assert that education raises the standard of citizenship, and thereby enlarges the scope and beneficent results of civilization. It is a good maxim in time of peace, and in time of war the benefits of education immediately appear in the higher qualities of the men who may be called into active service in promoting or defending national interests. Every civilized nation has learned this truth, and history is full of illustrations of the power of education as a means of national defense, operating through the increased efficiency of organized military power. The times in which Burke lived did not promise an early cessation of military movements, nor encourage the hope of an early disbandment of standing armies. Universal peace seems much nearer realization now than when Burke wrote, but it is still too far away to justify a reliance upon education as the only means of national defense. It has been the general policy of nations, ancient as well as modern, to regard every able-bodied man as a possible soldier, and in many highly developed nations he has been required to receive some degree of military instruction to qualify him for possible national exigencies. This nation has adopted the general policy of requiring every able-bodied citizen of military age to be ready on demand to become a member of a military organization in actual service, and thus discharge, in that special manner, the obligation which every person owes to aid in preserving the government under which he lives.

The colony of New York, during a large part of its history, was, in a broad sense, an armed camp. This resulted partly from the exigencies of pioneer life, and partly from the laws enacted and enforced, which required every able-bodied man to arm himself at his own expense, and be ready, on short notice, to defend his home, the settlement, or the colony. The same principle,

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with modifications, has been continued under state government, and appears in our latest military codes, except that persons subject to military duty are not now required to arm themselves at their own expense. It will also be observed that the militia article of the Constitution of 1894 perpetuates the principle that every man of military age is deemed a possible soldier.

The Dutch West India Company, which received its charter on the 3d of June, 1621, and under whose auspices colonization in New York, then New Netherland, was immediately begun, was vested not only with commercial powers, but also with large governmental powers, which are described and interpreted by the States General in an order dated January 23, 1664, only a few months before the Dutch lost control of the colony, as including the right "to make and conclude contracts, treaties, and alliances with the Princes and Natives of the countries contained therein, erect fortresses and strongholds there, appoint, remove, and dismiss governors, soldiers, and officers of justice necessary for all requisite service for the conservation of the places, the maintenance of good order, police, and justice," subject, however, to the authority of the States General. Here was a grant of sovereign power which the company exercised under modifications prescribed by the home government, including the administration of military affairs. In the exercise of its powers the company, soon after the inception of its project, erected a fort at New Amsterdam, and organized a military force. In the so-called "Freedoms and Exemptions" granted by the company, June 7, 1629, for the purpose of encouraging the settlement of the colony, and which provided for establishing the feudal system under government by patroons, who were vested with the "chief command" in the portion of the colony allotted to them, such patroons were given large civil

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authority, and were "required to administer the government under their jurisdiction according to the laws of the Netherlands," and under the general superior authority of the company. The patroons do not seem to have been directly vested with military authority, but the company promised to take all the colonists under their "protection, and them defend against all foreign and domestic wars and powers with the forces they have there as much as lies in their power." The company also promised, without delay, to finish the fort on Manhattan Island. The company thus reserved to itself, and continued to exercise, full military authority in the colony. The grant of Freedoms and Exemptions was afterwards renewed, 1640, by direct authority of the States General. The company agreed to maintain a fort and garrison on Manhattan Island. No military power was granted to the patroons. Governor Peter Stuyvesant, in his report of October 19, 1665, on the causes which led to the loss of the colony, presents a gloomy picture of the colony at the time of his accession, in 1647. The military weakness of the colony is shown by his statement that the "whole province would not muster 250, at most, 300, men capable of bearing arms."

It seems from a report of a committee of the States General, considered in April, 1650, that military organization and training had been neglected in the colony, for the committee says that "the people of New Netherland either are not obliged, or have themselves forgotten, to possess and make use of arms necessary for their own defense;" and recommends that the inhabitants be "bound each to provide himself with a good gun and the requisite powder and lead, and be enrolled and formed into companies." The military history of the colony under Dutch sovereignty is quite meager, but during most of this period the colony was feeble, the population small, and

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there was little occasion for any elaborate military organization. On the 27th of August, 1664, O. S., the colony passed under English control, and a proprietary government was established by the Duke of York under a charter granted to him on the preceding 12th of March. The body of laws for the government of the colony, known as the "Duke's Laws," was promulgated on the 1st of March, 1665. These laws contained a chapter on "military affairs," which I think was the first military code in the colony. It contained specific and detailed provisions relative to military organization. The preamble recited that the "good management of the militia is the support of all governments in peace and safety, to which all persons, of what quality soever, are obliged in duty and conscience in their proportions to be aiding and assisting." The code required all male persons above sixteen years of age, with specified exceptions, to attend all prescribed military training and service. Each town was required to maintain a "warehouse," and keep therein a specified quantity of ammunition. All men between sixteen and sixty years were required to provide for themselves arms, accoutrements, and ammunition, as prescribed by the code. The constable and overseers were authorized to nominate a captain, lieutenant, and ensign, who were to be commissioned by the governor, unless he objected to a nomination, in which case the appointment was to be determined by "the plurality of voices" of the soldiers. Each town was required to have four training days in each year. There was also to be a general training once a year in each riding, and a general training for the colony once in two years. Military punishments, among other things, included the stocks, "and riding a wooden horse." The code contained the following provision: "No man shall be compelled to bear Armes or wage war by sea or Land, without the bounds

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and limits of this Government, But from Defensive warrs noe man shall be exempted." We also find in this code a provision relating to foreign service which is worthy of notice because a similar provision was afterwards incorporated in the early militia laws of the state. The code, after reciting that, "in respect of the mutuall and Brotherly Assistance which wee ought at all times to Cherish and improve, for the helpe and Support of our English Neighbours in other his Majestyes Colonyes," authorized the governor and council at any time "by beat of Drum" or otherwise, to organize and "send out of this government" all men who might volunteer for that purpose. Such volunteer force was to receive one month's pay from the colony of New York, to be raised by general tax, and any other expenses were to be paid by the colony by which the force was employed. Troopers were required to furnish their own horses and accoutrements. The code also contained provisions relating to military discipline which need not be cited here.

The earliest reference I have found to the number of men in the colonial military establishment is in a report by Governor Andros, in 1678, from which it appears that there were then in the militia about 2,000 men, including "140 horse in three troops." In the instructions to Governor Dongan, January 27, 1683, he was authorized to "settle and establish a militia of the inhabitants" under proper officers, and to use the military force of the colony against any foreign or other enemies, and "represse, fight with, kill and destroy them."

I have already cited in another chapter the provision in these instructions requiring Governor Dongan to call an assembly, and have given an account of the selection and meeting of that body in October, 1683. On the 27th of October, 1684, the assembly passed a militia law which, according to the preamble, was enacted "for the better

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regulating of the militia within this province, and for the Common Defense and Preservation thereof." A major was to be appointed in each county, who was to have general charge of the militia therein. The governor was authorized to appoint all military officers, to be chosen from the freeholders and inhabitants of the respective towns and counties. The act does not assume to cover the whole subject, and is much less complete than the militia chapter in the Duke's Laws. The revived assembly of 1691 passed a new militia law; and all male persons between fifteen and sixty years of age were made liable to military duty.

Governor Fletcher, in a report to the home government, in April, 1693, states the aggregate militia in the colony by counties at 2,932. This probably meant the active organized militia, and apparently did not include the whole number of able-bodied men, for, according to an estimate made to the Lords of Trade, in September, 1696, by Abraham Gouvernier and Jacob Leisler, the colony then contained from 8,000 to 9,000 families; and that, in 1689, four years before Governor Fletcher's report, the militia numbered from 12,000 to 14,000 men. Mr. Gouvernier had been employed in the colonial secretary's office, and based his estimate on information then obtained. This estimate seems too large, especially if we are to admit the accuracy of the estimate as to the number of families. Governor Cornbury, in 1708, estimated the number of militia at "rather more than 4,000;" but probably did not intend to include the whole number of able-bodied men.

The militia laws were revised in 1702. The preamble recited the importance of arming the inhabitants and training them in the "Art Military," not only for the honor of "her Sacred Ma'ty" (Queen Anne), but also for the "preservation of their own lives and fortunes."

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The military age was fixed from sixteen to sixty years. Soldiers were required to provide their own arms and a specified quantity of ammunition, and troopers were required to provide their own horses. In addition to fire-arms, soldiers might also be required to provide a pike or lance. Negroes, Indian slaves, or servants could not be "listed," or do duty in the militia. The act was to continue in force only two years.

The assembly evidently intended to maintain control of the military establishment, including its organization and support; at least, so far as this support was the subject of local taxation; for we find that, running through a long period, a militia law was passed almost biennially. This was consistent with the policy adopted by the assembly in relation to annual taxation, which has been noted in the article on apportionment. The growth of republican principles, which was quite natural in view of the separation of the colonists from the direct influence of home policies, and the necessity of relying largely on themselves in every emergency, was manifested in a peculiar manner by an incident described by Governor George Clinton, in a report dated November, 1747, referring to the orders which he had received to discharge the troops raised upon the expedition to Canada. He said he had recommended that the assembly retain 800 men on the pay of the province, "which they refused to do." He then ordered the colonels to hold their regiments ready to march on an hour's warning. The Governor continues: "Accordingly this Day the Militia Reg't of this city with the independent companies were drawn out and when in the field my orders were read to them by their respective Captains, and every Man unanimously refused to obey my orders from the Crown unless an Act of Assembly was first passed in this Province for that purpose, whereby I conclude the Militia of

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the other Countys will take example. This evidently shews what Allegiance the People of this Province pay to the Crown, and how well my opinion of their levelling and republican principles has been grounded from time to time." This colonial governor, George Clinton, evidently entertained different views of republican principles from those entertained by his greater namesake, the first governor of the state, who fought for those principles through the Revolutionary War, and was a leading exponent of them through the twenty-one years that he held the office of governor of the state.

A new militia law was enacted in 1772 which fixed the military age from sixteen to fifty, and every able-bodied man, with certain exceptions, was required to be enrolled. The statute continued former provisions requiring soldiers to furnish their own arms, horses, and ammunition. The act was limited to two years. Governor Tryon, in January, 1773, made a special report on this law, saying that it had been well received, that the officers in general "had discovered a laudable emulation for appearing and acting up to their appointments, and that the desire of acquiring a knowledge in the Art Military is equally conspicuous even among those of the rank and file." He then described a review of several companies and regiments recently organized, which he said was "the most brilliant Militia review that was ever had within His Majesty's American dominions." It is not improbable that the military activity of that period may have had a deep underlying motive, which was not fully appreciated by the Governor. Republican principles were rapidly developing. The movement for organized resistance against the Crown was becoming consolidated in all the colonies. It was already apparent to many farsighted patriots that a struggle with the Crown was imminent. Agitation was active, and the grievances of the

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colonies were freely discussed. It will be remembered that the first Continental Congress was held at Philadelphia the next year, and the movement represented by that congress had numerous sympathizers in New York. I have already pointed out, in the chapter on the first Constitution, that, while a majority of this assembly were loyal to the home government, and refused to join the other colonies in the new movement for freedom, there was a respectable and persistent minority of patriots who courageously asserted their opinions at every convenient opportunity. A revival of the militia law, with stringent requirements concerning military preparations, doubtless offered the patriots as well as the loyalists a convenient opportunity to prepare for the impending conflict. In his report of June 11, 1774, Governor Tryon gives the white population of the colony at 161,102, and estimates the available militia at about 32,000. The latter figures, omitting loyalists, show the possible military force available to the patriots in the war which began the next year.

Another militia law was passed on the 1st day of April, 1775, two days before the last meeting of the old colonial assembly. But the colony was soon engaged in the Revolutionary struggle, and this statute had little practical effect. The Continental Congress met at Philadelphia on the 10th of the next month, and on the 22d of May the first Provincial Congress of New York assumed control of public affairs, which, through its successors, was continued until the organization of the state government in September, 1777. On the 26th of May, 1775, the Continental Congress adopted resolutions directing, among other things, that "the militia of New York be armed and trained and in constant readiness to act at a moment's warning." The resolutions contained details concerning the occupation of certain points in New York,

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and placed the military forces raised in the colony under the general direction of the Provincial Congress, and under the immediate command of officers appointed by that body. For the purpose of organizing the New York contingent in the continental army the Provincial Congress, on the 31st of May, 1775, resolved that it "be recommended to the inhabitants of this colony in general, immediately to furnish themselves with necessary arms and ammunition; to use all diligence to perfect themselves in the military art, and, if necessary, to form themselves in companies for that purpose, until the further order of this Congress;" and on the same day a committee was appointed to organize the troops and provide for their government. The committee reported on the 9th of August, and recommended that the different parts of the state be divided into "districts or beats," with a company in each, to consist of "about 83 able-bodied men," officers included, between sixteen and fifty years of age. The officers were to be elected by members of the company, and the method of voting prescribed by the committee indicates a determination to apply to military administration the principle of popular election already familiar in local civil affairs. A committee of two, representing Congress, was to preside at the election. Then the report provided that, "after the company is drawn up, the committeemen who preside at the election may repair to a station at some convenient distance from the company; then let the men pass in single file between them, each man giving in the name of the person he chooses to fill the office in question, the majority of such votes to determine the election." The report further provided that every fourth man in each company, if willing to serve, should be selected as a "minute man;" but the selection was not limited absolutely to the fourth man.

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A militia bill was adopted by the Provincial Congress on the 22d of August, 1775. The bill included the foregoing report, and also provided for the organization of the militia, appointment of a major general and other officers, and the division of the force in brigades and other subordinate organizations. The military age was fixed from sixteen to fifty years. Every man of military age was required to furnish his arms and accoutrements, and a prescribed quantity of ammunition, and attend specified local and general trainings. Officers were required to take an oath to obey the orders of the Continental and Provincial Congresses, and also all their superior officers, which oath was to be taken "under all the ties of religion, honour, and regard to our country." The bill made numerous exemptions from military service. This was a brief military code, adopted by a congress of delegates from different parts of the colony, and which was a purely revolutionary body. It assumed sovereign authority, and it will be remembered that this action was taken nearly a year before the independence of the colonies was declared and the Declaration had been ratified by a new Provincial Congress in New York, which proclaimed, by resolution, on the 10th of July, 1776, that henceforth the congress should be known as the "convention of the Representatives of the State of New York." Military operations were carried on under this code and under orders adopted by provincial congresses, councils of safety, and committees of safety, until after the organization of the state government.

The first Constitution provided for militia, but that subject has been considered in the chapter on that instrument, and needs no further attention at this time. The first military code under the state government was enacted on the 3d of April, 1778, after the Articles of Confederation, which required the states to maintain militia, had

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been approved by the legislature, but before the articles had been actually adopted by Congress. This was in the midst of the Revolutionary War, and the necessities of the time were manifest from the preamble, which declared that "the wisdom and experience of the ages point out a well-regulated militia as the only secure means for defending a state against external invasions and internal commotions and insurrections;" that "this and the other United States of America are now invaded by foreign enemies, and the safety of this state may be endangered by intestine commotions and insurrections," wherefore, in order to encourage a martial spirit among the people, and provide for co-operating with other states "in a cause no less noble and exalted than the defense of the common rights and liberties of America against hostile tyranny and oppression," the statute was passed which required the immediate enrolment of all able-bodied male persons between the ages of sixteen and fifty years, except Indians and slaves. Each soldier was to provide, at his own expense, specified arms, accoutrements, and ammunition. I have already quoted from the Duke's Laws a provision relating to service of militia out of the colony. The code of 1778 contained the following provision on this subject: "The governor or commander in chief for the time being shall have power and authority, from time to time, in his discretion, to order out the whole or any part of the militia of this state into actual service, not only for the defense of this state, but to give assistance to any of the other United States, or to reinforce the army of the United States or any part thereof, and to cause them to march out of this state for either of the said purposes; provided, always, that none of the militia of this state shall be compelled to do duty out of the same for a greater space of time than forty days."

After the close of the war the legislature, in 1786, re-

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vised the militia law, fixing the military age from sixteen to forty-five. This law also provided for sending militia out of the state under the following provision:

"The commander in chief for the time being may, in case of invasion or other emergency, when he shall judge it necessary, order out any proportion of the militia of the state, to march to any part thereof and continue as long as he may think necessary, and likewise may, in consequence of an application from the executive of any of the United States on an invasion, or an apprehension of an invasion of such state, at his discretion, order any number of the militia, not exceeding one third part thereof, to such state; provided they be not compelled to continue on duty out of this state more than forty days at any one time. That while in actual service in consequence of being so called out, they shall receive the same pay and rations, and be subject to the same rules and regulations as the troops of the United States of America."

The Articles of Confederation, adopted July 9, 1778, contained brief provisions relating to state militia. The character of the confederation and the evident purpose to maintain general control of national affairs, at the same time permitting the states to exercise extensive local powers, are indicated by the provision that "no vessels of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary by the United States in Congress assembled for the defense of such state or its trade; nor shall any body of forces be kept up by any state in time of peace except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall

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provide and have constantly ready for use in public stores, a due number of field pieces and tents, and a proper quantity of arms and ammunition, and camp equipages;" and the further provision that "when land forces are raised by any state for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively by whom such force shall be raised, or in such manner as such state shall direct; and all vacancies shall be filled up by the state which first made the appointment."

The Convention of 1787, which framed the Federal Constitution, deemed it expedient to include provisions relating to the militia, and accordingly, by subdivision 16 of § 8 of article 1, gave Congress power to "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;" and by subdivision 15, Congress was given power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and by another provision the President was made commander in chief "of the militia of the several states when called into the actual service of the United States." Elliott's Debates contains an interesting summary of the discussion on this subject in the Convention, and shows the evolution of various suggestions resulting in the provisions finally adopted. It is impracticable to give the details of that discussion here, but it may be worth while to note that George Mason, who introduced the subject, thought the power to regulate the militia "necessary to be given to the general government, and he hoped there would be no standing army in time of

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peace unless it might be for a few garrisons. The militia ought, therefore, to be the more effectually prepared for the public defense." Congress, under this authority, passed a general militia law on the 8th of May, 1792, which fixed the military age from eighteen to forty-five years, and required every white male person of military age, resident in any state, to be enrolled in the militia thereof within twelve months after the passage of the law. Each person so enrolled was required to provide himself with specified arms, accoutrements, and ammunition. The militia was to be arranged in the usual military organizations. The rules of discipline prescribed by Congress, by resolution, on the 29th of March, 1779, were, so far as practicable, applied to the militia organized under this act.

The legislature of 1793, in consequence of the adoption of the Federal Constitution and the enactment of a national militia law, passed a new state law quoting the Federal statute, and providing for the arrangement of the state militia. This statute re-enacted the provision of the act of 1786, authorizing the governor to send a portion of the militia into another state, on the application of its executive. I do not find this provision in any subsequent statute. The subject was again revised in 1818. Resident aliens who owned real estate, and their sons of military age, might be enrolled in the militia.

In the chapter on the Convention of 1821 I have considered its action in relation to the militia, and the results which appear in the second Constitution. The legislature of 1823, following the adoption of the Constitution, passed a new militia law. It continued the provision of the act of 1818, authorizing the enrolment of aliens.

The militia law of 1846, chap. 270, omitted aliens, and required the enrolment of all white male citizens of military age, not exempt under Federal or state law. This

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statute changed the policy in relation to arms and equipments for the militia, which were required to be furnished by the commissary general, at the expense of the state. The scope of the militia article of the Constitution was somewhat enlarged by the Convention of 1846. This subject has been considered in the chapter on that Convention. In consequence of the adoption of the new Constitution, the legislature of 1847 again revised the militia law. An important statute relating to this subject was also passed in 1849, and another general act was passed in 1854.

The great Civil War which began in April, 1861, and which required the immediate exercise of the military power of the Federal government under the Constitution, and a resort to the militia of the loyal states, naturally revived practical interest in military affairs, which had been neglected during recent years. Governor Morgan, in his message to the legislature, on the 1st of January, 1861, evidently anticipating the coming struggle, suggested the need of immediately reorganizing the militia. He said that "the organized portion of the militia of the state comprised 19,435 officers and men, uniformed, armed, equipped, and for the most part in a creditable state of discipline;" and he estimated the additional available military force at 450,000 men, making a total possible force of 469,435. The Governor evidently hoped that the war would be averted, and that it would never be necessary to employ the "strong arm" of the militia "for any unfriendly purpose," but he observed that a "well-regulated militia is necessary to the security of a free people, and to maintain such an organization is a part of the established policy of our country." No militia legislation was passed at this session, except the act incorporating certain members of the Seventh Regiment "as veterans of the National Guard." I think this is

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the first statutory use of the term "National Guard." Governor Morgan referred to the subject again in his message of 1862, stating difficulties which had occurred in administering the existing militia law in connection with the war which began the previous year. He recommended several specific changes in the law, and also a general revision of the statutes, suggesting that "the defective character of the act of Congress of 1792 presented a serious difficulty in the way of such modifications of our present laws as experience would dictate." The result was the enactment of chapter 477, to provide for the enrolment of the militia, the organization of the National Guard, and for the public defense. The act made important modifications in military administration and organization intended to meet conditions incident to the war and enable the state promptly and efficiently to do its part in that great struggle. Some of the powers which the Governor had felt compelled to exercise during the preceding year at the opening of the war were evidently deemed doubtful, and the statute, therefore, in general terms ratified "all the acts, proclamations, and orders of the governor of this state since the 16th day of April, 1861, relating to the calling out of the militia or volunteers from this state for the service of the United States," and confirmed all commissions issued by him under the act of Congress. The details of the statute cannot be given here, but it should be noted that it provided for a biennial enrolment of all men of military age not members of the organized National Guard. They were designated as the reserve militia, and were divided into two classes,—the first class to be composed of those between eighteen and thirty years of age, and the second class of those between thirty and forty-five. The act required an annual camp of instruction in each division district. The term of service in the National Guard was fixed at seven years.

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The effect of the Civil War on the subject of permanent military organization is apparent from the fact that a large organized militia force was maintained several years. That war closed in the summer of 1865. Governor Fenton, in his message of 1867, informed the legislature that on the 1st of January, 1866, the organized militia "was slightly in excess of 50,000 men." The legislature of 1866 fixed this number as the maximum of noncommissioned officers and privates in time of peace. The amendatory act of 1867, chap. 502, required an annual enrolment of the reserves.

The militia received considerable attention from the Convention of 1867–68. The work of that Convention has already been described. Its proposed constitution embodied the essential principles of the existing policy, dividing the militia into actives and reserves, the actives to be known as the National Guard, and the maximum number was fixed at 30,000 men in time of peace. The Convention adjourned February 28, 1868. The legislature, at the same session, May 6, adopted the proposed constitutional limit, and fixed the maximum of the National Guard at 30,000. The rejection of the proposed constitution left the legislature free to act, and the maximum was afterwards reduced to 15,000. In 1868 the provisions relating to enrolment were suspended until revived and enforced by the governor's order. The act of 1869, chap. 778, required the enrolment of the reserves to be made once ir five years, beginning in 1871.

The legislature of 1870, by chap. 80, again revised the militia law, which was designated as "The Military Code." No stated enrolment of the reserves was required, but they might be enrolled at any time when directed by the commander in chief. The act did not require a classification of reserves. The maximum of the organized National Guard was fixed at 20,000 men. The

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National Guard, so far as practicable, was to be subject to the rules and discipline prescribed by Congress for the Army of the United States. The act of 1876, chap. 29, fixed the term of service in the National Guard at five years.

The legislature of 1880, complying with a recommendation by Governor Cornell, appointed a commission to revise the statutes relating to the National Guard. This commission was to be composed of three commissioned officers of the National Guard, to be appointed by the Governor, and the adjutant general, inspector general, and chief of ordnance. The Governor, in the same message, said the National Guard was composed of 20,280 officers and men. He favored a reduction of the guard, and several organizations were disbanded during that year. In his message of 1881 he advised a further reduction, and in 1882 stated in his message that the National Guard had been reduced to 12,495 men. The number was still deemed too large, and, according to Governor Cleveland's message of 1883, the National Guard then consisted of 11,608 men.

The commission of 1880 presented to the legislature of 1881 a report on the militia laws and a proposed new military code. The commission said it did not intend to make any radical changes in the law, but to reduce the statutes to a simpler form, observing, in connection with the subject of organization, that the code was not intended for a standing army, but for a volunteer militia in time of peace, and therefore should be made simple and elastic, and be adapted to business and social conditions, so that military training could be acquired without serious interference with the vocations in which the volunteers were engaged.

A new military code was enacted in 1883. It continued the essential provisions of previous militia laws. The

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National Guard was to be composed in time of peace of not less than 10,000 nor more than 15,000 enlisted men. All other qualified persons were included in the reserves, who were made "liable to military duty in case of war, insurrection, or invasion, or imminent danger thereof." A member of the National Guard, injured while in actual service, was to be "taken care of and provided for at the expense of the state." An amendatory statute, passed in 1887, authorized enlistments in the National Guard for not less than five nor more than seven years, and also enlistments of persons over forty-five years of age by permission of the commandant of the brigade or division to which the organization was attached.

A new military code was enacted in 1893 and became one of the general laws proposed by the statutory revision commission. The act made all able-bodied male citizens between eighteen and forty-five years of age subject to military duty, and also aliens who had declared their intention to become citizens. This code continued the provision in the code of 1883, fixing the number of organized militia at not less than 10,000 nor more than 15,000 enlisted men.

Convention of 1894.—Mr. Holls introduced an amendment which divided the militia into three classes; namely, the actives, inactives, and reserves. Actives included militia armed, equipped, and ready for immediate service. Reserves consisted of persons honorably discharged from the state militia or from the United States military or naval service. The legislature was authorized to provide for the organization of reserves. All other persons in the enrolled militia were inactives, and an enrolment was required once in five years. Aliens could not become members of militia organizations. Mr. Tucker proposed to modify the clause of the existing Constitution exempting from military service "such in-

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habitants of this state of any religious denomination whatever, as, from scruples of conscience, may be averse to bearing arms," by striking out the clause "of any religious denomination," thus extending the exemption to all persons having conscientious scruples against bearing arms, whether members of any religious denomination or not. Mr. Cochran proposed a new article 11, which, with modifications, was reported favorably by the committee on militia.

General Hedges, chairman of the committee, in presenting the subject to the Convention, said the article had been submitted to the officers of the National Guard, and was approved by them. An important change was the recognition of the naval branch of the militia, which before had no standing in the Constitution. The new article also fixed the minimum number of militia at 10,000 armed men. This was in accordance with the policy already adopted by the legislature. The new article also imposed on the legislature the obligation to make annual appropriations for the maintenance of the National Guard. The new article omitted the provision in the former Constitution which required the militia to be armed and equipped. General Hedges said this had become obsolete. As a substitute for this provision, which apparently applied to all militia, whether organized or not, the new Constitution required a minimum of 10,000 in the active military force, always armed, disciplined, and ready for service. Exemptions were left wholly to the discretion of Congress and the legislature. Mr. McDonough moved to restore the provision in the existing Constitution specifically exempting persons of any religious denomination, who, from conscientious scruples, were averse to bearing arms. But the Convention sustained the committee in its exclusion of this provision.

Mr. Cochran, who had given the subject very careful

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study, said the one purpose of the new article was to define specifically who constituted the militia, and the provision on this subject in the Federal Constitution had therefore been incorporated in the state Constitution. This included primarily all able-bodied resident citizens between eighteen and forty-five years of age; but, following and extending the provision in the military code of 1893, in relation to aliens, § 2 of the new article authorized the enlistment of "such other persons as may make application to be so enlisted." Mr. Cochran said this was intended to include not only aliens, but residents of other states. Section 4 omitted the provision fixing the term of a commissary general at two years, and requiring him to give a bond. Mr. Cochran said that, in consequence of the change in the functions of this officer, the provision had become obsolete. Sections 2 and 6 of the existing Constitution were combined in the new § 5, which transferred to the legislature full power to prescribe the method of choosing military officers not mentioned in § 4, and required a two-thirds vote of the legislature to change an existing mode of election. Mr. Cochran said the new § 6, in relation to the removal of officers, was intended to include the provision then in force under the military code. Removals by the senate and on the decision of a court-martial were already authorized by the Constitution. The article was adopted as reported, without amendment, by a vote of 101 to 3.

The legislature of 1898 passed a new military code, chap. 212, which was intended to put into practical operation the provisions of the new militia article of the Constitution, and which made numerous modifications in relation to the organization, equipment, maintenance, and discipline of the National Guard and naval militia. Section 2 of the new militia article of the Constitution, which authorized the legislature to provide for enlistments of

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persons other than resident citizens of military age, was applied in the new code by the provision that an "able-bodied man of good character, who can read and write, and who is a citizen of the United States, or has declared his intention to become such, may be enlisted in the National Guard or naval militia of this state;" but men over forty-five or under eighteen were expressly excluded, "except that men who are sixteen years and more of age may be enlisted as musicians." The provision is not limited to residents of the state.

Art. XII. Cities and Villages.

The government of cities has already received considerable attention in this work, and I have noted in the development of our history various projects and proposed constitutional or statutory changes intended to provide better administration in this class of municipal corporations. Conventions, commissions, and legislatures have tried to discover and apply adequate measures for reform in municipal government, but the constitutional provisions actually adopted were, prior to the Constitution of 1894, practically confined to the right of the people to choose their own local officers, and to the limitation of municipal indebtedness. The growth of cities in number, wealth, and population naturally gave occasion for a large mass of municipal legislation, and statesmen long ago saw the necessity of adopting general principles for the government of cities, either by constitution or by statute, thus relieving the legislature from the consideration of innumerable minor details relating to local affairs, and permitting that body to give its attention to the larger matters with which the whole state was concerned. These various attempts have been recounted in former chapters, and the reader has doubtless observed that the chief effect of all the agitation on this subject has been the crea-

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tion of public sentiment in favor of some plan of treating municipal affairs which would give the people directly interested larger opportunities of control over subjects of local administration.

The effort to find a remedy for objectionable conditions in local government has brought into special prominence the so-called "home rule" idea. This idea has found various forms of expression, and many who urge the sufficiency of home rule as a cure for municipal evils differ widely in the definition and proper application of the term; some carrying it even to the point of complete municipal autonomy, under which the city would be free even from the interference of the legislature in local administration, while others believe that a reasonable application of the principle of home rule should be limited to the selection of local officers and to the administration of affairs in which the people of the locality are primarily most interested, leaving to the legislature substantial control of subjects which affect the whole state, with power to interfere even in strictly local matters where it seems clear that the interests of citizens, few or many, may suffer without the aid of the state, acting through its legislature. Advocates of the extreme view point to European cities of the middle and earlier ages as examples of what city government should be, perhaps overlooking the fact, or perhaps not giving proper effect to the fact, that these cities were, in the main, the results of independent growth, not originally united or forming a part of a national system, and therefore not primarily acknowledging any superior sovereignty. The ancient Greek cities, for the most part, belonged to this class, originally and usually autonomous, though sometimes grouped in a loosely formed confederation, or becoming tributary to a conquering city through which they enjoyed protection

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against a common enemy; but these conditions did not usually affect local laws or administration. The cities and towns, however, which were founded by colonization, which was carried on extensively by Greece and Rome, were more like the modern American cities, for they owed their origin, existence, and preservation to the home city, whose laws and customs governed the remotest colony. Modern colonization does not differ materially from ancient colonization in respect to these principles. It is manifest that the free cities of Europe in the middle ages do not afford any satisfactory illustration of the principles of independent local government which should be applied to American cities, for the reason, already suggested, that they were autonomous from the outset, and were not the creatures of a superior state. Our nation is a great colony, originating in different sources, but united under one common government. The eastern states were colonized from Europe, and from these states and also from foreign countries the stream of colonization has moved westward, all settlements, since the formation of the Federal government, becoming subject to the principles on which that government was founded. There are not and cannot be any free cities as the term is understood and applied to the cities of the middle ages, nor any autonomous cities like those of ancient Greece, but each state, as a larger municipal corporation, is the creature of the nation, and each city, or subordinate municipal corporation, is the creature of the state.

HOME RULE.

The home rule idea includes more than cities, and has been applied from the beginning to all municipal corporations. As soon as a state begins to divide itself into local subdivisions for purposes of government with local officers, it begins at once to apply home rule in some form,

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and its application in cities does not differ in principle from its application in other municipal subdivisions. It is a question of degree and of detail, differing only in the extent to which the people of a locality are clothed with powers of self-government.

Cities are, with us, usually the final form of development of a community, passing usually from the hamlet to the village, and from the village to a city, though a city sometimes includes an entire township or county. The state of New York, in its various municipal subdivisions, has enjoyed home rule from the earliest colonial period. So much of the evolution of home rule belongs to municipalities other than cities that it seems impracticable to consider the subject solely from the city standpoint, especially as, in nearly all cases, the city, in its prior form as a village or town, enjoyed the measure of home rule applicable to such other municipal forms, and its new city government is often largely a change of name rather than of substance. Besides, the census tells us that several of our larger villages have more inhabitants than the smaller cities, and they would gain little by transforming a village charter into a city charter.

The subject of home rule may conveniently be considered under two heads: first, the choice of local officers; and second, the powers of local government.

1. Choice of Local Officers.

In the colony.—It has already been stated that the Dutch West India Company, which received its charter from the States General on the 3d of June, 1621, was vested with large governmental powers, and was charged with the duty of colonizing New Netherland, which afterwards became New York. By this charter the company was authorized to "build forts and fortifications, to appoint and discharge governors,

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people for war, and officers of justice and other public officers, for the preservation of the places, keeping good order, police and justice, and in like manner for the promoting of trade;" and "advance the peopling of these fruitful and unsettled parts." By the "Freedoms and Exemptions" of July 19, 1640, providing for settlements by patroons, the company reserved the right to found "cities, towns, and churches." The patroons were also vested with large powers of government, including the provision in the first of the so-called "Freedoms and Exemptions," in 1629, that if a patroon "should in time prosper so much as to found one or more cities, he shall have power and authority to establish officers and magistrates there, and to make use of the title of his colony according to his pleasure and to the quality of the persons." The same provision in substance was continued in the "Freedoms and Exemptions" of 1640, except that towns were added in the later charter. These "Freedoms and Exemptions" were special charters, granted by the home government, and modified, to some extent, the charter granted to the company; but the company retained general jurisdiction over the province, including the territory assigned to the patroons.

It will be observed that the company's charter gave it the right to appoint all necessary officers of government, and this right, limited according to locality, was subsequently transferred to the patroons within their special jurisdiction. In the development of the colony some form of local government became a necessity in the various settlements, and this involved a selection of local officers for purposes of administration. As already suggested, these were at first appointed. The plan of local government existing in Holland was, so far as practicable, transferred to New Netherland, and, according to an order quoted by Dr. O'Callaghan in his "History of

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New Netherland," vol. 1, p. 393, qualified persons in cities, villages, and hamlets in the province were authorized to "nominate for the office of magistrates a double number of persons, wherefrom a selection shall reasonably be made by the director and council, the appointment of a schout, secretary, and court messenger remaining to the company." After the conquest of the colony by the English, in August, 1664, the system of local government was somewhat modified, and by the "Duke's Laws," promulgated March 1, 1665, the constable and eight overseers were to be chosen in each town by a "plurality of voices of the freeholders." This continued the policy of home rule in the election of the principal officers of the town. The colonial laws contain numerous provisions relating to local elections, and at the end of the colonial period the people had long been accustomed to elect their own local officers, except justices of the peace.

An examination of the first English charter of New York, known as the Dongan charter, granted April 27, 1686, affords an interesting view of the control of municipal affairs then deemed necessary by the government. The mayor, sheriff, recorder, town clerk, and clerk of the market were to be appointed by the governor and council. The aldermen, assistant aldermen, and petty constables were to be chosen by the people by wards, the high constable was to be appointed by the mayor, and the chamberlain by the mayor and aldermen. By this charter New York is described as "an antient Citty" whose citizens have "antiently been a Body Politique and Corporate" and have enjoyed certain "rights, Libertyes, Priviledges, ffranchises, ffree Customes, Preheminences, Advantages, Jurisdiccons, Emoluments and Immunityes," which, by the charter, were expressly confirmed and continued, provided they were not "inconsistent with or Repugnant to the laws of his Majestyes Kingdome of

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England or any other the Laws of the General Assembly of this Province." New York was, by this instrument, granted special and important privileges, but it was not released from its obligations to the home government. It clearly illustrated the principle enunciated by the Federal Supreme Court in *United States* v. *Baltimore & O. R. Co.* (1872) 17 Wall. 322, 21 L. ed. 597, that a municipal corporation (in this case the city of Baltimore) is a representative not only of the state, but is a portion of its governmental powers. "It is one of its creatures, made for a specific purpose, to exercise, within a limited sphere, the powers of the state. The state may withdraw these local powers of government at pleasure; and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large." The bearing of this principle on the status of cities will be seen when we consider the propositions submitted in the report of the cities committee to the Convention of 1894, by which, in effect, the power of the legislature to control city affairs in relation to specified subjects was withdrawn, and the city was made substantially autonomous as to these subjects. The charter contains no hint or suggestion that the Crown intended to abandon its sovereignty over the city or relinquish control of its affairs. The city, not only by this charter, but by the ancient privileges which it confirmed, was a creature of the government, and continued to be subject to its authority and supervision. In the chapter on the colonial period I have referred to the order of the Amsterdam Chamber of April 4, 1652, providing for the establishment of a municipal government in New Amsterdam, and recommending the election of one schout, two burgomasters, and five schepens, and have noted the proceedings by Governor Stuyvesant on the 2d of February, 1653, establishing the new municipal government, but in which the

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city officers were appointed instead of being elected, as recommended by the Amsterdam Chamber. Thus, New York received, through Governor Dongan, an English charter based on a Dutch original; and it was this original which formed the foundation and source of the city's ancient privileges, referred to by Governor Dongan in the preamble to the charter granted by him. In both cases, as already suggested, the municipal privileges were an express grant by the central government, and were, in general, subject to modification at any time.

The charter of Albany, granted by Governor Dongan on the 22d of July, 1686, contained substantially the same provisions in relation to the method of choosing local officers, and it also contained a similar recital relating to its ancient privileges, describing Albany as an "antient towne," instead of a city, as in the case of New York.

It would not be profitable to give in detail an account of the growth of the policy of electing local officers during the colonial period. Offices were established from time to time to meet new conditions. Administrative officers of towns and similar subdivisions were usually elective, but I have not discovered any instance in which a county or colonial officer with general functions was chosen by the people, except members of assembly, who were chosen by localities under varying regulations. The home rule principle was applied in the choice of officers nearest the people, but officers with general jurisdiction received their appointment from the home government or directly or indirectly from the governor and executive council.

The first Constitution.—I have already noted the fact that the provincial congress, or convention, which was chosen to establish a state government, and which adopted the first Constitution, acting either directly or as a committee or council of safety, assumed the power to

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govern that part of the colony under its immediate control, and adopted numerous resolutions and ordinances which were, in effect, legislative acts, thus exercising the powers which had previously been exercised by the governor and colonial legislature. An instance of this authority pertinent to our present inquiry was the resolution adopted by the committee of safety on the 1st of March, 1777, directing that on the first Tuesday of April following, an election of supervisors, assessors, and collectors be held in the several counties, towns, and precincts, except where elections had been held under charter provisions or such elections were directed to be sooner held by such charters. The persons chosen were to hold office one year "unless sooner discharged by the legislature of the state." The Constitution, adopted a few weeks later (April 20, 1777), contained the following provision relating to the method of choosing local officers:

§ 29. The town clerks, supervisors, assessors, constables, and collectors, and all other officers heretofore eligible by the people, shall always continue to be so eligible, in the manner directed by the present or future acts of the legislature. That loan officers, county treasurers, and clerks of the supervisors continue to be appointed in the manner directed by the present or future acts of the legislature.

These provisions with modifications have been continued in subsequent constitutions, and in their present form are found in § 2 of article 10 of the Constitution of 1894. The officers "eligible" or elective by the people at the adoption of the first Constitution included supervisors, aldermen, assistant aldermen, town clerks, assessors, collectors, constables, overseers of the poor, and surveyors (commissioners) of highways.

Except the case of local officers and a few others whose appointment was otherwise provided for, the general

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power to choose public officers was vested in the Council of Appointment, composed of the governor and four senators, chosen by the assembly. In a former chapter I have given the history of this provision, and have shown that it was a substitute for a plan by which it was originally proposed to vest the power of appointment in the legislature. There was no home rule in this scheme of appointment. The abolition of the council by the Convention of 1821, and the gradual transfer to the people of the right to select their own officers, including the principal state officers, have been described in previous chapters.

Three cities were incorporated under the first Constitution,—Hudson, 1785; Schenectady, 1798; and Troy, 1816. Each charter provided for the appointment of a mayor and several other officers by the governor, "by and with the advice and consent of the Council of Appointment," while aldermen, supervisors, and other local officers included in § 29 of the Constitution were made elective by the people. It is an interesting fact in connection with these cities that they did not pass through the village stage of municipal evolution. Schenectady and Troy were incorporated directly from towns, and Hudson from a district which, according to the preamble to the charter, was established primarily for commercial purposes. I think it will be found that in the case of all cities subsequently incorporated there was a transition from an organized village government to a city charter, and that this constituted the third stage of municipal development; namely, the town, the village, and the city. During the same period several statutes were passed, particularly the act of 1788, chap. 64, providing for the election of the usual town officers.

Organized village government began with the incorporation of Lansingburgh, in 1790. Its charter provided

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for the election of trustees and other officers by the people, and the policy thus inaugurated continued through numerous village charters under the first Constitution. Section 29 of the Constitution, which preserved the right of election of existing local officers, was evidently not deemed to preclude the legislature from creating other local subdivisions and providing for the election of officers in them by the people. The three city charters, however, limited the election to those officers which had usually been elected under colonial city charters, and several minor offices which have since been filled by election were, by those charters, required to be filled by the Council of Appointment. Thus the local auxiliaries of government—cities, towns, precincts, and villages—possessed the right generally to elect their own officers.

The first common school law (1795) illustrated the same policy of local government by providing for the election in towns of commissioners of common schools and the selection by the people of trustees in different parts of the town to take charge of particular schools. The common school statutes of 1812, 1814, and 1819 continued the same policy of local school administration by officers chosen by the people. Without more detail it may be stated as a general proposition that, at the end of the first constitutional period,—1822,—local administration in towns, precincts, villages, and school districts was in the hands of officers chosen by the people, and this policy embraced the governing body in cities. The provisions of the first Constitution in relation to the appointment of officers permitted little elasticity, and therefore officers whose functions were of a general character were to be chosen by the Council of Appointment, and this rule applied to new offices as well as to those existing at the adoption of the Constitution.

The second Constitution.—The abolition of the Coun-

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cil of Appointment by the Convention of 1821 required a new distribution of the power of appointment. Sheriffs, county clerks, coroners, and the register and clerk of the city and county of New York were made elective by the people. The general right to elect local officers was continued by the following provision, which was a substitute for § 29 of the first Constitution:

"All officers heretofore elective by the people shall continue to be elected; and all other officers, whose appointment is not provided for by this Constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people or appointed, as may by law be directed."

Mayors of cities were to be appointed by the common council. In the Convention, the committee on the appointing power excepted New York from the provision requiring the mayor to be appointed by the common council, but after an animated debate the exception was stricken out. In 1833 the Constitution was amended by providing for the election of the mayor of New York by the people, and in 1839 the Constitution was further amended, authorizing the legislature to provide for the election of mayors by the people in all cities. This amendment was put into practical operation by the legislature of 1840, which enacted chapter 21, requiring mayors of all cities to be elected by the people.

Under the first Constitution justices of the peace were appointed by the Council of Appointment. In the Convention of 1821 the committee on the appointing power recommended the election of these officers by the people of the respective towns, but the Convention modified the recommendation by adopting a curious provision which authorized the board of supervisors and judges of the county courts jointly to select justices of the peace; but,

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in case of their disagreement, the nominations of the supervisors and judges respectively were to be transmitted to the governor, who was required to appoint from these nominations. This arrangement was unsatisfactory and did not long continue; the Constitution was amended in 1826, by providing for the election of justices by the people. This practically completed the home rule policy as applied to towns. New town offices have occasionally been since created, and they have been filled sometimes by election and sometimes by appointment.

Four cities—Buffalo and Utica in 1832 and Brooklyn and Rochester in 1834—were incorporated during the second constitutional period. The charters, following the Constitution, provided for the choice of a mayor by the common council; but this requirement was superseded by the act of 1840, which was passed to carry into effect the constitutional amendment of 1839, authorizing the election of a mayor by the people. Aldermen, assessors, and supervisors were made elective by the people under these charters, but the rule in relation to the method of choosing other officers was not uniform. By the constitutional amendment of 1839 the home rule idea was further extended in cities, and since the enabling act of 1840 the people have had the right to choose the principal city officers, and especially those who should compose the governing body of the city. This right, except as to the mayor, was declared by the first Constitution, continued by the second, and has been preserved in subsequent constitutions.

The third Constitution.—The subject of municipal organization was considered in the Convention of 1846. In the chapter on that Convention I have given a sketch of its proceedings in relation to this subject, and have there noted the fact that Henry C. Murphy, chairman of the standing committee on municipal corporations, submitted

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in a minority report, a plan which required the incorporation of cities and villages by general law, prohibited any special act for this purpose, and imposed particular limitations on municipal administration. The result of the Convention's consideration of this subject was the adoption of a section requiring the legislature to "provide for the organization of cities and incorporated villages." This did not specifically require the enactment of general laws, but the legislature of 1847 enacted such a law providing for the incorporation of villages on the order of the court of sessions, approved by a vote of the people of the proposed village, and without application to the legislature. Another general village law was enacted in 1870, and in 1874, as a result of the labors of the Commission of 1872, a constitutional amendment was adopted prohibiting the incorporation of villages by special act. Thus, after twenty-eight years, the principle for which Mr. Murphy so earnestly contended in the Convention of 1846 was included in the Constitution. The act of 1870 was deemed sufficient for the purpose of village incorporation, and it continued in force with some amendments until superseded by the new village law of 1897.

The third Constitution provided for the election of county judges and surrogates by the people of the county, and contained the following general section in relation to the election of local officers:

Art. 10, § 2. All county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. 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,

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towns, and villages or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. 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.

The legislature did provide for the organization of cities as required by the Constitution, but it did this by special charters. The third constitutional period—1847–1894—was specially prolific in municipal organization. A large number of villages were incorporated and also twenty-six cities; namely, Amsterdam, 1885; Auburn, 1848; Binghamton, 1867; Cohoes, 1869; Corning, 1890; Dunkirk, 1880; Elmira, 1864; Gloversville, 1890; Hornellsville, 1888; Ithaca, 1888; Jamestown, 1886; Kingston, 1872; Lockport, 1865; Long Island City, 1870; Middletown, 1888; Mount Vernon, 1892; Newburgh, 1865; Niagara Falls, 1892; Ogdensburg, 1868; Olean, 1893; Oswego, 1848; Poughkeepsie, 1854; Rome, 1870; Syracuse, 1847; Watertown 1869; Yonkers, 1872. The charters of these cities, with some variations of detail, illustrated the home rule principle of the Constitution in the election of city officers. In previous chapters I have given a sketch of the discussion relating to city administration and numerous reforms proposed by the Convention of 1867, the constitutional commission of 1872, the Tilden commission on cities of 1875, the senate committee on cities of 1890, and also several legislative amendments, all intended to correct abuses in city government, and provide a more reasonable and efficient control of city affairs, but no constitutional changes were actually adopted affecting the choice of city officers. The home rule principle, as declared in early charters and constitutions, remained in full force when

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the Convention of 1894 began its deliberations on the subject of municipal reform.

2. Powers of Local Government.

A study of our municipal history shows that the method of choosing municipal officers has not been the chief feature of the discussion in relation to municipal organization, but rather the measure, quality, and extent of power which might properly be devolved on local officers. How much autonomy should be granted to a municipal corporation, and how much control should be reserved to the legislature, are questions which have evoked wide discussion, and on which statesmen have been unable to agree; but during this discussion, which has been prolonged through more than two centuries, the state, step by step, has moved steadily forward in the policy of vesting in municipal corporations a large measure of home rule in the administration of local affairs. In general this policy has been legislative only, and therefore subject to change at any time; but while there has been a possibility of change, and changes have sometimes been made to meet important municipal conditions, the state has adhered to the general policy of independent local administration, but without surrendering its sovereignty over municipal affairs.

The obvious difficulty of properly administering local affairs by a distant central government needs no elaboration here. The Dutch settlers who colonized New Netherland under the auspices of the West India Company enjoyed the municipal privileges with which they had become familiar in the fatherland, and, by special order of the home government, were to have "middle and low jurisdiction, and the same rights as mannors in the province of Holland," including a large measure of home rule

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in local affairs. In the "Duke's Laws" (1665) from which I have quoted in the preceding article, we find a reason for home rule as pertinent now as when it was written in that ancient code; namely, that "in perticuler Townes many things do arise which concerne onely themselves;" therefore, it was enacted that, for "the well Ordering their Affairs, as the disposing, Planting, Building and the like of their owne Lands and woods, granting of Lotts, Election of Officers, Assessing of rates, with many other matters of a prudentiall Nature tending to the Peace and good Government of the Respective Townes," the constable and at least five of the eight overseers who constituted the governing body of the town "have power to Ordaine such and so many peculiar Constitutions as are Necessary to the welfare and Improvement of their Towne," with certain specified restrictions, not affecting the general power; but these "peculiar constitutions" were declared to be invalid unless approved by the court of sessions within four months after their adoption. Our modern statutes contain no broader grant of home rule than this provision in the body of laws prepared for the colony by the first royal proprietor of New York. It contained the essential principles of English municipal freedom, combined with the privileges and immunities which had been enjoyed under the Dutch *régime*.

The New York charter granted by Governor Dongan, April 27, 1686, authorized the common council to make and amend "Laws, Orders, Ordinances, and Constitutions" on specified subjects, which, however, must not be repugnant to the royal prerogative, the laws of England, or the province. The evident intention of the colonial government to keep its hand on municipal affairs is manifest from the provision in the charter requiring all local ordinances to be approved by the governor and executive council before they could take effect. The first charter

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of Albany, July 22, 1686, contains substantially the same provisions relating to local government. The assembly of 1691, following, in part, the provisions of the Duke's Laws in relation to town affairs, passed a law authorizing the freeholders in each town to make prudential regulations concerning lands, highways, and fences, and to elect surveyors of highways, who possessed substantially the powers conferred by statute on modern commissioners of highways. These regulations were subject to approval by the court of sessions. Other colonial statutes which need not be noticed in detail authorized towns to erect churches and other public buildings, care for the poor, and raise taxes for these purposes.

The state law of 1788, chap. 64, provided for town meetings, and authorized the freeholders at such meetings to make prudential regulations relating to land, highways, fences, and some other subjects, and these regulations were to have all the force of law, and no approval of them was required. The first village charter (Lansingburgh, 1790) conferred large powers on the freeholders in respect to regulations concerning internal affairs, including some of the subjects stated in the town law of 1788, and adding others especially applicable in settled communities. The village was autonomous as to these regulations which were not subject to approval by any other tribunal or body, but the charter itself was subject to amendment by the legislature. The policy of this charter in committing certain subjects to the action of the people was, with modifications of detail, followed in subsequent village legislation, and, by a process of expansion of the principle of home rule, villages finally came to enjoy a large measure of local independence, subject, always, to legislative control. The same policy has been pursued in relation to cities, but it would not be practicable to state in detail here the subjects to which

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the principle of home rule is applied either in cities, villages, or towns.

I have already referred to the provision in the early common school statutes authorizing the election of local school officers. The same statutes conferred on the people substantial independence in relation to the amount to be raised by taxation for school purposes, and common schools were thus included in the home rule idea. Later statutes confirmed and continued this policy, notably the free school law of 1851, the union school law of 1853, the revised common school law of 1864, and the consolidated school law of 1894. It would not be easy to find a stronger example of home rule than the union school law. Under it the people may choose territory in which to organize a public educational corporation, and may elect a board of education with large administrative powers, possessing authority on behalf of the district to buy property, build school houses, establish and maintain common and academic schools, employ teachers, raise taxes, and prescribe courses of study. The district possesses substantial independence in school affairs, subject only to the general supervision and appellate jurisdiction of the state commissioner of education, and the general oversight of its academic department by the university. The common school system as applied in ordinary school districts is nearly as autonomous, and city schools are usually organized, managed, and maintained according to the wishes of the people, acting directly or through representatives chosen for this purpose.

County government as an auxiliary to the state has become a permanent feature of modern public administration in New York. The act of 1788, chap. 65, establishing boards of supervisors in all counties, required such boards to meet annually and audit claims against the county and provide by taxation for raising the

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amounts needed for county purposes, and also for sums imposed on the county by any state law. The powers of the board were gradually enlarged. In the Convention of 1846 the standing committee on counties reported a section requiring the legislature to provide by law for the reorganization of boards of supervisors with more equal representation therein, and authorizing the legislature to confer on them additional powers of local legislation. The first part of the section was rejected, and the Convention, on motion of Mr. Strong, adopted the following substitute, which appears as § 17 of article 3:

"The legislature may provide by law for conferring upon the several boards of supervisors in this state such powers of local legislation and administration as shall, from time to time, be prescribed."

The section in this form had little practical force, for the legislature already exercised and doubtless possessed the constitutional right to confer powers of local legislation on boards of supervisors. An amendment adopted in 1874 on the recommendation of the Commission of 1872 specifically required a board of supervisors in each county, except in a county coterminous with a city, in which the common council or the board of alderman might exercise the functions of the board of supervisors; and the amendment also required the legislature, by general law, as it might deem expedient, to confer further powers of local legislation on such boards. The legislature of 1875, for the purpose of carrying this amendment into effect, passed chapter 482, which conferred large additional powers of local legislation on boards of supervisors, and these boards, by this statute and other legislation, have become very important subordinate legislative bodies, exercising within their jurisdiction the powers usually exercised by the legislature. By opera-

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tion of the restrictive provisions of § 18 of article 3, adopted in 1874, many powers of government previously exercised by the legislature have, by general law, been vested in boards of supervisors, and thereby counties, acting through such boards, now possess a large measure of home rule.

The general tendency has been to expand home rule in its application to various municipalities, but there are a few instances indicating a contrary tendency, and by which the state has reversed the policy previously maintained. One instance relates to the administration of excise affairs. Prior to 1896 the regulation of the liquor traffic had usually been a subject of local administration, under the jurisdiction of town, city, and village officers, except under the act of 1857, which provided for the appointment of county commissioners of excise. The policy of town commissioners was restored by the act of 1874, and continued by the revision of 1892. Licenses were granted by local officers, who fixed the fees for that purpose within limits prescribed by statute, and moneys derived from these licenses were used for local purposes. This practice, combined with the principle of local option under the act of 1845 and subsequent statutes, conferred on municipalities substantial home rule in relation to the authorized sale of intoxicating liquors. The liquor tax law of 1896 reversed this policy, and transferred to a state bureau the administration of this subject through officers either appointed by or acting for the state, and the office of local commissioner of excise was abolished. The state not only thus assumed control of this subject for purposes of administration, but appropriated to the state treasury a portion of the receipts derived from liquor tax certificates. But while the policy of local administration was abrogated, local option was retained, and to this extent the people of a town still have home

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rule. The act of 1890, chap. 126, providing for state care of the insane, and abolishing county supervision of this subject, is another instance of the same kind. The special franchise tax law of 1899 belongs to the same class. By this act local assessors were deprived of jurisdiction to assess certain corporate property, and the authority to assess such property was transferred to state officers. Other forms of franchise taxation imposed on corporations, and also the taxation of inheritances, represent original state policies, and have not been at any time a subject of direct local administration.

The foregoing sketch of home rule, omitting many details, shows that the subordinate municipalities of a state have, from our earliest history, enjoyed a large measure of independence in local affairs. Counties, cities, towns, villages, and school districts possess ample autonomy, which, in many respects, especially in relation to the choice of officers, is wholly independent of any interference by the state; and while in respect of administrative powers the sovereignty of the state has not been abandoned, and the legislature may still, with few exceptions, modify or abrogate existing home rule powers of government, the policy of local administration has been so long maintained without interruption, and is ordinarily so beneficent in its results, that the usual administrative powers now vested in and exercised by municipal governments are substantially as irrepealable as if directly protected by the Constitution.

THE CONVENTION OF 1894.

One of the really great problems which confronted this Convention related to the administration of city affairs. The careful consideration which it received, and the prolonged discussion of it by the Convention, indicated an opinion that it was

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no less important than apportionment, or charities, or education, or the judiciary. Prior to 1846 the incorporation of cities had not been a subject of serious legislative concern, for during the period between the Dongan charters of New York and Albany, in 1686, and the Convention of 1846, covering 160 years, only nine municipalities had received city charters,—Albany, Brooklyn, Buffalo, Hudson, New York, Rochester, Schenectady, Troy, and Utica,—and only seven of these had received their first charter since the organization of the state government. The problem of city government presented to that Convention was, therefore, comparatively simple, and by rejecting Mr. Murphy's plan to permit the incorporation of cities by general law only, the Convention lost a golden opportunity to adopt a constitutional policy which at least would have established a general and uniform scheme of city organization and administration, and would have saved the legislature the time and trouble necessary in the preparation and enactment of thirty-seven city charters since that Convention, besides hundreds of revisions, amendments, and special acts. The legislature of 1847 did enact a general law for the incorporation of villages; it was perfectly feasible for the legislature at that time to enact a general law for the incorporation of cities, under which the transition might easily have been made from a village to a city form of government. I have quoted in a former chapter Mr. Murphy's argument that, by elastic provisions, a general law could readily accommodate different conditions in different cities. This result has been accomplished under the general village law of 1897, under which local administration is easy and convenient in all classes of villages ranging, according to the village census of 1902, from Laurens, with 243 inhabitants, to Glens Falls, with 13,355.

But while the plan to require city organization under

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general laws was rejected by the Convention of 1846, it was not abandoned, and we find that its inclusion in the Constitution was recommended by the Convention of 1867, the Constitutional Commission of 1872, in effect, though not specifically, by the Tilden Commission of 1875, and such general uniform organization was required by the amendments proposed by the senate committee on cities of 1890, in its report of 1891, and by the Mullin amendment of 1893. It was therefore a live public question when the Convention of 1894 was chosen.

The method of incorporating cities—whether by general or special law—was, however, only one element, and really a minor element of the problem, for the machinery to be used in creating a city is far less important than the powers of government which shall be conferred on the city after it is created, including the degree of responsibility charged upon the city, and the degree of state responsibility and jurisdiction which should be correspondingly relinquished.

The amendments introduced on this subject covered all aspects of city organization and administration which were deemed proper in the Constitution. Mr. Holls proposed to separate city elections from national and state elections by an amendment prohibiting the election of city officers and national or state officers at the same time, and requiring city officers to be chosen at the general election once in two years, beginning in 1895. Separate city elections had been recommended by the Tilden Commission of 1875. I have already quoted from the report of the senate committee on cities the suggestion that cities be classified according to population, and also the amendment introduced by Senator Mullin, in 1893, dividing cities into three classes, the first to include cities having a population exceeding 1,000,000, the second class to include cities with a population between 250,000 and

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1,000,000, and the third class to include cities with a population less than 250,000. Mr. Dean introduced an amendment in the Convention dividing cities into two classes,—the first class to include those having a population exceeding 50,000, and the second class to include all other cities. In connection with this proposition he submitted a plan of city government in thirty-one sections, providing for a municipal council, to be composed of a select and common council. The plan contained detailed provisions relating to the election and powers of the municipal council and of various city officers, together with an elaborate statement of the duties, functions, and responsibilities of the governing body in cities, including many features of city administration recommended by the Convention of 1867, the Commission of 1872, and the Tilden Commission of 1875. Mr. Lauterbach proposed to require the election of city officers in odd-numbered years for a term of two years or of some multiple thereof. He also proposed to authorize the legislature to create commissions with jurisdiction over parks, police, and public works in two or more cities and adjacent territory. Mr. Hill proposed the following amendment:

"Every bill granting or amending a charter of a municipal corporation, and not applying equally to all municipal corporations within the state, shall, within one year after its approval by the governor, be submitted to the electors residing within the respective districts to be affected by said bill, and every such bill shall be valid as to such district only where it has received the approval of a majority of the electors there and voting; otherwise such bill shall be void."

Mr. Veeder proposed to authorize the consolidation of cities and villages whenever approved by a majority of the voters thereof. Mr. Tucker proposed a new article on cities. His plan, like Mr. Dean's, proposed two

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classes of cities, fixing the line of division at 50,000 population. General laws were to be passed relating to cities "and all such general laws shall apply equally to all cities of each class, and no law relating to less than the cities in any one class shall be passed." This was apparently the germ of the provision afterwards included in article 12, classifying city laws according to the class of cities to which they relate. Mr. Tucker's amendment further provided that towns and cities might be incorporated under such general laws. A town or city having 20,000 inhabitants might frame a charter for itself not inconsistent with the Constitution, and establish a specified local government. A town or city charter might be amended by a majority of the electors. The plan also provided for the consolidation of adjoining towns and cities. Municipal powers could not be delegated to a subordinate authority. Power to levy taxes was vested solely in the municipal corporation, and the plan apparently excluded the legislature from jurisdiction of this subject except as exercised under general laws, but the legislature was authorized to select particular classes of property for exclusive taxation. Mr. Turner afterwards introduced substantially the same plan.

Mr. Banks and Mr. Roche offered amendments relating to the limitation of city indebtedness, modifying existing constitutional provisions. An amendment introduced by Mr. Wiggins provided that "no officer of a city in this state shall be nominated or elected by or in the name of any political party or organization voting at any prior state or national election, nor by any organization designed or intended to represent such political party or organization." Mr. C. H. Lewis proposed to provide for the government of cities by general laws, and to prohibit special charters. Each city was to have a common council, and, in cities having 800,000 inhabitants, mem-

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bers of the common council were to be elected on a general city ticket, on the plan of minority representation. Provision might also be made by law for electing the common council in other cities in the same manner. Cities incorporated under a special charter might, by vote, be reincorporated under the general law. "When any city shall have organized under a general law, no general or special law thereafter passed by the legislature for a municipal purpose shall take effect in such city unless the same be accepted and approved by its local legislative authority. . . . No law hereafter passed by the legislature for a municipal purpose, except a general law for the organization thereof, shall take effect in any city heretofore organized unless the same be accepted and approved by its local legislative authority." We shall see, in the course of this article, that this principle of local acceptance of laws relating to a city, but reserving ultimate power in the legislature, was incorporated in § 2 of article 12, and became one of the essential features of the new city provisions. Mr. Banks proposed to prohibit a municipal corporation from granting a franchise except under a general law, and on terms providing for compensation to the city "either by way of a single payment or an annual rental, or a proportionate share of the receipts, or a combination of such methods." The franchise was to be limited to thirty years, but might be renewed. Mr. Jenks proposed to give to the "principal officer in the executive departments of finance, law, assessment, taxation, public works, health, police, and fire" of a city the right to a seat upon the floor of the legislative body thereof and to discuss any measure relating to his department, but not the right to vote. Mr. Cady proposed to divide cities into three classes: first, those with more than 200,000 inhabitants; second, those with a population between 50,000 and 200,000 inhabitants;

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and third, those with a population not exceeding 50,000. This classification was adopted, modified by making the minimum of the first class and maximum of the second class 250,000 inhabitants. Mr. Cady's plan provided for three commissions, of four members each, to prepare respectively a general charter for cities of each class. After the adoption of a general charter for the cities of a particular class, subsequent legislation relating to that class was required to be general. Mr. Speer proposed to prohibit special laws "in regard to the affairs of cities." His amendment also provided for boards of aldermen in all cities except those coterminous with a county. Mr. Jesse Johnson proposed a plan of bi-partisan election commissioners in cities. Mr. Tekulsky proposed to amend § 13 of article 3 by prohibiting a private or local law "relating to street improvements, docks, parks, public or private buildings, assessments, collection of taxes, salaries, or choice of officials in any city;" also prohibiting state legislation regulating places of amusement, which were to be under the exclusive jurisdiction of local authorities. Mr. Jesse Johnson proposed to limit the power of appointment of the head of a city police force to the mayor, either alone or with the consent of the common council, but whenever the public welfare should require it the governor might be authorized to appoint three police commissioners in cities of the first class. Mr. A. H. Green proposed to require the election of a corporation counsel by the people in cities having a population of 100,000.

The foregoing amendments were introduced at different dates between the 22d of May and the 18th of July. On the 27th of July the committee on cities reported a new article "to provide home rule for cities." The legislature was required to pass general laws for the incorporation of cities. Each city was to have a mayor, and

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a common council, to consist of one or two bodies, which might be chosen by minority representation. City officers, and county officers of New York and Kings, were to be chosen at the general election in an odd-numbered year. Provision was made for extending or shortening the terms of existing officers for the purpose of adjusting the new plan requiring elections only in odd-numbered years. Cities were divided into two classes on the division line of 50,000 inhabitants, as suggested in Mr. Dean's amendment. "Laws relating to all cities of the the same class are general city laws." The report contained the following provisions relating to local legislation: "Except as permitted by § 4, the legislature shall not pass any law relating to cities, except a general law, or a general city law as to" streets or highways, with certain exceptions, parks and public places, sewers and waterworks, the erection of buildings, fire apparatus, salaries of city officers and employees, ward boundaries, vacating, reducing, or postponing any tax or assessment, membership and constituent parts of the common council, powers and duties of the common council or city officers relating to the foregoing subjects, but special laws might be passed relating to such subjects where the powers and duties were to be performed outside the city.

The cases in which special laws might be passed were stated in § 4 as follows:

"Laws may be passed affecting one or more of the subjects enumerated in the last preceding section, in any city, on the consent of the mayor or the mayor and common council, given as hereinafter provided. The enacting clause of such act shall be 'The People of the State of New York, represented in Senate and Assembly, and by and with the consent of the (here insert the words "mayor of" or "mayor and common council of" as is required for the city to be affected, and the name of the city), do enact as follows.' After any

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bill with such an enacting clause has been presented to the governor, and before he shall act thereon, there shall be twenty days in which, as to any city of five hundred thousand inhabitants or over, according to the then last state enumeration, the mayor of the city named in the title of the bill may consent thereto; and in which, as to any other city, the mayor and common council thereof may consent thereto, but no such consent shall be given until five days' notice by publication in the newspapers designated to publish city notices, stating the title of the bill in full, and that the city officers here designated for such city are considering the question of consenting thereto. After such consent is given and presented to the governor, he shall have the same power as to such bill and the same time to act thereon as he has as to other bills. The legislature may also pass laws as to any city, affecting one or more of such subjects, to take effect on the consent of a majority of the electors thereof voting thereon, expressed at a general or special election, as may be provided by the legislature, not less than thirty days after the passage of the act."

It will be observed that this contained the indirect reference to the city through its mayor or legislative body according to population, and also a direct reference by which the people had the right to determine whether a specified bill should become a law. We shall find, as the subject develops, that the direct referendum was omitted, but the principle of requiring the mayor or legislative body to assent to a law was continued and embodied in § 2 of article 12, but with important modifications relating to the method of applying the principle. The power of appointment of the head of the police force was vested solely in the mayor, either with or without the consent of the common council. This was in accordance with Mr. Johnson's amendment. The governor might, for cause and after a hearing, remove the head of the police force, and appoint a successor. Mr.

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Johnson's amendment providing for bi-partisan election boards and commissioners above cited was included in the committee's plan. Anticipating the consummation of the pending project for the enlargement of the city of New York, the amendment expressly authorized the legislature to provide for the consolidation of contiguous cities or the annexation of territory and the enactment of a new charter for the consolidated city, but after such consolidation the city was to be subject to the new provisions of the Constitution. The plan was not intended to affect the power of the legislature over cities, except as expressly limited by the amendment.

With the proposed amendments the committee on cities submitted a report stating the reasons for the intended additions to the Constitution. After pointing out the difference between statutory provisions relating to local administration in counties and towns, and powers of local government which had been conferred on cities, from which it appeared that the larger cities possessed less local authority than counties and towns, the committee say that the "entire system of government for cities lacks the principle of direct responsibility," which results from the fact that while the municipality chooses its own officers, their powers are regulated by the state legislature, in consequence of which official responsibility is only indirect, and if anything goes wrong the blame is charged to the legislature. Referring to the autonomous powers conferred by the proposed § 3, the committee say: "It is a very large grant of power to cities, and it is intended and believed to be effective and permanent. In and by itself it is a larger degree of home rule than has ever before been presented by any legislative or official body;" under it city officials could not escape responsibility as to the subjects enumerated, and they would be free from legislative interference. The

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Tilden Commission of 1875 had also proposed to limit the authority of the legislature over cities by the provision that "the legislature shall itself have no power to pass any law 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."

Mr. Jesse Johnson, chairman of the standing committee, opening the debate, said that home rule, as used in the present discussion, meant constitutional home rule as distinguished from legislative home rule, or certain specified rights of local government protected by the Constitution, and not subject to the discretion of the legislature. The problem relates to the degree of municipal independence which may be granted without dismembering the sovereignty of the state. There was considerable discussion of the amendments relating to the separation of city from state and national elections, and also of proposed provisions relating to police, but the debate was finally concentrated on the propositions relating to the degree of local power proposed to be conferred on the city's governing body, and the measure of sovereignty actually delegated to the city. Here was the storm center of a discussion more or less pertinent and often taking a wide range, which occupied the time of the Convention, with some interruptions, for sixteen days. There was little difference of opinion concerning the importance of separating elections substantially according to the plan proposed by the committee, and a section was formulated to accomplish this result. To

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what extent a city might resist legislative action concerning its local affairs, and how this resistance should be expressed, were serious problems, which were carefully considered. By the committee's plan the legislature, except by general law or general city law, had no power to enact laws relating to subjects specified in § 3, without the consent of the city authorities, or unless such proposed law had been approved by the people. Such a bill was to be presented to the governor in the usual manner, but his jurisdiction to act was suspended for twenty days, during which time the city authorities were required to determine whether they would give their consent to the proposed law. The governor's power to act on the bill depended on the affirmative action by the city authorities, or the approval by the people, if submitted to them. If the city authorities or the people approved the bill, the governor's jurisdiction to act upon it became complete.

Mr. Choate, for the purpose of simplifying § 4, offered an amendment which he thought would obviate the objection to a double veto, and said he did not believe "that the people of the state will ever consent or ought to be asked to consent to abandon their sovereignty over any division of the city in respect to any of its affairs." Mr. Choate's amendment was stated in the following form:

"Laws may be passed affecting one or more subjects enumerated in the last preceding section in any city by a majority of the members elected to both houses, if, after a full hearing by the mayor, he assents to the same, or by a vote of three fifths of the members elected to both houses, if he refuses his assent."

Mr. Choate said there were two evils to be avoided: "One is the abandonment of the power of the state over the city," and the other "is to prevent, if we can, con-

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stant, causeless, unchecked, undeliberate, unnotified interference with its domestic affairs." He thought his amendment would accomplish these objects by preserving the sovereignty of the state and by giving "the city an opportunity to be heard in respect to every intervention in its municipal affairs." Mr. Bowers approved the principle of § 4, requiring the assent by a city to proposed legislation, but he did not approve the section in its proposed form. He thought cities should have the right to govern themselves in their own way "absolutely free from legislative restraint;" that the mayor's assent should be required to any law providing for the expenditure of municipal funds, amending existing laws affecting a city, or granting public franchises. Mr. Nicoll said the report contained two principles absolutely essential to any constitutional scheme for the better government of cities; namely, the separation of city from national and state elections, and "an inhibition to the legislature to interfere by special act with the charters of cities." Mr. Hotchkiss proposed to add "police, charities, and corrections" to the limitations stated in § 3, and Mr. Mulqueen proposed to add education and the power to levy and collect taxes. Mr. Mulqueen did not believe the standing committee could hope for the passage of the proposed article. He said it might well be called a measure depriving cities of home rule, instead of granting it. He thought cities should be incorporated by general law, and that existing cities should have power, by popular vote, to reincorporate under a general law. Mr. Mulqueen said the proposition stated in Mr. Choate's amendment might be a check on cities, but it was not home rule. Mr. Francis, referring to the fact that the time of the legislature was largely occupied with consideration of details relating to municipal affairs, said that "the plan proposed by the committee on cities would do away with

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this by granting to municipalities control of certain matters purely local, to be carefully defined in the fundamental law. At the same time the sovereignty of the state should be, must be, rigidly guarded and distinctly affirmed;" and he thought "this would combine with the essential principle of state supremacy a recognition of the right of communities to self-government within such limits as would be regarded as proper, reasonable, and expedient," and would afford a very substantial relief to the legislature. "The state may yield what is safe and proper, but it must not abnegate its sovereignty to the peril of the protection of citizenship, life, liberty, and property which it is bound to maintain." Mr. Jenks suggested that the cities be divided into three classes: the first class to consist of those having a population of 250,000 or more, the second class of cities having a population of 50,000 and less than 250,000, and the third class to consist of all other cities. This was the same as the Cady amendment, except that the minimum population of the first class cities was fixed at 250,000, instead of 200,000.

After a prolonged discussion the article and the amendments proposed in committee of the whole were again referred to the standing committee, and on the 23d of August a majority of the committee reported a revised article in seven sections, providing for city elections in odd-numbered years, bi-partisan election boards, the appointment and removal of police officers, requiring each city to have a mayor and common council which might be chosen by minority representation, requiring general laws for the incorporation of new cities, dividing cities into three classes, as suggested by Mr. Jenks, and specifying certain subjects (as in the first report) over which the legislature should have no direct control. The second report continued substantially the provisions in the

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first report relating to Greater New York and the governor's power to remove a mayor. Mr. Davenport, Mr. Banks, Mr. Rowley, and Mr. Speer concurred in a minority report differing quite materially from the majority report in relation to home rule. Under their plan every city was to have a common council "vested with sole legislative authority to legislate for all city purposes, including the following subjects: Streets, parks and public places, docks, markets, waterworks, sewers, public buildings and property, the character and structure of buildings as to safety and security, salaries of all officers and employees paid out of the city moneys, the issue of municipal securities and obligations, the raising and the appropriation of moneys for city government and public purposes lawfully charged upon the city, and such other matters as are the concerns of the local government of cities. . . . The legislature shall enact general laws for the government of cities, so that all cities of the same class shall possess like powers and be subject to like restrictions. . . . The legislature shall not pass special or local laws for the government of any city, except with the approval of the mayor of the city affected."

The majority report was considered by sections.

§ 1. All elections, except to fill vacancies, of city officers, including supervisors and judicial officers of inferior or local jurisdiction, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, shall be on the first Tuesday succeeding the first Monday in November, in an odd-numbered year, and the term of every such officer shall expire at the end of some odd-numbered year. The terms of office of all such officers elected before the first day of January, one thousand eight hundred and ninety-five, whose successors have not then been elected, which, except as herein provided, would expire

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in an even-numbered year, or in and before the end of an odd-numbered year, are extended to and including the thirty-first day of December following such expiration; the terms of office of all such officers which, except as herein provided, would expire in an even-numbered year, and before the end thereof, are shortened so as to expire at he end of the year preceding such expiration.

Mr. Jenks proposed to amend the section by requiring that city elections "be held separate from all elections for state and national officers, and that the legislature, at its session next after the adoption of this article, shall enact such general laws as it deems necessary for such purpose." Mr. Hotchkiss proposed the following substitute for the Jenks amendment:

"Elections of city officers and of judges and justices of inferior local courts in all cities, and of county officers in all counties containing a city, and of supervisors elected in a city, except to fill vacancies, shall be on the Tuesday succeeding the first Monday in November in an odd-numbered year. The legislature shall, at its first session after the adoption of this article, provide by law for carrying into execution the foregoing provision, and in so doing shall extend or abridge the terms of such officers then in office so far as may be necessary for that purpose."

Mr. Peck proposed that in all counties containing cities, county and city officers be elected at different times. Mr. Jesse Johnson proposed some verbal changes and also the following addition at the end of the section: "This section shall not apply to any judicial officer except judges and justices of inferior and local courts." Subsequently, on Mr. Dickey's motion, the last sentence was amended by including a clause excepting third class cities from the operation of the section. The amendments

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proposed by Mr. Jenks, Mr. Hotchkiss, and Mr. Peck were determined in the negative.

Section 2, relating to bi-partisan election boards, was stricken out. This subject is included in § 6 of article 2, and has been considered in the notes on that article.

§ 3. No law shall be passed conferring the power to appoint the head of the police force of any city on any city officer except the mayor, or the mayor with the consent of the common council. The governor may remove the official or officials or any of them constituting the head of the police force of any city for cause, upon charges preferred before him; a copy of such charges shall be served upon the official sought to be removed, and an opportunity afforded him to be heard in his defense. Upon such removal the governor may appoint the successor of any official so removed, and said successor shall hold office until the expiration of the term of office of the mayor of said city holding office at the time such charges are preferred. Nothing in this section contained shall in any manner interfere with the power of the mayor or other officers to remove or appoint the head of police or other police officer, as such power is or may be conferred by law; but such power shall not extend to the removal of any person appointed by the governor as herein provided.

The Tilden Commission of 1875 recommended a similar provision in relation to the governor's power to remove the mayor.

§ 4. Every city shall have a mayor, who shall be its chief executive, with such powers as may be provided by law; his term of office shall be two years. Every city shall have a common council which shall consist of one or two bodies, to be elected with or without proportional or minority representation, and with such municipal legislative powers as may be provided by law. The legislature shall pass general laws under which new cities may be incorporated.

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Mr. Choate moved to amend by authorizing the legislature to provide for the election of the legislative body in cities of the first class by minority representation, but the amendment was rejected in committee of the whole, including also Mr. Veeder's motion to apply the amendment to all cities. Mr. C. B. McLaughlin offered the following substitute for § 4:

"There shall be in the several cities of this state a common council or board of aldermen, to be composed of such members and to be elected in such manner as may be provided by law. The legislature shall, by general laws, confer upon the common council or the board of aldermen of the several cities of this state, including those that may be hereafter incorporated, such further power of local legislation and administration as the legislature may, from time to time, deem expedient."

Mr. Towns offered an amendment providing for single-headed boards and departments in all cases. These amendments were not adopted.

§ 5. All cities are classified according to the last state enumeration, as such enumeration shall, from time to time, be made, as follows: The first class includes all cities having a population of 250,000, or upwards; the second class includes all cities having a population of 50,000 and less than 250,000; the third class includes all other cities. Laws relating to any of the subjects hereinafter in this section enumerated in all cities of one or more classes are general city laws. Except as provided by section 6, the legislature shall not pass any law, except general city laws, as to any of the following subjects in any city: First, streets and highways, except bridges or tunnels across the Hudson river below Waterford, or across the East river, or across waters which form a part of the boundary of any city, and approaches to any such bridge or tunnel; second, parks and public places;

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third, sewers and waterworks; fourth, the character and structure of buildings as to safety and security; city apparatus and force for preventing or extinguishing fires; fifth, salaries of city officers and employees; sixth, ward boundaries; seventh, vacating, reducing, or postponing any tax or assessment; eighth, membership and constituent parts of the common council; ninth, the powers and duties of the common council or of any city officer as to the subjects hereinbefore enumerated. The legislature is not hereby restricted in passing laws affecting the jurisdiction or power of any city as to such subjects, so far as it is to be exercised outside of the boundaries of such city.

Mr. Spencer offered a section providing in effect that a city might, by popular vote, determine to exercise "exclusive legislative and administrative powers concerning the streets, highways, parks, public places, and sewers within said city, and the compensation of city officials and servants whose duties appertain to any of such subjects," and laws were thereupon to be enacted by the legislature to carry the vote into effect.

§ 6. Laws, other than general city laws, relating to any of the subjects enumerated in section 5, or to such subjects with other subjects, are special city laws; all such laws, and bills therefor, shall contain the words "special city law" before the first section of the bill or law. After any such bill has been passed by both branches of the legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of the city to which it relates, and within fifteen days thereafter the mayor shall return it to the house from which it was sent, with a certificate thereon that such city does or does not consent thereto. In every city having a population of 500,000 or more, according to the then last state enumeration, the mayor, and in every other city the mayor and the common council, shall act for such city as to such bills. After consent is given to any such bill,

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as herein provided, it shall be presented to the governor for his action thereon. Any such bill which is returned without the consent of the city may be passed by a three-fifths affirmative vote of the members elected to each branch of the legislature, and it shall then be subject to the action of the governor as are other bills. In such cases there shall appear thereon, after the enacting clause, the words "passed by a three-fifths vote without the consent of the city." The legislature shall provide for public notice of any such bill transmitted to the mayor, and for opportunity for hearings thereon before the consent of the city is given.

It will be observed that this section contained Mr. Choate's amendment authorizing the legislature, by a three-fifths vote, to pass a bill over a city's objection, and it also modified the original provision by giving the city authorities fifteen days instead of twenty for the consideration of a bill, and it omitted the provision in the original report authorizing the submission of a bill to the people of a city. At Mr. J. Johnson's suggestion the term "legislative body" was substituted for the term "common council." Mr. Nicoll moved to substitute first seven eighths and then four fifths of the legislature for the three fifths stated in the section as necessary on the second passage of a bill against the city's objection, but both suggestions were rejected. Mr. Bush proposed to amend by requiring a two-thirds vote in the legislature in such a case. Mr. Dean moved to substitute a majority of the legislature for three fifths. He thought the ordinary rule of the Constitution under which bills were passed by a majority vote should apply to a city bill even after a veto of it by the mayor. Mr. Hill thought Mr. Dean's amendment would "rob the city of whatever good there is in the principle of home rule." Mr. Dean said the opponents of the majority vote in the legislature on the second passage of a bill overlooked the influence of

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the newspapers in determining the propriety of such a second passage. He said the bill would be under consideration fifteen days after its first passage, and during that time was subject to public criticism through the press and otherwise. "With all that deliberation, it is not fair to say that this is equivalent to passing it by the the same vote." He thought the Convention would not be justified "in surrendering the sovereignty of the state in the slightest degree to the city of New York or any other municipality." Mr. Cassidy, supporting Mr. Dean's amendment, said he believed every part of the state should have an interest in every other part. "We are mutually interested in every part of the state alike." Mr. Root opposed the Dean amendment, saying it was "totally destructive of the proposed provision." Concerning the general purpose of the new provision Mr. Root said "it secures the presentation of every law which relates to the private or local affairs of a great city; every law which relates to what may properly be called its private pecuniary interest, its business interests as distinguished from its functions as a part of the government of the state. It secures that every such law shall, after it has reached a perfected form, be held before the people so that they shall have an opportunity, through their chosen representative in the city, to express their opinion about it, and say whether they want it or not. It restores to them the power in regard to their private corporate affairs, to do what private corporations long had the right to do,—to accept or refuse to accept a change of their charter. It provides that if, after this full opportunity for discussion and expression of opinion is had, the chief magistrate of the city shall signify to the legislature that the people of the city do not want the law changing their private affairs, it shall not be forced upon them except by a three-fifths vote,—the vote of the same

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number that is required to be present when money bills are passed." He thought that requirement would not "stand in the way of any measure which ought to be forced upon any city in this state against its will in respect of these private local matters." The new provision would "turn the light of public discussion, public opinion, and public knowledge, full upon the chief magistrate of every city, and put him to his responsibility for assenting to measures regarding that city's private affairs, or refusing to assent; and if he refuses, it will turn that same light and concentrate that same responsibility upon the legislature of the state." Mr. Dean's amendment was rejected.

Mr. Cochran proposed to restore the provision contained in the first report relating to the passage of city laws on specified subjects, and which prohibited such laws without the consent of the city authorities. This proposition was rejected by a vote of 30 to 54.

§ 7. Nothing in this article contained shall limit or affect the power of the legislature to annex contiguous territory to any city, or to consolidate contiguous cities, or to make, or provide for making, a charter for any city created by such consolidation; but after the charter of any city created by such consolidation shall have become a law, such city, and the charter and laws relating thereto, shall be subject to all the provisions of this article. Except as expressly limited, the power of the legislature as to cities, their officers and government, and as to any district created by law and containing a city, or to provide for the removal of the mayor of any city, remains unimpaired; but such removal shall only be for cause and after a hearing.

Mr. Roche moved to strike out the provision relating to the creation of a district, and Mr. Mulqueen moved to amend by making the consolidation dependent upon the

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affirmative vote of the people of each city to be affected. Both amendments were determined in the negative.

The committee of the whole rejected a proposition by Mr. Moore to strike out all of the article except the first section, and substitute the following provision, proposed by the senate committee on cities, in 1891:

"The legislature shall enact general laws for the government of all cities in this state, and no municipal corporation shall hereafter be 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 the general laws."

Mr. Davenport's motion to substitute the minority report was also rejected. The committee of the whole reported the article favorably by a vote of 87 to 47.

The Convention, on the 30th of August, on Mr. Jesse Johnson's motion, by a vote of 91 to 40, recommitted the cities article to the standing committee on cities, with instructions to strike out all except the first section (separate city elections) and report the same immediately. The amendment, including only the first section, was then ordered to a third reading and sent to the committee on revision. It was finally adopted by a vote of 107 to 40. The next day a resolution by Mr. Jenks, directing the president to appoint a special committee of six to report an article on the government of cities, including the section on separate city elections already adopted, was tabled by a vote of 80 to 57.

On the 8th of September Mr. Jesse Johnson offered the following amendment as a substitute for §§ 5 and 6 of the standing committee's second report:

"All cities are classified according to the latest state enumeration as from time to time made, as follows: The first class includes all cities having a population of two hundred

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and fifty thousand or more; the second class, all cities having a population of fifty thousand and less than two hundred and fifty thousand; the third class, all other cities. Laws relating to the property, affairs, or government of cities and the several departments thereof, are divided into general and special city laws. General city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law relating to a city has been passed by both branches of the legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, with his certificate thereon, stating whether the city has or has not accepted the same.

"In every city of the first class, the mayor, and in every other city, the mayor and the legislative body thereof, concurrently, shall act for such city as to such bill; but the legislature may provide for the concurrence of the legislative body in cities of the first class. The legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted, unless accepted as herein provided, by every such city. Whenever any such bill is returned without the acceptance of the city or cities to which it relates, or is not returned within such fifteen days, it may, nevertheless, again be passed by both branches of the legislature, and it shall be subject, as are other bills, to the action of the governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words 'accepted by the city,' or 'cities,' as the case may be; in every such law which is passed without such acceptance, by the words 'passed without the acceptance of the city' or 'cities' as the case may be."

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On the 14th, when the amendment was taken up for consideration, Mr. Johnson said that under it "local and special laws affecting cities shall be referred to the city for advice;" that "laws of a general character relating to cities shall relate to cities by classes, thus obviating the difficulty of laws general in form, but special in application." The city's responsibility for legislation would be shown by the record of the statute, and also the responsibility of the legislature for statutes passed against the city's assent. Mr. Johnson thought this carried the home rule proposition as far as it was then possible, and as far as it had been carried or attempted in any other state. Under the new section a bill might be passed over the city's veto by a majority of the legislature. This was, in effect, the Dean amendment which had been rejected when § 6 was under consideration in committee of the whole. During the debate on the new section Mr. Nicoll proposed to amend it by requiring a two-thirds vote on the second passage of a bill, which was rejected, together with another motion requiring a three-fifths vote. The new section was reported favorably by the committee of the whole without amendment, and was adopted by a vote of 93 to 42.

Thus ended a protracted consideration of the subject of home rule. The policy conferring on a city absolute sovereignty over specified local subjects, which had been recommended by the distinguished Tilden Commission of 1875, and again by the standing committee on cities in the Convention of 1894, was abandoned, and the state continued to possess and might exercise undiminished authority over the government of every part of its territory. The state remains greater than any of its parts, and while the citizens in a given municipality may by law be charged with the primary responsibility for a proper administration of local affairs, the Constitution

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does not present the incongruity of making a city in any particular respecting its government, superior to the state from which it derives its existence. The result of the controversy over home rule appears in § 2 of article 12. It will be observed that this section includes several distinct portions of the cities article as proposed in the first and second reports of the standing committee, and also additional provisions suggested during the progress of the debate. Details are omitted and general rules only are stated. Many delegates who were committed to the policy of absolute home rule were dissatisfied with the result, and thought it did not justify the time and labor expended by the Convention in producing it. When the Convention decided to maintain the sovereignty of the state in the government of cities there remained only the problem of devising a plan by which the city should have ample notice of any intended legislation affecting it, and an opportunity to be heard and present its objections. I have called attention in previous chapters to attempts to formulate plans under which proposed local bills should be published before presentation to the legislature. This was one plan to prevent surprise; but, by the plan adopted, not only is surprise prevented, but the city possesses a constitutional right to veto proposed legislation, and, if vetoed and again passed, the legislature becomes ultimately responsible for it. As a means of preventing hasty local legislation this amendment should be considered in connection with the amendment included in § 15 of article 3, requiring bills in their final printed form to be upon the desks of members three days before their final passage. This gives every local bill a possible eighteen days for actual, if not constitutional consideration by the city. The scope and purpose of the proposed law may be fully known before it receives final action by the legislature or the governor. After an

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official observation of the practical operation of this amendment through six years, 1895–1900, I have no hesitation in pronouncing it a wise and beneficent provision in relation to city legislation, and one which embodies all the city control of such legislation which is practicable under a system of government in which all the people, acting in the capacity of the state, are responsible to one another for the protection and enjoyment of the rights of persons and property guaranteed by the fundamental laws of society. The state cannot be divided into smaller states or independent sovereignties. Obviously there can be but one sovereignty, and that must remain in the state, to be exercised through its organized lawmaking body, the legislature.

The legislature of 1895 enacted chapters 1 and 9 for the purpose of prescribing the procedure to be observed in cities in relation to local bills passed by the legislature. This subject was afterwards included in the general city law enacted in 1900. Additional suggestions concerning this amendment, with a review of judicial decisions, will be found in notes to the section in the fourth volume.

Art. XIII. Official Oath; Bribery; Passes.

OFFICIAL OATH; BRIBERY.

In the existing Constitution the provision relating to official oaths was in article 12, and the subject of bribery was in article 15, added by the amendments of 1874. By a rearrangement of the Constitution in 1894 these subjects were included in article 13, but without change. The provision against passes, which grew out of an amendment proposed to article 1, was also placed in article 13.

Mr. Lauterbach introduced an amendment requiring public officers to file an oath within ten days after the

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expiration of their term that they had not been guilty of official corruption while in office, and until such oath was filed they could not vote nor hold a public office. Mr. Moore proposed to amend the official oath by adding a clause excluding promises to aid in advancing particular measures as a reward for political support, and a further provision making it an attempt at bribery to obtain from a candidate a promise to promote such measures in return for such support. Mr. I. S. Johnson proposed to add to that part of the official oath relating to corruption at elections a clause making the oath applicable also to corruption at a "primary election, caucus, or convention." This amendment was reported favorably by the judiciary committee, but was not considered in convention.

Mr. J. I. Green proposed to add to § 3 of the bribery article (rights of person accused) a provision requiring all investigations by any court, board, officer, or body, including a legislative committee, to be governed by legal rules of evidence, and giving the accused the right to appear by counsel. An adverse report by the judiciary committee was sustained by the Convention. Mr. I. S. Johnson proposed several amendments to the bribery article, applying it specifically to city and village officers, and to a preliminary canvass for an official appointment or nomination, and prohibiting political contributions by corporations.

PASSES.

This subject was considered by the judiciary commission of 1890, and in the chapter on that commission I have quoted the provision recommended by it that no judicial officer shall "accept from any person or corporation free transportation for himself or any member of his family over the line of any common carrier." In

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the Convention of 1894 the subject was considered from two points of view, including, first, a provision prohibiting public officers from receiving passes from common carriers, and second, a provision requiring common carriers to transport certain public officers free. The direct prohibition against passes was included in Mr. E. R. Brown's amendment providing that:

"No public officer or person elected or appointed to public office, and no juror or person drawn or summoned as a juror, shall accept or request from any person or corporation, for himself or another, a free pass or other gratuity from any corporation which acts as a common carrier."

This was the basis of the provision finally adopted. The other proposition, to require railroad corporations to carry certain officers free, was expressed in three amendments. One was introduced by Mr. Moore, under which the state reserved in all existing or future corporate franchises the right of free transportation to all its state officers, judges, and district attorneys over and upon all lines of travel anywhere within this state. Mr. Marshall introduced the following amendment:

"The governor, lieutenant governor, secretary of state, comptroller, treasurer, attorney general, state engineer and surveyor, superintendent of public works, superintendent of state prisons, the members of the senate and assembly, the judges of the court of appeals, and the justices of the supreme court, shall be entitled to free transportation over all railroads within this state while engaged in the performance of their official duties, upon presentation of a certificate of their election, issued by the secretary of state, and it shall be unlawful for any such officers, except as aforesaid, and for any other public officer or any person, to accept or re-

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quest from any person or corporation free transportation for himself or another over the line of any common carrier."

Mr. Griswold's amendment was in the following form:

"Each corporation and company running or operating a railroad within this state for the carrying of persons and passengers shall carry and transport upon the line of its road upon any of its regular trains, without compensation, and free of charge, each of the judges of the court of appeals and of the supreme court, and each member of the legislature of this state, when traveling upon or over the line of its road from his residence to his place of destination in or for the purpose of the performance of the duties of his office as such, and in returning therefrom to his place of residence."

The committee on railroads reported Mr. Brown's amendment in the following form:

"No public officer or person elected or appointed to a public office shall make use of, or by himself, or in conjunction with another, accept or request for himself or for another, any free pass, free transportation, franking privilege, or discrimination in passenger rates from any company or corporation. Any person who violates the provisions of this section shall forfeit his office, at the suit of the attorney general."

In committee of the whole Mr. E. R. Brown pointed out the evils of the practice of giving railroad passes to public officers, especially to members of the legislature and judges, and said that in some sections of the state passes were also given to assessors, and the rate of assessment was controlled by this means. Municipal officers were also frequently, if not usually, the recipients of such passes. He cited several states whose Constitutions con-

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tained provisions against passes. Mr. Floyd said a pass was equivalent to a gift of money. Mr. Nicoll offered the following substitute for the Brown amendment:

"No person elected or appointed to a public office under the laws of this state shall, directly or indirectly, ask, demand, accept, receive, or consent to receive, for his own use and benefit, or for the use and benefit of another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph, or telephone rates from any company or corporation, or shall make use of the same by himself or in conjunction with another. Any person who violates any provision of this section shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the attorney general."

Mr. Nicoll said the practice of giving passes, at which the amendment was aimed, was an offense against public morals, and ought to be suppressed. For the purpose of carrying into effect the policy suggested by several amendments requiring the compulsory transportation of public officers by common carriers, Mr. Mantanye proposed to add to the Brown amendment an exception providing that the "incorporated common carriers of the state, as one of the burdens incident to their franchises, shall issue to every officer, including judges of the court of appeals and justices of the supreme court and members of the legislature, free transportation between the place of residence of such officer and the place where his official duties are to be performed, and by the usual traveled routes, for the personal use of such officer only; such transportation to be furnished on the certificate of the secretary of state." This proposition was rejected and Mr. Nicoll's substitute was adopted.

On Mr. Choate's motion the following addition to the section was adopted:

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"No person or officer or agent of a corporation giving any such free pass, free transportation, franking privilege, or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same."

Mr. Choate said that if it was to be a misdemeanor for a public officer to receive a pass, it ought also to be a misdemeanor for an officer of the corporation to sign such a pass. Mr. Goodelle also thought that corporations should not be exempted from punishment for giving passes. Mr. Nicoll suggested the following addition to Mr. Choate's amendment, which he said was in analogy to the bribery article:

"Any corporation or officer or agent thereof, who shall offer or promise to a public officer or person elected or appointed to a public office, any such free pass, free transportation, franking privilege, or discrimination, shall also be deemed guilty of a misdemeanor, and shall be liable to punishment, except as herein provided."

This was accepted and appears as the third sentence of the section in its final form. The Convention, by a vote of 96 to 44, adopted the section in the following form:

"No public officer or person elected or appointed to a public office shall make use of, or by himself, or in conjunction with another, accept or request for himself or for another, any free pass, free transportation, franking privilege, or discrimination in passenger rates from any company or corporation. Any person who violates the provisions of this section shall forfeit his office, at the suit of the attorney general.

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"Any corporation or officer, or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege, or discrimination, shall also be deemed guilty of a misdemeanor, and liable to punishment, except as herein provided. No person or officer, or agent of a corporation giving any such free pass, free transportation, franking privilege, or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving of the same."

This is the form in which the section was adopted on the 12th of September, according to the record of the proceedings and debates of the Convention, but the journal of that day gives the first part of the section in the following form:

"No public officer, or person elected or appointed to a public office, under the laws of this state, shall, directly or indirectly, ask, demand, accept, receive, or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph, or telephone rates from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the attorney general."

The last two sentences of the section are the same in both records. I do not find that the Convention again considered this section separately, and the journal form of the amendment appears in the Constitution as finally revised and adopted by the Convention.

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Art. XIV. Amendments and Conventions.

The committee on future amendments thought the Constitution should be so framed as to prevent the adoption of an amendment by a small minority of the voters, which had been done in many cases during our constitutional history. To insure a representative vote on such amendments the committee, in its second report, proposed to include the following in § 1:

"Such approval shall be expressed in one of the following methods: First, if such amendment or amendments are submitted at a general election, by the affirmative votes of a majority of all the electors voting at such election; or second, provided two thirds of all the electors voting at such election shall vote thereon, by the affirmative votes of a majority of such electors voting thereon; third, if submitted at a special election, by a number of affirmative votes equal to a majority of all the electors voting at the last previous general election; or fourth, provided two thirds of the number of electors who voted at the last previous general election shall vote thereon, by the affirmative votes of a majority of such electors voting thereon."

The subject had been included in the committee's first report and had been considered in committee of the whole; but when the second report was taken up for consideration, on the 14th of September, Mr. Marshall, chairman of the committee, while expressing the opinion that the principle of the foregoing rules should be incorporated in the Constitution, said he believed it would be improper to press it at that stage of the work of the Convention, and on his motion the new provision was stricken out. The first section, relating to future amendments, was left unchanged, except by the addition of the provision fixing the time when amendments take effect,

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which had been included in a new article, 16, by the amendments of 1874.

Section 2, relating to constitutional conventions, was modified in important particulars, including several features suggested by recent history and the experience of the Convention. The section will be considered by topics.

I. WHEN CONVENTIONS TO BE HELD.

Under existing constitutional provisions on this subject, which had been adopted in 1846, the people were entitled to decide in 1866 and each twentieth year thereafter, and also at other times, in the discretion of the legislature, whether a convention should be held to revise and amend the Constitution. Under this provision the subject had been submitted to the people in 1866, resulting in an affirmative vote, followed by the Convention of 1867–68. The question had again been submitted in 1886 with the same result, but, for reasons which appear in the first part of this chapter, the Convention was not held until 1894. Under that Constitution the question of another constitutional convention would have been submitted to the people in 1906, which would have been only twelve years after the Convention of 1894. That Convention was therefore called on to determine whether the question of another convention should again be submitted so soon, or whether the subject should be deferred for a longer time. Several amendments were introduced relating to this subject. Mr. Tucker proposed to submit the question of a convention in 1904, Mr. C. H. Truax, Mr. Herzberg, and Mr. Parmenter in 1914, and Mr. Veeder and Mr. Mereness in 1916. The committee on future amendments recommended the latter date, 1916, and this was adopted. Under this provision the question of holding a convention will be submitted

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to the people in 1916, and, if a convention is ordered, delegates will be elected in 1917, and the convention will be held in 1918.

The framers of the new section intended to make it self-executing so far as practicable, and therefore, instead of requiring the legislature to provide by law for a convention, the people, by this section, reserved to themselves the absolute right to elect delegates to constitute a convention, without further action by the legislature. Under the election law, which requires the secretary of state to give notice of the election of all state officers, it will be his duty in the year following an affirmative vote by the people on the question of holding a convention, to give notice of the election of delegates, and thereupon the machinery of the election law will become applicable to this class of officers and no special statute will be needed. The provisions of the old Constitution relating to holding conventions once in twenty years, and also at other times, if ordered, on a special submission of the question by the legislature, were continued in the new Constitution.

2. HOW CONVENTIONS CONSTITUTED.

In a former part of this chapter I have given a sketch of the controversy between the legislature and the governor over bills providing for a constitutional convention after the people, in 1886, had voted in favor of such a convention, from which it appears that there was considerable difference of opinion concerning the proper number of delegates and the manner of their selection. This was manifest from the bill passed by the legislature in 1887 and vetoed by Governor Hill, from the convention law of 1892, amended in 1893, and from several bills introduced, but not passed. This fluctuation of legis-

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lative opinion prompted the Convention to fix in the Constitution itself the number and method of selection of delegates to compose a constitutional convention. The Conventions of 1801, 1821, and 1846 had been composed of delegates equal in number to the members of assembly, and chosen in the same manner; but, in providing for the Convention of 1867 and 1894, this rule was changed, and delegates were chosen by senate districts, with an additional number elected from the state at large.

The first suggestion on this subject was contained in an amendment introduced by Mr. Lincoln on the 23d of May, providing that the number of delegates should be at least equal to the number of members of the legislature, which, under the existing Constitution, was 160. On the 29th, Mr. Veeder introduced an amendment limiting the maximum number of delegates to the number of members of the legislature, providing for four delegates from each senate district, and delegates at large, equal in number to the senate districts, but no elector could vote for more than one half of the delegates at large. This was the plan under which the Convention of 1867 was chosen. Other similar amendments were subsequently introduced. Mr. Herzberg's amendment provided for a convention in 1914 and in each twentieth year thereafter without a previous vote by the people, and unless the legislature should otherwise direct, the convention was to be composed of the same number of delegates, and chosen in the same manner, as the Convention of 1894. Mr. Mereness proposed to limit the minimum number of delegates to the number of members of the legislature. Under his amendment state officers, members of the legislature, and judges of courts of record were not eligible to membership in the convention. Mr. Tucker proposed a convention composed

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of one delegate from each assembly district, and one from each senate district.

On the 27th of July the standing committee reported an amendment including a plan for a convention to be composed of four delegates from each senate district and fifteen at large. As the legislature was then constituted this would have made a convention with 143 delegates. Mr. Marshall, referring to the controversy between the legislature and the governor concerning a convention after the vote of the people in 1886, said that, in order to avoid a repetition of that situation and the delay in holding a convention which the people had ordered, the committee had proposed a plan which was believed to be self-executing, and under which the people could choose a convention, and the convention could be held without the enactment of a statute specifically providing for it. Mr. Marshall said the number of delegates to be chosen by senate districts was fixed at four, anticipating that the Convention might determine to increase the number of senate districts from 32 to 50. This would have made a convention with 215 delegates. The committee thought a convention should not be much larger than the Convention of 1894, which was composed of 175 delegates. In committee of the whole Mr. Moore proposed to fix the number of district delegates at five. Without action on this motion the whole subject of amendments and conventions was referred back to the standing committee, which made another report on the 17th of August, in which the convention plan was continued as stated in the first report. The subject was not reached again in committee of the whole until the 14th of September. In the meantime the new apportionment had been adopted, by which the assembly had been increased to 150 and the senate to 50. On Mr. Ackerly's motion the number of district delegates was

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fixed at 3, instead of 4, as reported by the committee. The number of delegates at large was not changed, and in this form the plan was adopted which provides for a convention of 165 delegates, with a possibility, however, that under the enumerations of 1905 and 1915, and the reapportionments of 1906 and 1916, additional senate districts may be created under § 4 of article 3, in which case the number of district delegates in the next convention, to be held in 1918, will be correspondingly increased.

3. POWERS OF CONVENTION.

Another feature of the new provisions relating to constitutional conventions was a statement of the convention's powers and functions, it being a part of the policy of the committee to provide a convention scheme which, so far as practicable, would be independent of the legislature. The plan embraces:

a. Compensation.—This had previously been subject to the discretion of the legislature. The act of 1893, under which this Convention was held, fixed the compensation of delegates at $10 a day and legislative mileage, and terminated the *per diem* compensation on the 15th of September, 1894. The Convention did not complete its labors until the 29th of September, and the members received no compensation for this extra service. Under the amended Constitution delegates will receive the same compensation and mileage as members of assembly.

b. Date of meeting.—This had previously been fixed by the statutes under which the conventions were held. The new plan requires the convention to meet on the first Tuesday of April in the next year after the delegates are elected.

c. Length of session.—The convention act of 1867 in effect limited the session of the Convention, by requiring

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the Constitution or amendments proposed by it to be submitted to the people at the November election in that year; but the Convention continued its labors until the 28th of February, 1868, and the legislature passed an act ratifying the prolongation of the session after the time originally fixed for the submission of its work to the people. The legislature of 1893 apparently sought to fix a date for the termination of the Convention's work by providing that no *per diem* compensation should be received after the 15th of September, 1894. This act also required the work of the Convention to be submitted to the people at the November election, in 1894. The new Constitution provides specifically that the delegates "shall continue their session until the business of such convention shall have been completed."

d. Vote on amendments.—In the chapter on the Convention of 1867 I have called attention to the fact that amendments were frequently adopted by a small minority of delegates, and the people were thus called on to consider and determine constitutional amendments which had not received the approval of a majority of the Convention. The Convention of 1894 adopted a rule that "no constitutional amendment shall be adopted unless by the assent of a majority of all the members elected to the convention." Under that rule no amendment could be submitted to the people nor included in the revised constitution unless it received the affirmative votes of 88 delegates. This rule was incorporated in the new Constitution. It is consistent with the provisions of the section relating to amendments proposed by the legislature. A legislative amendment must receive the affirmative vote of a majority of all the members elected to each house, and in accordance with this principle the people should not be required to consider a convention amend-

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ment which has not received the approval of a majority of the convention.

c. Determining the election and qualifications of delegates.—It has already been observed that a constitutional convention is the highest representative body known to a free people. It seems reasonable, therefore, that it should possess the original powers of a parliamentary body, including, under our system, the right to determine the election, returns, and qualifications of its members. Several seats in the Convention of 1894 were contested, and the Convention assumed the right to determine these contests. A committee on privileges and elections was appointed, which investigated the contests and reported the results to the Convention. Some contestants were given the seats claimed by them, and the claims of other contestants were rejected. The right of the Convention to determine these questions was challenged by a writ of prohibition, issued by Justice Samuel Edwards of the supreme court. This grew out of a contest in the thirtieth senate district, in which Harvey W. Putnam and Thomas A. Sullivan claimed the seats held under the election returns by Charles Beckwith and Herman F. Trapper. The contestants presented their claims on the opening day of the session, May 8. The Convention adjourned to the 22d. During the recess Mr. Trapper obtained the writ, and it was served on several members of the Convention, including the president. It restrained the Convention and the contestants from interfering with Mr. Trapper's right to a seat, except to take testimony in proceedings already instituted.

On the 22d of May, when the Convention reassembled, President Choate announced the service of the writ and said it was "a matter of the highest privilege and of the first importance to the Convention." The subject was referred to the judiciary committee, and on the 1st

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of June that committee presented a report, in which it expressed the opinion that "no court or legislative or executive officer has authority to interfere with the exercise of the powers or the performance of the duties which the people have enjoined upon" the Convention. That these powers included the right to determine the election, returns, and qualifications of its members; that such powers had not been conferred upon the judiciary, but were inherent in legislative bodies. "It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary legislature. . . . The convention furnishes the only way by which the people can exercise their will in respect" to the judiciary and the legislature, "and their control over the convention would be wholly incompatible with the free exercise of that will." The general report of the judiciary committee was accompanied by a report of a subcommittee, prepared by Mr. Marshall, which considered with great care the principles governing parliamentary organization, and the status of a constitutional convention under our system of government, and numerous decisions were cited to show that the higher legislative bodies must, of necessity, be independent; at least, so far as concerns their organization and the ordinary exercise of their functions. The report cited authorities to show that the issuance of a writ of prohibition by the supreme court involved "the assertion by the tribunal whence it emanates, that the body to whom it is directed is an inferior tribunal, usurping powers which it does not possess, and encroaching upon a jurisdiction beyond its purview." This relation of the court to the Convention was denied, and it was asserted that such a convention was not an inferior tribunal, "but a gathering of the people, in their sovereign capacity;" and they may, when so assembled, exercise the

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very highest political powers. Any attempt by the court to restrict the Convention in the exercise of ordinary parliamentary powers would be a direct attack upon our political system. The report quoted the provisions of the convention act of 1893, which specifically conferred on the Convention the power to determine the election, returns, and qualifications of its members. This was deemed a legitimate exercise of legislative power under the constitutional provision relating to conventions, and by it the people, acting through the legislature, had expressly determined that the Convention might exercise this high political power. No decision was cited involving the question of the power of the Convention to determine the election, returns, and qualifications of its members, and it may be assumed from Mr. Marshall's careful examination of the subject, that this question had not received direct judicial consideration.

Mr. Lincoln, not a member of the judiciary committee, examined the subject historically for the purpose of ascertaining the practice of constitutional conventions in relation to the question involved in this writ, and presented the results of his examination in a speech delivered on the 1st of June, when the report of the judiciary committee was under consideration. He said he thought this was the first instance "where the judiciary had challenged the right of a constitutional convention to determine the election and qualifications of its own members;" that he had examined the journals of ninety-four constitutional conventions in the United States, including the Revolutionary conventions which framed the first state Constitutions, the reconstruction conventions in the southern states, held soon after the Civil War, the conventions called for the purpose of framing constitutions in territories preliminary to their admission as states, besides numerous other conventions held under organized gov-

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ernments. He said that about half of the conventions took some action bearing upon the question "of the eligibility and election and qualifications of its members," and in several instances this action resulted in a direct decision by the convention of contests in relation to seats; that he had found no instance where the question had been referred to or decided by a judicial tribunal, but that, from first to last, the convention had exercised the prerogative of deciding who were elected members. He thought the Convention had a "supreme and indisputable right to determine the election and qualifications of its own members."

The judiciary committee recommended that its views, as embodied in the report, be transmitted to the supreme court, with a respectful remonstrance against its entertaining jurisdiction. A resolution to that effect, offered by Mr. Root, was adopted by the Convention on the 1st of June, and the report was accordingly transmitted by the secretary to Judge Edwards, before whom the writ was made returnable at Hudson on the 2d of June. The matter was not heard by Judge Edwards, but was brought to a hearing at Buffalo on the 5th of June, before Justice Manly C. Green, who on that day denied the application for a writ of prohibition and vacated the proceedings already taken.

On the 23d of May—the next day after President Choate announced the service of the writ of prohibition—Mr. Lincoln introduced an amendment providing that a "constitutional convention, when assembled, shall be the judge of the election and qualification of its members, and shall have exclusive jurisdiction to determine contested elections." Mr. C. H. Truax, Mr. Danforth, and Mr. Parmenter afterwards introduced amendments containing a similar provision. The standing committee on future amendments and conventions included this subject

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in its report, and it was incorporated in the convention section in its final form.

f. Vacancies.—The self-executing character of the new section relating to conventions further appears from the provision for filling a vacancy in a district delegation by the remaining delegates representing that district, and for filling a vacancy in a delegation at large by the remaining delegates at large. Under the convention act of 1893 vacancies were to be filled by special election. The new provision is a radical departure from the general policy of the state under which representatives in legislative bodies are to be chosen directly by the people, but the session of a constitutional convention is almost necessarily brief, and if a special election were the only method of filling a vacancy, much time would elapse before it could be filled, or else, in default of such special election, the seat would remain vacant. Vacancies did occur in the Convention of 1894, but were not filled. The new provision furnishes a prompt and inexpensive method of filling vacancies.

g. Rules and procedure.—The new section prescribes for a convention substantially the rules and procedure established for the legislature by other provisions of the Constitution, including the number necessary to constitute a quorum, and providing specifically that the convention "shall have the power to appoint such officers, employees, and assistants as it may deem necessary, and fix their compensation, and to provide for the printing of its documents, journal, and proceedings," and the convention was also required to enter on its journal the yeas and nays on constitutional amendments.

h. Submission of Constitution or amendments.—The convention is authorized to fix the time and manner of submitting its work to the people "at an election which shall be held not less than six weeks after the adjourn-

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ment of such convention," and such Constitution or amendments will go into effect on the 1st day of January next after their adoption by the people.

i. Coincident amendments.—A constitution or an amendment proposed by a convention will, if approved, supersede a legislative amendment on the same subject adopted at the same election. This provision was primarily intended to meet a condition presented by legislative amendments which were to be submitted to the people at the November election in 1894, and which included subjects covered by the proposed constitution, but the provision was amended by including future cases of the same character.

It has already been pointed out that under the first and second Constitutions no provision was made for conventions, and that the Conventions of 1801, 1821, and 1846 were called after an affirmative vote by the people on a question submitted by the legislature. The Constitution of 1846 provided specifically for future conventions at stated periods. That subject has been fully considered in a previous chapter. But, while the people had the right to determine every twenty years whether a convention should be held to revise the Constitution, the structure of the convention, the time when it should be held, and other details concerning it, were left to the discretion of the legislature. The convention section in the Constitution of 1894 contains apparently the ultimate practicable stage of evolution on this subject, by providing a convention scheme which is substantially independent of the legislature.

Art. XV. When Constitution to Take Effect.

Mr. C. H. Truax introduced an amendment that "this Constitution shall be in force from and including the

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first day of January, 1895." This was adopted with the additional clause "except as otherwise herein provided." This exception includes the provisions relating to prison labor, the change of term of the governor and lieutenant governor, the jurisdiction of the court of appeals, the organization of the appellate division of the supreme court, and the abolition of circuit courts, courts of oyer and terminer, courts of sessions, and superior city courts.

Conclusion.

We have now given a sketch of the origin, progress, and result of numerous propositions for constitutional reform which were considered by the Convention of 1894, including much history of subjects which, developing sometimes slowly and sometimes more rapidly, through a period of years, culminated in a situation which seemed to demand constitutional recognition, and which are embodied in provisions now appearing in our Constitution for the first time. In this treatment of constitutional development I have followed the course adopted in previous chapters relating to the earlier Constitutions, and have sought to show, so far as practicable, previous and existing political, social, and commercial conditions which seemed to demand constitutional attention. The Convention of 1894 was in session practically four months. A large number of amendments were considered, either by committees or by the Convention, but out of this extended consideration only thirty-three positive amendments were adopted; besides these, several obsolete provisions were omitted from the revised Constitution. The existing Constitution contained 156 sections; the new Constitution contained twenty-six entirely new sections, but by reason of the omission of sections

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in the old Constitution which had become obsolete, and the consolidation and rearrangement of others, the Constitution of 1894, as adopted, contained only 151 sections. The twenty-six new sections do not embody twenty-six new subjects. The number of new subjects is quite limited; and several sections are sometimes used to express a single subject. The changes in the existing Constitution which received the most serious consideration related to legislative apportionment, the reorganization of the judiciary, and canals. Other parts of the Constitution received their share of attention, but many provisions were left untouched, and nobody suggested any modification of them. They have continued through several Constitutions, and have become established features of our constitutional system. The changes actually made were intended to remedy conditions which it was believed demanded immediate relief. No change was made simply for the sake of change, and the Convention kept constantly in mind President Choate's admonition, in his opening address, that the Constitution should not be treated "with rude and sacrilegious hands."

The objection was often made during the deliberations of the Convention that proposed amendments were of a legislative character, were clearly within the province of the legislature, and had no proper place in a constitution. This proposition was undoubtedly accurate if considered only from the standpoint of legislative power, for I have already, in the course of this chapter, called attention to the fact that several amendments included in the Constitution were substantial transcripts of existing statutes, and imposed no new duty, and conferred no new power on the legislature. They were included in the Constitution for preservation, and to place them beyond the control of the legislature. Future amendments, so far as they may relate to modifications of essential consti-

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tutional principles, will probably be few in number, unless our form of government be changed, and future conventions, like the Convention of 1894, will doubtless devote the larger share of their attention to propositions intended to limit the authority of the legislature. The amendments of a legislative character adopted by this Convention include provisions relating to poolselling and bookmaking, damages for injuries causing death, registration of voters, bi-partisan local election boards, riders on appropriation bills, contract labor in prisons, the civil service, the forest preserve, the state board of charities, lunacy and prison commissions, common schools, the university, sectarian appropriations, city legislation and separate elections, free passes, and a large part of the section relating to constitutional conventions. The legislature already possessed power to enact laws in relation to these subjects, and might also have repealed such laws. The inclusion of these provisions in the Constitution withdraws them from the domain of legislative discretion, and this was the controlling purpose of the Convention of 1894 in adopting amendments relating to these subjects. The revised Constitution, in its final form, was adopted by the Convention by a vote of 93 to 46.

On the 28th of September Mr. Cookinham, from the committee appointed for that purpose, reported an address to the people in which the work of the Convention and its results as embodied in the new Constitution were briefly reviewed, with a concise statement of the reasons for the several changes, and submitting the Constitution to the people with an expression of confidence that, if "ratified by them, experience of its operation will show that it will be a safe and efficient organic law, competent for the present needs of this great commonwealth, and sufficient for the demands of that expanding civilization which the ensuing twenty years will witness." The

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report was adopted by the Convention and a large number of copies ordered printed and distributed throughout the state, together with the new Constitution.

The Constitution of 1777 was attested only by Leonard Gansevoort, president *pro tem.* of the Convention, the president and vice president being absent, and the secretaries refusing to attest the instrument because it had not been engrossed. The amendments of 1801, in five sections, were, by order of the Convention, attested by the president, Aaron Burr, and by the secretaries, James Van Ingen and Joseph Constant, and delivered to the secretary of state. The Constitution of 1821 was attested by Daniel D. Tompkins, president of the Convention, and by John F. Bacon and Samuel S. Gardiner, secretaries. One hundred and one delegates also signed the Constitution,—98 before the Convention adjourned, and three afterwards. The Constitution of 1846 was attested by President John Tracy, and by James F. Starbuck, Henry W. Strong, and Francis Seger, secretaries, and was also signed by 114 delegates. The Constitution proposed by the Convention of 1867–68 was officially attested by the president, William A. Wheeler, and by Luther Caldwell, secretary. It was also signed by 123 delegates, in accordance with a resolution offered by Thomas G. Alvord, under which delegates were permitted to sign the instrument at any time before it was submitted to the people. The Convention of 1894 decided to dispense with the attestation by delegates, and on motion of Mr. Holls, the president and secretary were directed to attest the Constitution in behalf of the Convention. The instrument was accordingly signed by Joseph Hodges Choate, president and delegate at large, and by Charles Elliott Fitch, secretary.

It has already been stated in a former chapter that the Constitution of 1777 was not deposited in the office

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of the secretary of state until August 30, 1821, forty-four years after its adoption. There was no secretary of state when this Constitution was adopted, and therefore no public state office in which the document could be deposited. It was for many years in the custody of John McKesson, one of the secretaries of the Convention, and after his death was deposited by his nephew in the secretary's office. Subsequent constitutions in their original, engrossed, and attested form, including the amendments of 1801, have been deposited in the same office, there to remain as a part of the permanent records of the state. The constitutions proposed by the Conventions of 1846, 1867, and 1894 were attested and delivered to the secretary of state in the presence of the respective conventions. Thus, the several conventions adopted and observed the most solemn formalities which the importance of the occasion seemed to suggest, and which were manifestly appropriate in promulgating the fundamental law of a great state.

The Convention of 1894 adjourned on the 29th of September. President Choate, in his closing address, briefly reviewed the work of the Convention. "We found," he said, "great responsibility and difficult duties intrusted to us. We were to decide, in the first place, the great question whether we should devise a new constitution for the state of New York, or merely repair, enlarge, and improve that ancient structure under which its people had prospered and lived in happiness so long. There could be but one answer to that question. We had only to go over this venerable structure to discover the defects which the ravages of time had made, the improvements and additions which the progress of civilization demanded, and to apply our wisdom, so far as we might, to the work of improvement and repair." Referring to the fact that more than 400 amendments had

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been proposed, the president said that by adopting only thirty-three propositions out of the large number introduced, the Convention had performed a great public service, entitling it to the gratitude of the people. "We have demonstrated that this, at least, was a conservative convention, mindful of the value of the experience of the past, of the precious value of the institutions which our fathers had handed down to us." After commenting on the great subjects of the judiciary, education, charities, and apportionment, as expressed in the new Constitution, he said the Convention had adopted "many other wise provisions of reform" which he believed would "contribute to the welfare of the people."

Submission and result.—While a large number of provisions in the existing Constitution were continued without change, the Convention decided to submit to the people a revised constitution, which, if approved, would be known as the Constitution of 1894. On account of the wide differences of opinion concerning the new legislative apportionment, it was deemed proper to submit the new provisions separately, and thus enable the people to determine, independently of other provisions, whether the legislature should be increased and reorganized, as proposed by the Convention. Section 10 of article 7, relating to canal improvement, was also deemed of sufficient importance to warrant a separate submission. It was thought by a majority of the Convention that the remainder of the Constitution might be submitted as a whole. A resolution was accordingly offered by Mr. Root providing for a submission of the revised Constitution, excepting apportionment and canal improvement, and for the separate submission of those two subjects. Mr. Kerwin said that numerous applications had been received for a separate submission of the prison labor section, and he moved that it be separately submitted.

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Mr. Root said he would like to see every amendment which had been adopted by this Convention "put before the people, so that they could express their wishes in regard to that upon its own merits, by itself;" but that would be practically impossible, for the reason that it would require the submission of thirty-three separate propositions, which the people would be obliged to consider and determine in addition to two legislative amendments, besides the election of officers, state and local, to which must be added the Greater New York proposition to be voted on in Brooklyn, and the question of rapid transit in New York. He said he had tried to find some way under the law by which the amendments could be separately submitted, but this was impracticable under the existing election law and the convention act of 1893. Mr. Kerwin's proposition was determined in the negative by a vote of 47 to 83, and Mr. Root's resolution was adopted by a vote of 89 to 41.

The Constitution was submitted to the people at the general election on the 6th of November, 1894. The provisions relating to apportionment were approved by a vote of 404,335 to 350,625; canal improvement by a vote of 442,998 to 327,645; and the revised Constitution by a vote of 410,697 to 327,402. With certain exceptions, already noted, the new Constitution took effect January 1, 1895.

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CHAPTER XIII.

From 1894 to 1905.

Five constitutional amendments have been adopted since 1894. One adopted in 1899, introduced by Senator Nevada N. Stranahan, amends § 26 of article 3 by exempting the counties included in Greater New York from the provision requiring a board of supervisors in each county. The new section is stated in the following form:

"There shall be in each county, except in a county wholly included in a city, 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. In a city which includes an entire county, or two or more entire counties, the powers and duties of a board of supervisors may be devolved upon the municipal assembly, common council, board of aldermen, or other legislative body in the city."

Another amendment adopted in 1899, first introduced by Senator Charles L. Guy, in 1898, amends § 2 of article 6, relating to the appellate division of the supreme court, by authorizing the governor to make temporary designations to the appellate division whenever the "presiding justice of any appellate division shall certify to him that one or more additional justices are needed for the speedy disposition of the business before it."

In 1899 an amendment introduced by Senator Elon R. Brown was approved which authorized the governor, on the application of the court of appeals, to assign to that caurt not more than four supreme court justices, to serve until the calendar of the court of appeals shall be

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reduced to 200 causes. This subject has been considered in the article on the judiciary, in the last chapter.

The section limiting municipal indebtedness (article 8, § 10) was also amended in 1899, adopting an amendment introduced in 1897, in the senate, by Mr. Stranahan, and in the assembly, by George C. Austin, by including the following provision, applicable only to Greater New York: "Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease; but the debt of the county, heretofore existing, shall not, for the purposes of this section, be reckoned as a part of the city debt."

In 1901 an amendment introduced in the assembly by Merton E. Lewis was adopted which added to § 18 of article 3 a clause prohibiting a private or local law "granting to any person, association, firm, or corporation, an exemption from taxation on real or personal property."

It will be observed that these five amendments do not involve any essential constitutional principle. Two of them—the judiciary amendments—were intended to afford temporary relief to the court of appeals and the appellate division by the appointment of additional judges. These temporary provisions may develop into permanent features of our judicial system, but they do not affect the essential structure of these courts, nor do they introduce any new principle. Two of the other amendments—supervisors and city indebtedness—were made necessary by conditions presented in Greater New York as a result of the consolidation of several counties in one municipality; these amendments, while general in terms, have only a local application; the sections amended were already sufficient for other parts of the state. These provisions are essentially administrative in

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character, and confer on the legislature no power which it did not already possess; for the legislature, without a constitutional provision, might and did provide for a board of supervisors and for restrictions on municipal indebtedness. The remaining amendment—requiring exemptions from taxation by general law only—is a limitation which the legislature asked to have imposed on itself. It might have enacted a general law for this purpose without a constitutional amendment, and already had power to refuse to enact private or local laws exempting property from taxation. The recent increase in this class of legislation, and the annual introduction of a large number of bills on this subject which were not passed, suggested the propriety of a constitutional restriction which would relieve the legislature from the necessity of considering special applications for such exemptions.

Suggested Amendments.

We find in this period many illustrations of the tendency already noted to seek relief from supposed unfavorable social or political conditions by amending the Constitution; and notwithstanding the recent revision of our fundamental law, dissatisfaction with the new Constitution was manifested by several amendments introduced soon after it took effect. Besides this class of amendments, others were introduced representing conditions which had arisen since the adoption of the Constitution of 1894, and which, of course, could not have been anticipated by the Convention which framed that instrument. These amendments may conveniently be arranged by groups, in the order of the articles of the Constitution to which they relate.

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SUFFRAGE.

Woman suffrage amendments were introduced in 1895, 1897, and 1898, and one was passed by the legislature in 1895. An amendment was introduced in 1897, reducing the term of citizenship from ninety days to ten days, and also authorizing the legislature to provide for minority representation in municipal elections.

The legislature of 1904 passed a suffrage amendment —article 2, § 1—changing the qualifications in relation to residence by providing that a person may vote if he has been for four months a resident of a county "or of a city comprising more than one county;" doubtless intending to remove the four months' restriction as to the city of New York, and to permit residents of that city to vote in any county therein, provided they have resided in the city four months, in the state a year, and in the election district thirty days.

Other amendments, which were not passed, authorized the registration, by judicial order, of voters necessarily absent from the county or city of their residence, or physically incapable of attending personally for the purpose of registration, and the registration of absent voters on the presentation of a certificate showing their qualifications, and also provisional registration.

THE LEGISLATURE.

In 1895, 1899, 1900, 1901, and 1903 amendments were introduced providing for the initiative and referendum in relation to statutes and constitutional amendments. In 1895 it was proposed to limit legislative mileage to twelve trips in each session. Amendments providing for biennial sessions were introduced in 1897, 1898, 1899, 1904, and one was passed in 1898. The biennial session amendments usually involved an extension of the term of sena-

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tors to four years and of members of assembly to two years, and one, 1898, proposed to fix the salary of a senator at $3,000, and of a member of assembly at $1,500 for the whole term, which would have reduced the salary to $750 a year. An amendment in 1903 proposed to fix the annual salary of a senator at $5,000 and of a member of assembly at $3,500. An amendment introduced in 1899 proposed to provide for an additional member of assembly in New York by creating another assembly district in the twenty-first senate district, and making an assembly of 151 members. In 1896 an amendment relating to the statutory revision commission proposed to require a two-thirds vote of the legislature to pass a bill reported by the commission.

In 1899, and again in 1903, Senator Elon R. Brown proposed to add the following section to the legislative article:

"Hereafter there shall be no general tax levy on the real and personal property in the state, except to meet expenses of national defense, of maintaining the union of the states, of quelling insurrections, or as required by a vote of the people on a proposition submitted pursuant to a joint resolution of the senate and assembly."

In 1900 it was proposed to amend § 19 by prohibiting the audit or allowance of any claim against the state "except by general laws." At the same session an amendment was introduced authorizing the legislature to vest state officers with power to enact forest, fish, and game ordinances.

In 1902 an amendment was passed authorizing the legislature to fix the compensation and hours of labor of state and municipal employees, and to provide for their protection and safety. The amendment was passed again

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in 1903, with a resolution directing its submission in 1905. The legislature of 1895 agreed to an amendment modifying the prison labor section of the Constitution. The amendment of 1895 is quoted and considered in the article on prison labor. In 1903 two amendments were introduced, adding to § 18 of article 3 provisions in relation to counties, towns, and villages, based on § 2 of article 12, relative to cities. One of these amendments authorized the legislature to divide counties, towns, and villages into not more than three classes, and required the submission of bills to these municipal corporations substantially in the manner provided by the city section, empowered the board of supervisors, or the town board, or the board of trustees to act for a county, town, or village, respectively, and these local boards were given fifteen days for the consideration of a bill, as in the case of a city. The other amendment varied the scheme by giving the governor ten days for consideration of a bill, and if not vetoed by him it was to be sent to the county, town, or village affected by it, and submitted to the people at the next regular municipal election, or at a special election called for that purpose; and the bill was to become a law on its approval by the people, without further action by the governor. An amendment introduced in 1904 proposed to fix the term of a member of assembly at two years.

CIVIL SERVICE.

In 1899, 1901, and 1902 amendments were introduced extending the soldier provision of the civil service section to persons who served in the Spanish-American War, and in 1901 an amendment included three years' service in the Army or Navy of the United States and also in the Philippines and in China; but Civil War veterans were

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to retain the preference given to them by the existing Constitution. An amendment proposed in 1899 limited the soldier provision to persons who were, at the time of their enlistment, citizens and residents of this state. In 1900 and 1901 it was proposed to abrogate the civil service provision.

JUDICIARY.

An amendment in 1898 proposed a second division of the court of appeals. In 1902 it was proposed to vest in the court of appeals, instead of in the governor, power to designate judges for the appellate division, except for temporary vacancies, which were to be filled by the presiding justice of the appellate division in which the vacancy might occur, and also to vest in the court of appeals, instead of in the governor, power to make appointments pending elections to fill vacancies in the court of appeals and supreme court. In 1903 and 1904 amendments were introduced authorizing the court of appeals to make designations to the appellate division. An amendment was also introduced in 1902 relating to the jurisdiction of the court of appeals.

Several amendments were introduced providing for an increase of the working force of the supreme court. In 1900, 1901, and 1902 it was proposed to add four justices in the first district, and in 1902 it was proposed by one amendment to add three, by another six, and by another eight justices. The legislature of 1900 passed an amendment providing for four additional justices in the first district and three in the second. In 1898 it was proposed to add one justice in the second district, and, by an amendment the same year, the additional justice was to reside in Dutchess county. In 1899 the legislature passed an amendment for three additional justices in the second district. In 1900 this provision was combined with the

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amendment providing for four additional justices in the first district, and passed in that form. In 1901 and 1903 it was proposed to add two justices in this district, and in 1901 and 1902 it was proposed to add three justices, and by another amendment, in 1902, five justices. An amendment introduced in 1902 provided for three additional justices in the eighth district. An amendment in 1903 proposed to add four justices in the first district, four in the second, and one in the eighth.

In 1902 the legislature passed an amendment which provided for the election of justices of the supreme court by districts, on the basis of population, limiting the maximum number in the first and second districts to one for each 80,000 inhabitants or major fraction thereof and in other districts to one for each 60,000 or fraction thereof not less than 35,000; and the legislature was authorized to divide the second district, and erect therein an additional district which should be subject to the 80,000 population limit. The amendment was introduced again in 1903, in 1904, and in 1905, but it had already been adopted the second time in 1903, with a resolution directing its submission in 1905.

In 1900 an amendment provided for trial commissioners in each judicial district, to be appointed by the governor, on the recommendation of the appellate division.

In 1898 an amendment proposed to authorize the governor, on the certificate of the appellate division in the first department, to appoint in that department not more than ten additional justices of the supreme court, whose term should expire at the end of the term of the governor making the appointment. An amendment introduced in 1902 authorized the governor, on the certificate of the appellate division in any department, to designate county judges to act as trial justices of the supreme court when the number of causes on the trial calendar in any county

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exceeds 2000, and to act as such justices until the number of causes is reduced to 2000. An amendment the same year authorized the legislature to increase or decrease the number of justices of the supreme court on the certificate of the appellate division. An amendment introduced in 1898 provided for the election of judges of the court of appeals and of the supreme court in an even-numbered year, and their terms of office were to begin on the first day of January, in the next odd-numbered year.

In 1901 it was proposed to amend § 14 of article 6 by consolidating the auxiliary court of Kings county with the county court, and providing for four county judges.

The legislature of 1904 passed an amendment providing that a justice of the appellate division, when not performing official duties in the department to which he may have been designated, "may hold any term of the supreme court, and exercise any of the powers of a justice of the supreme court in any county or judicial district in any other department of the state;" also an amendment providing for trial commissioners in counties containing a population exceeding 500,000, to be appointed by the appellate division, upon the order of the court of appeals authorizing the same. Such commissioners may hold office six years and shall receive an annual salary of $12,000. They are to possess, in such counties only, all the trial powers of justices of the supreme court; also an amendment authorizing the legislature, by a two-thirds vote, to increase the court of appeals to a number not exceeding eleven judges, and to provide for an indefinite increase in the supreme court. Another amendment authorized the legislature to provide for two divisions of the court of appeals. Amendments were proposed authorizing appeals in certain cases from trial and special terms directly to the court of appeals, and otherwise regulating appeals to that court. It was also proposed to provide

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for the election of justices of the supreme court in odd-numbered years.

CANALS AND FINANCE.

An amendment in 1898 authorized the sale of the canals to the United States, and another amendment in 1900 proposed the same disposition of the canals, but on condition that the United States should maintain them as a free public highway. An amendment in 1901 authorized the general sale of the canals; the same year, and again in 1902 and in 1903, it was proposed to abrogate the section prohibiting the sale of the canals. In 1902 it was proposed to amend the section requiring a popular vote on a law creating a state debt exceeding $1,000,000 by making the debt payable within thirty-five years instead of eighteen years. Another amendment the same year, which was passed by the legislature, authorized the use of any moneys in the state treasury for the payment of a state debt or for the purpose of creating and maintaining a sinking fund without resorting to a direct tax. The amendment was passed again in 1903, with a resolution directing its submission in 1905. An amendment introduced in 1902 authorized a state debt for the purpose of raising not exceeding $20,000,000 for improvement of highways. In 1903 it was proposed to increase the amount to $50,000,000. An amendment in 1902 required the surplus in the state treasury at the end of each fiscal year to be paid to the several counties in proportion to the assessed valuation of real and personal property therein. In 1903 an amendment was introduced authorizing the legislature to abandon the Erie canal, and use its bank and bed for the construction of a four-track railroad. At the same session an amendment was introduced requiring a debt question under § 4 to be submitted only to taxpayers. Another amendment authorized the

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legislature to reimpose canal tolls, also extending the time under § 4 for the payment of state debts from eighteen years to fifty years.

In 1896 an amendment proposing to change the policy of the state in relation to the forest preserve as expressed in the Constitution of 1894 was rejected by a large popular vote. That subject, together with amendments introduced in 1902, has been fully considered in the article on the forest preserve. An amendment in 1901 authorized timber to be cut on forest preserve lands in Lewis county. The legislature of 1904 passed an amendment authorizing the state to dispose of "dead timber on burned areas so far as necessary for reforestation," and authorizing the sale of lands outside the present Adirondack and Catskill parks, the proceeds to be used only for the purchase of lands within the parks.

CITIES.

In 1895 an amendment was proposed to the city legislation section (article 12, § 2), requiring bills to be returned within ten days after the transmission to the city, and giving the governor thirty days in which to consider such bills after their return. In 1901 an amendment was passed excepting from the operation of § 10 of article 8 debts created in the city of New York after January 1, 1904, for the purpose of supplying the city with water. The amendment was passed again in 1903, with a resolution directing its submission in 1905. By an amendment proposed in 1904 no city bill could become a law without the approval of the mayor, or a two-thirds vote of the legislature. Other amendments proposed to vest in cities largely increased powers of independent local government, including the adoption of a charter by popular vote, and requiring the two-thirds vote of the legislature to pass a city bill the second time.

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MISCELLANEOUS.

An amendment introduced in 1900 proposed to abolish the death penalty and substitute imprisonment for life. In 1901 an amendment was proposed authorizing a verdict by ten jurors in a civil or criminal case, and permitting a trial to proceed with not less than ten jurors in case of a juror's inability to serve. An amendment introduced in 1904 proposed to allow a verdict to be rendered on the concurrence of five sixths of the jury, if authorized by the legislature. In 1903 a new article was proposed (16) providing for an initiative and referendum on legislative bills. In 1904 an amendment was proposed regulating public franchises.

Several propositions to amend the Constitution were presented to the legislature of 1905, three of which were adopted by both houses. These propositions will be considered in the order of articles.

The senate passed an amendment adding to § 2 of article 1 the following provision: "Additional jurors, to attend during a trial to fill vacancies which, from any cause, may occur on a jury, may be drawn in the manner to be prescribed by the legislature." The assembly amended the provision to read as follows: "Additional jurors may be impaneled, in the manner to be prescribed by the legislature, to attend upon a trial to fill vacancies which, from any cause, may occur on a jury, during such trial." The senate did not concur in the assembly amendment.

The assembly passed an amendment to § 1 of article 2 (suffrage), applying the four months rule of residence to a "city comprising more than one county," but it was not passed by the senate. This would have enabled a resident of the city of New York to vote in any part of the city, even if he had not resided in a particular county four months. The same amendment was adopted by the legis-

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lature of 1904. An amendment was introduced, but not passed by either house, adding to article 2 a new section, 7, requiring the legislature to enact laws regulating the use of money at elections.

Amendments were introduced, but not passed, providing for biennial sessions of the legislature, and fixing the term of senators at four years and members of assembly at two years. The senate passed an amendment to § 27 of article 3, authorizing the legislature to provide for the election of county auditors. An amendment was introduced, but not passed by either house, adding to article 3 a new section, 30, limiting the power of the legislature over cities, and vesting in cities additional powers of local government.

Resolutions were introduced, but not adopted, proposing to amend article 6, § 1, by vesting in the legislature power, by a two-thirds vote, to provide for the election of not more than eleven judges of the court of appeals, and of an indefinite number of justices of the supreme court, and § 7, by authorizing the legislature to provide for two divisions of the court of appeals. These amendments had both been adopted by the legislature of 1904. The amendments adopted in 1904 relative to supreme court commissioners were again introduced in 1905, but not adopted.

An amendment was introduced authorizing the legislature to declare abandoned any part of the canals, and provide for the construction and operation of a railroad on the route of any canal so abandoned.

It was proposed to authorize the city of New York to incur indebtedness not exceeding 15 per cent of the assessed valuation of real estate therein.

An amendment was introduced revising article 12, relative to city laws, and vesting in cities additional powers of local government.

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Amendments Submitted to the People in 1905.

Seven amendments were submitted to the people in 1905. Four had been adopted the second time by the legislature of 1903, each with a resolution directing its submission in 1905. The postponement of the submission of these amendments was authorized by article 14, § 1, which vests in the legislature the power to fix the time when an amendment shall be submitted. They embrace the following subjects:

Authorizing the legislature to increase the number of justices of the supreme court according to a prescribed ratio of population; amending article 6, § 1.

Authorizing the use of any moneys in the state treasury for the payment of a state debt, or for the purpose of creating and maintaining a sinking fund, without resorting to a direct tax; adding to article 7 a new section, numbered 11.

Excepting from the operation of the section debts created in the city of New York after January 1, 1904, for the purpose of supplying the city with water; amending article 8, § 10.

Authorizing the legislature to fix the compensation and hours of labor of state and municipal employees, and provide for their protection and safety; amending article 12, § 1.

Three amendments were adopted the second time by the legislature of 1905, with a direction that they be submitted to the people at the general election in that year. These are as follows:

Authorizing justices of the appellate division to hold any term of the supreme court, or perform other judicial service in any other department; amending article 6, § 2.

Extending the time limit on state debts from eighteen years to fifty years, authorizing the issue of bonds for a

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period not exceeding fifty years in lieu of bonds already authorized, but not issued, and abrogating the prohibition against submitting a debt law at the same election at which a constitutional amendment is submitted; amending article 7, § 4.

Authorizing the legislature to create state debts not exceeding in the aggregate fifty million dollars, for the improvement of highways, and to impose on counties and towns specified proportions of the expense of such improvement; adding to article 7 a new section, numbered 12.

The text of the foregoing amendments will be found in the fourth volume, in notes to the respective articles so amended.

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APPENDIX.

Governor Tryon's Commission and Instructions.

NOTE.—In the Introduction it has been pointed out that the commission and instructions issued to colonial governors constituted the basis of government during the colonial period, and that these documents, together with certain statutes, ordinances, and regulations, were the Constitution of the colony. The executive, legislative, and judicial branches of the government derived their authority, for the most part, from these commissions and instructions. I have already made some observations on the importance of these documents in relation to the Constitution of the colony, and their influence in shaping the policies which found expression in the first Constitution. The commission and instructions issued to Governor Tryon on his appointment in February, 1771, were in force at the beginning of the Revolution, and were in operation in a part of the province when the first Constitution was framed and the first state government organized. It has already been noted that Governor Tryon took the oath of office July 9, 1771, and that he continued in office until March 23, 1780. The commission and instructions issued to him were therefore the last expression of royal opinion and policy concerning the government of the colony before the new state government was organized.

The archives of the State Library contain a manuscript copy of the commission, but, as already noted in the preface, I was unable to find in this country a copy of the instructions. I therefore procured a manuscript copy from

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the English archives. It is believed that these documents will be found useful in comparing the various elements of our system of government. I think they are now published for the first time. The copy of the commission in the State Library appears in one continuous paragraph; but, for convenience, it is here presented in separate paragraphs, with appropriate heads. In a few instances notes have been added to paragraphs in the commission and also in the instructions, showing corresponding or similar provisions in the Constitution of 1894, or in earlier Constitutions, and in statutes.

A. The Commission.

George the Third, by the Grace of God of Great Britain, France and Ireland, King, Defender of the faith and so forth: To our trusty and well beloved William Tryon, Esquire, Greeting:

[Governor Dunmore's appointment revoked.]—Whereas, we did by our Letters Patent under our Great seal of Great Britain, bearing date at Westminster the second day of January in the tenth year of our reign, constitute and appoint John, Earl of Dunmore, Captain General and Governor in Chief in and over our Province of New York and the Territories depending thereon in America, for and during our will and pleasure, as by the said recited Letters Patent relation being thereunto had may more fully and at large appear. Now know you that we have revoked and determined, and by these presents do revoke and determine the said recited Letters Patent, and every clause, article and thing therein contained.

[Governor Tryon appointed.]—And further know you that we, reposing special trust and confidence in the prudence, courage and loyalty of you, the said William Tryon, of our especial grace, certain knowledge and mere

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motion, have thought fit to constitute and appoint, and by these presents do constitute and appoint you, the said William Tryon, to be our Captain General and Governor in Chief in and over our Province of New York and the territories depending thereon.

[Governor's general powers.]—And we do hereby require and command you to do and execute all things in due manner that shall belong unto your said command, and the trust we have reposed in you according to the several powers and authorities granted or appointed you by this present commission, and the instructions herewith given you, or by such further powers, instructions and authorities as shall at any time hereafter be granted or appointed you under our signet and sign manual, or by our order in our privy council, and according to such reasonable laws and statutes as are now in force or hereafter shall be made and agreed upon by you with the advice and consent of our council and the Assembly of our said Province under your government in such manner and form as is hereafter expressed.

[Official oaths.]—And our will and pleasure is that you, the said William Tryon, after the publication of these our Letters Patent, do in the first place take the oaths appointed to be taken by an act passed in the first year of the reign of King George the First intitled "An Act for the further security of his majesty's person and government and the succession of the crown in the heirs of the late Princess Sophia, being protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," and by an act passed in the sixth year of our reign intituled "An Act for altering the oath of abjuration and the assurance and for amending so much of an Act of the seventh year of her late Majesty Queen Anne intituled 'An Act for the improvement of the union of the two kingdoms as after the

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time therein limited requires the delivery of certain lists and copies therein mentioned to persons indicted of high treason or misprision of treason,' " as also that you make and subscribe the declaration mentioned in an act of Parliament made in the twenty-fifth year of the reign of King Charles the Second intituled "An Act for preventing Dangers which may happen from popish recussants," and likewise that you take the usual oath for the due execution of the office and trust of our Captain General and Governor in Chief in and over our said Province of New York, and the territories depending thereon, for the due and impartial administration of justice, and further that you take the oath required to be taken by governors of plantations to do their utmost that the several laws relating to trade and the Plantations be observed, which said oaths and declaration our council in our said Province, or any three of the members thereof, have hereby full power and authority, and are required to tender and administer unto you, and in your absence to our Lieutenant Governor if there be any upon the place; all which being duly performed you shall administer to each of the members of our said council, as also to our Lieutenant Governor if there be any upon the place, the oaths mentioned in the said acts intituled "An Act for the further security of his majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," and an Act for altering the oath of abjuration and the assurance, and for amending so much of an Act of the Seventh Year of her late majesty Queen Anne intituled "An Act for the improvement of the union of the two kingdoms as after the time therein limited requires the delivery of certain lists and copies therein mentioned to persons indicted of high treason or misprision of trea-

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son," as also cause them to make and subscribe the aforementioned declaration, and to administer to them the oath for the due execution of their places and trusts.

[Lieutenant governor and councilors may be suspended.]—And we do hereby give and grant unto you full power and authority to suspend any of the members of our said council from sitting, voting and assisting therein, if you shall find just cause for so doing, and if there shall be any Lieutenant Governor, him likewise to suspend from the execution of his command, and to appoint another in his stead until our pleasure be known.

[Vacancies in council.]—And if it shall at any time happen that by the death, departure out of the said Province, or suspension of any of our said councillors or otherwise, there shall be a vacancy in our said council (any three whereof we do hereby appoint to be a quorum) our will and pleasure is that you signify the same unto us by the first opportunity that we may under our signet and sign manual constitute and appoint others in their stead. But that our affairs may not suffer at that distance for want of a due number of councillors if ever it shall happen that there be less than seven of them residing in our said Province, we do hereby give and grant unto you, the said William Tryon, full power and authority to chuse as many persons out of the principal freeholders inhabitants thereof as will make up the full number of our said council to be seven and no more, which persons so chosen and appointed by you shall be to all intents and purposes councillors in our said Province until either they shall be confirmed by us, or that by the nomination of others by us under our sign manual and signet our said council shall have seven or more persons in it.

[Assembly; qualifications of voters; official oaths.]—And we do hereby give and grant unto you full power and authority, with the advice and consent of

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our said council, from time to time as need shall require, to summon and call General Assemblies of the said freeholders and planters within your government according to the usage of our Province of New York. And our will and pleasure is that the persons thereupon duly elected by the major part of the freeholders of the respective counties and places, and so returned, shall before their sitting take the oaths mentioned in the said acts intituled "An Act for the further security of his majesty's person and government and the succession of the crown in the heirs of the late Princess Sophia, being protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," And "an Act for altering the oath of abjuration and the assurance and for amending so much of an act of the seventh year of her late majesty Queen Anne intituled 'An Act for the improvement of the union of the two kingdoms as after the time therein limited requires the delivery of certain lists and copies therein mentioned to persons indicted of high treason or misprision of treason,' " as also make and subscribe the aforementioned declaration, which oaths and declaration you shall commissionate fit persons under our seal of New York to tender and administer to them, and until the same shall be so taken and subscribed, no person shall be capable of sitting, though elected, and we do hereby declare that the persons so elected and qualified shall be called and deemed the General Assembly of that our Province and the territories depending thereon.

[Const. 1894, art. 2, § 1; art. 3, §§ 1, 2, 5; art. 13, § 1.]

[Legislative power; transmission of laws.]—And you, the said William Tryon, with the consent of our said council and assembly, or the major part of them respectively, shall have full power and authority to make, constitute and ordain laws, statutes and ordinances for the

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public peace, welfare and good government of our said Province and of the people and inhabitants thereof, and such others as shall resort thereto, and for the benefit of us, our heirs and successors; which said laws, statutes and ordinances are not to be repugnant, but as near as may be agreeable unto the laws and statutes of this our Kingdom of Great Britain, provided that all such laws, statutes and ordinances of what nature or duration soever, be within three months or sooner after the making thereof, transmitted unto us under our Seal of New York for our approbation or disallowance of the same, as also duplicates thereof by the next conveyance.

[Const. 1894, art. 3, § 1; art. 4, § 9.]

[Royal veto.]—And in case any or all of the said laws, statutes and ordinances not before confirmed by us, shall at any time be disallowed and not approved, and so signified by us, our heirs or successors under our or their sign manual and signet or by order of our or their privy council unto you, the said William Tryon, or to the Commander in Chief of our said Province for the time being, then such and so many of the said laws, statutes and ordinances as shall be so disallowed and not approved shall from thenceforth cease, determine and become utterly void and of none effect, anything to the contrary thereof notwithstanding.

[Governor's veto.]—And to the end that nothing may be passed or done by our said council or Assembly to the prejudice of us, our heirs or successors, we will and ordain that you, the said William Tryon, shall have and enjoy a negative voice in the making and passing of all laws, statutes and ordinances as aforesaid.

[Const. 1894, art. 4, § 9.]

[Assembly, governor may prorogue, adjourn, or

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dissolve.]—And you shall, and may likewise from time to time as you shall judge necessary, adjourn, prorogue and dissolve all General Assemblies aforesaid.

[Const. 1777, art. 18.]

[Great seal.]—And our further will and pleasure is that you shall and may use and keep the public seal of our Province of New York for sealing all things whatsoever that pass the great seal of our said Province under your government.

[State law (1892, chap. 678), § 43.]

[Oaths to inhabitants and others.]—And we do further give and grant unto you, the said William Tryon, full power and authority from time to time, and at any time hereafter, by yourself or by any other to be authorized by you in that behalf, to administer and give the aforementioned oaths to all and every such person and persons as you shall think fit, who shall at any time or times pass into our said Province or shall be resident or abiding there.

[Courts.]—And we do further by these presents give and grant unto you, the said William Tryon, full power and authority with the advice and consent of our said council, to erect, constitute and establish such and so many courts of judicature and public justice within our said Province under your government as you and they shall think fit and necessary for the hearing and determining of all causes, as well criminal as civil, according to law and equity, and for awarding of execution thereupon, with all reasonable and necessary powers, authorities, fees and privileges belonging thereto, as also to appoint and commissionate fit persons in the several parts of your government to administer the oaths mentioned in the aforesaid acts intituled "An Act for the further security of his majesty's person and government and the

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succession of the crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," and an Act for altering the oath of abjuration and assurance, and for amending so much of an act of the seventh year of her late majesty Queen Anne entituled "An act for the improvement of the union of the two kingdoms as after the times therein requires the delivery of certain lists and copies therein mentioned to persons indicted of high treason or misprision of treason," as also to tender and administer the aforesaid declaration unto such persons belonging to the said courts as shall be obliged to take the same.

[Const. 1894, art. 6.]

[Judicial officers.]—And we do hereby authorize and impower you to constitute and appoint judges, and in cases requisite, commissioners of oyer and terminer, justices of the peace, and other necessary officers and ministers in our said Province for the better administration of justice and putting the laws in execution, and to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of offices and places, and for the clearing of truth in judicial causes.

[Const. 1894, art. 6.]

[Pardons and reprieves.]—And we do hereby give and grant unto you full power and authority, where you shall see cause or shall judge any offender or offenders in criminal matters, or for any fines or forfeitures due unto us, fit objects of our mercy to pardon all such offenders and to remit all such offenses, fines and forfeitures, treason and wilful murder only excepted, in which cases you shall likewise have power upon extraordinary occa-

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sions to grant reprieves to the offenders until and to the intent our royal pleasure may be known therein.

[Const. 1894, art. 4, § 5.]

[Ecclesiastical appointments.]—And we do by these presents, authorize and impower you to collate any person or persons to any churches, chapels or other ecclesiastical benefices within our said Province and territories aforesaid, as often as any of them shall happen to be void.

[Governor's military authority.]—And we do hereby give and grant unto you, the said William Tryon, by yourself or by your captains and commanders by you to be authorized, full power and authority to levy, arm, muster, command and employ all persons whatsoever residing within our said Province of New York and other the territories under your government, and as occasion shall serve to march from one place to another, or to embark them for the resisting and withstanding of all enemies, pirates and rebels, both at sea and land, and to transport such forces to any of our plantations in America (if necessity should require) for the defence of the same against the invasion or attempts of any of our enemies, and such enemies, pirates and rebels if there shall be occasion to pursue and prosecute in or out of the limits of our said province and plantations or any of them, and if it shall so please God, them to vanquish, apprehend and take, and being taken either according to law to put to death or keep and preserve alive at your discretion, and to execute martial law in time of invasion or other times when by law it may be executed, and to do and execute all and every other thing and things which to our Captain General and Governor in Chief doth or ought of right to belong.

[Const. 1894, art. 4, § 4; art. 11.]

[Military defenses.]—And we do hereby give and

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grant unto you full power and authority, by and with the advice and consent of our said council, to erect, raise and build in our said province of New York and territories depending thereon, such and so many forts and platforms, castles, cities, boroughs, towns and fortifications as you by the advice aforesaid shall judge necessary, and the same or any of them to fortify and furnish with ordnance, ammunition and all sorts of arms fit and necessary for the security and defence of our said Province, and by the advice aforesaid, the same again or any of them to demolish or dismantle as may be most convenient.

[Naval discipline.]—And forasmuch as divers mutinies and disorders may happen by persons shipped and employed at sea during the time of war, and to the end that such as shall be shipped and employed at sea during the time of war may be better governed and ordered, we do hereby give and grant unto you, the said William Tryon, full power and authority to constitute and appoint captains, lieutenants, masters of ships and other commanders and officers, and to grant unto such captains, lieutenants, masters of ships and other commanders and officers commissions to execute the law martial during the time of war according to an act passed in the twenty second year of the reign of our late royal grandfather intituled "An Act for amending, explaining and reducing into one Act of Parliament, the laws relating to the government of his majesty's ships, vessels and forces by sea" and to use such proceedings, authorities, punishments, corrections and executions upon any offender or offenders who shall be mutinous, seditious, disorderly or any way unruly, either at sea or during the time of their abode or residence in any of the ports, harbors or bays of our said Province and territories as the case shall be found to require, according to martial law and the said directions during the time of war as aforesaid; *provided* that noth-

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ing herein contained shall be construed to the enabling you, or any by your authority, to hold, plea or have any jurisdiction of any offence, cause, matter or thing committed or done upon the high sea, or within any of the havens, rivers or creeks of our said Province or territories under your Government, by any captain, commander, lieutenant, master, officer, seaman, soldier or other person whatsoever who shall be in our actual service and pay in or on board any of our ships of war or other vessels acting by immediate commission or warrant from our commissioners for executing the office of our high admiral, or from our high admiral of Great Britain for the time being under the seal of our admiralty, but that such captain, commander, lieutenant, master, officer, seaman, soldier or other person so offending shall be left to be proceeded against and tried as their offences shall require, either by commission under our great seal of Great Britain as the statute of the twenty-eighth of Henry the Eighth directs, or by commission from our said commissioners for executing the office of our high admiral, or from our high admiral of Great Britain for the time being, according to the aforementioned act for amending, explaining and reducing into one Act of Parliament the laws relating to the government of his majesty's ships, vessels and forces by sea, and not otherwise; *provided* nevertheless that all disorders and misdemeanors committed on shore by any captain, commander, lieutenant, master, officer, seaman, soldier or other person whatsoever belonging to any of our ships of war or other vessels acting by immediate commission or warrant from our said commissioners for executing the office of our high admiral, or from our high admiral of Great Britain for the time being under the seal of our admiralty, may be tried and punished according to the laws of the place where any such disorders, offences and misdemeanors

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shall be committed on shore, notwithstanding such offender be in our actual service and borne in our pay on board any such our ships of war or other vessels acting by immediate commission or warrant from our said commissioners for executing the office of our high admiral, or from our high admiral of Great Britain for the time being as aforesaid, so as he shall not receive any protection for the avoiding of justice for such offienses committed on shore from any pretence of his being employed in our service at sea.

[Const. 1894, art. 11; military code (Laws 1898, chap. 212).]

[Public moneys, how disbursed.]— And our further will and pleasure is that all public money raised, or which shall be raised, by any act to be hereafter made within our said Province and other the territories depending thereon, be issued out by warrant from you by and with the advice and consent of our council, and disposed of by you for the support of the government and not otherwise.

[Const. 1894, art. 3, §§ 21, 24; state finance law (1897, chap. 413), § 4.] *X*

[Public lands, grants of.]—And we do hereby likewise give and grant unto you full power and authority, by and with the advice and consent of our said council, to settle and agree with the inhabitants of our Province and territories aforesaid, for such lands, tenements and hereditaments as now are or hereafter shall be in our power to dispose of, and them to grant to any person or persons upon such terms and under such moderate quit rents, services and acknowledgments to be thereupon reserved unto us, as you by and with the advice aforesaid, shall think fit, which said grants are to pass and be sealed by our seal of New York and being entered upon record by such officer or officers as are or shall be appointed

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thereunto, shall be good and effectual in law against us, our heirs and successors.

[Public lands law (1894, chap. 317).]

[Markets and harbors.]—And we do hereby give you, the said William Tryon, full power and authority to order and appoint fairs, marts and markets, as also such and so many ports, harbors, bays, havens and other places for the convenience and security of shipping and for the better loading and unloading of goods and merchandizes as by you with the advice and consent of our said council shall be thought fit and necessary.

[People to be obedient to executive authority.]—And we do hereby require and command all officers and ministers, civil and military, and all other inhabitants of our said Province and territories depending thereon, to be obedient, aiding and assisting unto you, the said William Tryon, in the execution of this our commission, and of the powers and authorities herein contained, and in case of your death or absence out of our said Province and territories depending thereon, to be obedient, aiding and assisting unto such person as shall be appointed by us to be our Lieutenant Governor or Commander in Chief of our said Province, to whom we do therefore by these presents give and grant all and singular the powers and authorities herein granted, to be by him executed and enjoyed during our pleasure, until your arrival within our said Province and territories.

[Gubernatorial succession.]—And if upon your death or absence out of our said Province and territories depending thereon, there be no person upon the place commissionated or appointed by us to be our Lieutenant Governor or Commander in Chief of our said Province, our will and pleasure is that the eldest councillor whose name is first placed in our said instructions to you, and who shall be at the time of your death or absence resid-

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ing within our said Province of New York, shall take upon him the administration of the government, and execute our said commission and instructions, and the several powers and authorities therein contained, in the same manner, and to all intents and purposes as other our Governor or Commander in Chief of our said Province should or ought to do in case of your absence, until your return, or in all cases until our further pleasure be known therein.

[Const. 1894, art. 4, § 7.]

[Governor's tenure of office.]—And we do hereby declare, ordain and appoint that you, the said William Tryon, shall and may hold, execute and enjoy the office and place of our Captain General and Governor in Chief in and over our province of New York and the territories depending thereon, together with all and singular the powers and authorities hereby granted unto you for and during our will and pleasure.

[Const. 1894, art. 4, § 1.]

[Governor's military jurisdiction in Connecticut.]—And whereas, there are divers colonies adjoining to our Province of New York, for the defence and security whereof, it is requisite that due care be taken in time of war, we have therefore thought it necessary for our service, and for the better protection and security of our subjects inhabiting those parts, to constitute and appoint, and we do by these presents constitute and appoint you, the said William Tryon, to be our Captain General and Commander in Chief of the militia, and of all the forces by sea and land within our Colony of Connecticut, and of all our forts and places of strength within the same. And for the better ordering, governing and ruling our said militia, and all our forces, forts and places of strength within our said Colony of Connecticut, we do

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hereby give and grant unto you, the said William Tryon, and in your absence to our Commander in Chief of our province of New York, all and every the like powers as in these presents are before granted and recited for the ruling, governing and ordering our militia and all our forces, forts and places of strength within our Province of New York, to be exercised by you, the said William Tryon, and in your absence from our territory and dominion of New York, by our Commander in Chief of our Province of New York within our said Colony of Connecticut for and during our Pleasure.

In witness whereof we have caused these our Letters to be made Patent Witness ourself at Westminster this Nineteenth Day of January in the Eleventh Year of our Reign. By writ of Privy Seal.

Yorke.

B. The Instructions.

[COMMUNICATION FROM THE LORDS OF TRADE.]

To the King's most excellent Majesty.

May it please your Majesty:

In obedience to your majesty's commands, we have prepared and herewith humbly lay before your majesty draughts of general instructions, as well as those which relate to the observance of the Acts of Parliament for the encouragement and regulation of the plantation trade, for William Tryon, Esquire, whom your majesty has been pleased to appoint to be Captain General and Governor in Chief of his majesty's Province of New York in America, in which draughts we have made no material

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alteration from the instructions given by your majesty to the late governor of your majesty's said Province.

Which is most humbly submitted

Hillsborough
Soame Jenyns
John Roberts
Wm. Fitzherbert
Greville.

Whitehall, January 30, 1771.

[DRAFT OF INSTRUCTIONS.]

Instructions to our trusty and wellbeloved William Tryon Esquire Our Captain General and Governor in Chief of Our Province of New York and the Territories depending thereon in America. Given at Our Court at St. James's the 7th day of February, 1771, in the eleventh year of our reign.

1. **[Governor's appointment; members of council.]**—With these our instructions you will receive our commission under our great seal of Great Britain constituting you our Captain General and Governor in Chief of our province of New York and our territories depending thereon in America. You are therefore to fit yourself with all convenient speed and repair to our said province of New York, and being arrived there you are to take upon you the execution of the place and trust we have reposed in you and forthwith to call together the following persons by name whom we do hereby appoint to be members of our council for that Province, viz.: Cadwallader Colden Esquire our Lt. Governor of our said province of New York, or our Lt. Governor of New York for the time being, Daniel Horsemanden Esquire, Sir William Johnson Baronet, John Watts, Oliver Delaney, Charles Ward Apthorp, Joseph Read, Roger Morris,

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William Smith Junr, Henry Cruger Senr, Hugh Wallace and Henry White Esquires.

2. **[Commission to be published.]**—And you are with all due and usual solemnity to cause our said commission to be read and published at the said meeting of the council and notification to be also given to our Colony of Connecticut of the power wherewith you are intrusted concerning the militia forces and forts within the said Colony, which being done you shall then take and also administer to each of the members of the said council the oaths mentioned in an act passed in the first year of the reign of King George the First intituled "An Act for the further support of his majesty's person and government and the succession of the crown in the heirs of the late Princess Sophia, being protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors," and in an Act passed in the sixth year of our reign intituled "An Act for altering the oath of abjuration and the assurance and for amending so much of an act of the seventh year of her majesty Queen Anne intituled 'an Act for the improvement of the union of the two kingdoms as after the time therein limited requires the delivery of certain list and copies to persons indicted of high treason and misprision of treason,' " and also make and subscribe, and cause the members of our said council to make and subscribe, the declaration mentioned in an act of Parliament made in the 25th year of the reign of King Charles the Second intituled "An Act to prevent dangers which may happen from popish recusants," and you and every of them are likewise to take an oath for the due execution of your and their places and trusts with regard to your and their equal and impartial administration of justice, and you are also to take the oath required by an Act passed in the 7th and 8th years of the reign of King William the

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Third to be taken by governors of plantations to do their utmost that the acts of Parliament relating to the plantations be observed.

3. **[Official oaths.]**—You shall administer, or cause to be administered, the oaths mentioned in the aforesaid acts intituled "An Act for the further security of his majesty's person and government and the succession of the crown in the heirs of the late Princess Sophia, being protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," and an Act for altering the oath of abjuration and the assurance and for amending so much of an act of the seventh year of her late majesty Queen Anne intituled "An Act for the improvement of the union of the two kingdoms as after the time therein limited requires the delivery of certain lists and copies to persons indicted of high treason and misprision of treason," to the members and officers of the council and Assembly, and to all judges and justices and all other persons that hold any office or place of trust and profit in our said province, whether by virtue of any patent under the great seal of this kingdom, or the public seal of New York, or otherwise, and you shall also cause them to make and subscribe the aforesaid declaration, without the doing of all which you are not to admit any person whatsoever into any public office nor suffer those that have been admitted formerly to continue therein.

[Const. 1894, art. 13, § 1.]

4. **[Instructions to be communicated to council.]**—You are forthwith to communicate unto our said council such and so many of these instructions, wherein their advice and consent are required; as likewise all such others from time to time as you shall find convenient for our service to be imparted to them.

5. **[Council, freedom of debate.]**—You are to per-

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mit the members of our said council to have and enjoy freedom of debate and vote in all affairs of public concern that may be debated in council.

[Const. 1894, art. 3, § 12.]

6. [**Council, quorum.**]—And although by our commission aforesaid, we have thought fit to direct that any three of the members of our said council make a quorum, it is nevertheless our will and pleasure that you do not act with a quorum of less than five members, unless upon extraordinary emergencies when a great number cannot be conveniently had.

[Const. 1894, art. 3, § 10.]

7. [**Council, governor to nominate for vacancies.**]—And that we may be always informed of the names and character of persons fit to supply the vacancies that may happen in our council at New York, you are from time to time when any vacancies may happen in our said council, forthwith to transmit unto us by one of our principal secretaries of state the names of three persons inhabitants of our said province whom you shall esteem the best qualified for that trust.

[Election law (1896, chap. 909), § 4.]

8. [**Council, governor's report of appointment.**]—And whereas by our commission you are empowered in case of the death or absence of any of our said council of the said province to fill up the vacancy in the said council to the number of seven and no more, you are from time to time to send unto us by one of our principal secretaries of state the names and qualities of any member or members by you put into our said council by the first conveyance after your so doing.

9. [**Qualifications of officers.**]—And in the choice and nomination of the members of our said council, as

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also of the chief officers, judges, assistant justices, and sheriffs, you are also to take care that they be men of good life, well affected to our government, of good estates, and Abilities suitable to their employments.

[Const. 1894, art. 5, § 9.]

10. **[Council, suspension of members.]**—You are neither to augment nor diminish the number of our said council, as it is hereby established, nor to suspend any of the members thereof without good and sufficient cause, nor without the consent of the majority of the said council signified in council after due examination of the charge against such councillor and his answer thereunto and in case of suspension of any of them, you are to cause your reasons for so doing, together with the charges and proofs against the said persons with their answers thereunto, to be duly entered upon the council books and forthwith to transmit copies thereof to us by one of our principal secretaries of state, nevertheless if it should happen that you shall have reason for suspending of any councillor not fit to be communicated to the council, you may in that case suspend such person without their consent, but you are thereupon immediately to send to us by one of our principal secretaries of state an account of your proceedings therein, with your reasons at large for such suspension, as also for not communicating the same to the council, and duplicates thereof by the next opportunity.

11. **[Council, duty of members to attend its sessions.]**—And whereas, we are sensible that effectual care ought to be taken to oblige the members of our council to a due attendance therein, in order to prevent the many inconveniences that may happen for want of a quorum of the Council to transact business as occasion may require, it is our will and pleasure that if any of the members of our said council residing in the said province shall hereafter absent themselves from the said province

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and continue absent for above the space of twelve months together without leave from you, or from the Governor or Commander in Chief of the said province for the time being first obtained, under your or his hand and seal, or shall remain absent for the space of two years successively without our leave given them under our royal sign manual, their place or places in the said council shall immediately thereupon become void, and that if any of the members of the said council residing in the said province shall hereafter wilfully absent themselves from the council board when duly summoned, without a just and lawful cause, and shall persist therein after admonition, you suspend the said councillors so absenting themselves till our further pleasure be known, giving timely notice thereof to us by one of our principal secretaries of state, and we do hereby will and require that this our royal pleasure be signified to the several members of the council aforesaid, and that it be entered in the council books of the said province as a standing rule.

12. **[Enacting clause; laws limited to one subject; title to state subject; revival, etc., of laws by reference prohibited.]**—You are to observe in the passing of all laws that the style of enacting the same be by the Governor, Council and Assembly and no other; you are also as much as possible to observe in the passing of all laws that whatever may be requisite upon each different matter be accordingly provided for by a different law without intermixing in one and the same act such things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any act which shall be foreign to what the title of such respective act imports, and that no perpetual clause be part of any temporary law, and that no act whatever be suspended, altered, continued, revived, or repealed by

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general words, but that the title and date of such act so suspended, altered, continued, revived, or repealed be particularly mentioned and expressed in the enacting part.

[Const. 1894, art. 3, §§ 14, 16, 17.]

13. **[Duration of laws regulated.]**—Whereas, laws have been enacted in several of our plantations in America for so short a time that our royal assent or refusal thereof could not be had before the time for which such laws were enacted did expire, you shall not for the future give your assent to any law that shall be enacted for a less time than two years, except in the cases hereinafter mentioned, and you shall not reenact any law to which the assent of us or our royal predecessors has been once refused, without express leave for that purpose first obtained from us upon a full representation by you to be made to us by one of our principal secretaries of state, of the reasons and necessity for passing such law, nor give your assent to any law for repealing any other law passed in your government, whether the same has or has not received our approbation, unless you take care that there be a clause inserted therein suspending and deferring the execution thereof until our pleasure shall be known concerning the same.

14. **[Assembly not to be altered.]**—Whereas, laws have at several times been passed in many of our colonies and plantations in America by which certain parishes and districts have been impowered and authorized to send representatives to the General Assembly of the respective colonies in which the said parishes and districts lie, and sundry other regulations have been introduced by those laws relative to the said assemblies, it is our will and pleasure, and we do hereby require and command, that you do not upon any pretence whatever give your assent to any law or laws to be passed in our Province under

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your government by which the number of the Assembly shall be enlarged or diminished, the duration of it ascertained, the qualifications of the electors and the elected fixed or altered, or by which any regulations shall be established with respect thereto inconsistent with our instructions to you, our Governor, as prejudicial to that right or authority which you derive from us in virtue of our royal commission and instructions.

15. **[Extraordinary laws, royal assent necessary.]**—Whereas, great mischiefs do arise by the frequent passing bills of an unusual and extraordinary nature and importance in the plantations, which bills remain in force there from the time of enacting until our pleasure be signified to the contrary, we do hereby will and require you not to pass or give your consent hereafter to any bill or bills in the Assembly of our said province of an unusual and extraordinary nature and importance wherein our prerogative or the property of our subjects may be prejudiced, nor to any bill or bills whereby the trade or shipping of this kingdom may be any ways affected, until you shall have first transmitted unto us by one of our principal secretaries of state the draught of such bill or bills, and shall have received our royal pleasure thereupon, unless you take care in the passing of any bill of such nature as before mentioned, that there be a clause inserted therein suspending and deferring the execution thereof until our pleasure shall be known concerning the same.

16. **[Private laws regulated; notice of application therefor.]**—You are also to take care that no private act, whereby the property of private persons may be affected, be passed in which there is not a saving of us, our heirs and successors, all bodies politic or corporate, and of all other persons, except such as are mentioned in the said act, and those claiming by, from and under them,

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and further you shall take care that no such private act be passed without a clause suspending the execution thereof until the same shall have received our royal approbation. It is likewise our will and pleasure that you do not give your assent to any private act until proof be made before you in council and entered in the council books that public notification thereof was made of the party's intention to apply for such Act in the several parish churches where the premises in question lie for three Sundays at least successively before any such act shall be brought into the Assembly, and that a certificate under your hand be transmitted with and annexed to every such private act, signifying that the same has passed through all the forms above mentioned.

[Const. 1894, art. 3, § 18; as to notice, see vol. 2, p. 436, Const. proposed by Conv. of 1867.]

17. **[Appropriations regulated.]**—It is our will and pleasure that all money raised for the supply and support of government, or upon emergencies, shall be disposed of and applied to the service only for which it was raised by warrant from you by and with the consent of our council of our said province and not otherwise. But the Assembly may nevertheless be permitted from time to time to view and examine the accounts of money disposed of by virtue of laws made by them. And whereas, a very irregular practice hath heretofore prevailed in our said province of nominating commissioners in the laws which have been occasionally passed in the said province with large discretionary powers for the execution of services, the management and direction of which belong of right to us and ought only to be executed by officers nominated by us or by those acting under our authority, it is therefore our will and pleasure that you do not upon any pretence whatsoever give your assent to any act in which

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commissioners shall be nominated for the execution of services which of right belong to us and our officers.

[Const. 1894, art. 3, §§ 21, 22, 24.]

18. **[Gifts to certain public officers prohibited.]**—Whereas, several inconveniences have arisen to our governments in the plantations by gifts and presents made to our governors by the General Assemblies, for prevention thereof for the future, it is our express will and pleasure that neither you, our Governor, Commander in Chief, or president of the council of Our said province of New York for the time being, do give your or their consent to the passing any law or act for any gift or present to be made to you or them by the assembly, and that neither you nor they do receive any gift or present from the Assembly or others on any account or in any manner whatsoever, upon pain of our highest displeasure and of being recalled from that our government.

19. **[Royal revenues protected.]**—And you are to take care that in all acts or orders to be passed within that our province in any case for levying of money, or imposing fines or penalties, express mention be made that the same to be granted or reserved to us, our heirs and successors, for the public uses of that province and the support of the government thereof as by the said act or order shall be directed, and you are particularly not to pass any law or do any act by grant, deed or conveyance, or otherwise, whereby our revenue may be lessened or impaired without our especial leave or command therein.

20. **[Public accounts to be kept.]**—You are not to permit any clause whatsoever to be inserted in any law for levying money or the value of money whereby the same shall not be made liable to be accounted for unto us here in Great Britain and to our commissioners of our treasury, or our high treasurer for the time being, and audited by our auditor general of our plantations or his

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deputy for the time being, and we do particularly require you to take care that fair books of accounts of all receipts and payments of all public money be duly kept and the truth thereof attested upon oath, and that all such accounts be audited and attested by our auditor general of our plantations or his deputy, who is to transmit copies thereof to our commissioners of our treasury, or to our high treasurer for the time being, and that you do every half year or oftener send another copy thereof attested by yourself to our commissioners for trade and plantations, and duplicates thereof by the next conveyance, in which books shall be specified every particular sum raised or disposed of, together with the names of the persons to whom any payment shall be made, to the end we may be satisfied of the right and due application of the revenue of our said province and the territories depending thereon, with the probability of the increase or diminution of it under every head and article thereof.

21. **[Lotteries prohibited.]**— Whereas, a practice hath of late years prevailed in several of our colonies and plantations in America of passing laws for raising money by constituting public lotteries, and whereas, it hath been represented unto us that such practice doth tend to disengage those who become adventurers therein from that spirit of industry and attention to their proper callings and occupations on which the public welfare so greatly depends, and whereas, it further appears that this practice of authorizing lotteries by acts of legislature hath been also extended to the enabling private persons to set up such lotteries, by means whereof great frauds and abuses have been committed, it is therefore our will and pleasure that you do not give your assent to any act or acts for raising money by the institution of any public or private lotteries whatever until you shall have first transmitted unto us by one of our principal secretaries of state

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a draught or draughts of such act or acts, and shall have received our direction thereupon.

[Const. 1894, art. 1, § 9.]

22. **[Coinage laws to be enforced.]**—And whereas, an act of Parliament was passed in the sixth year of the reign of her late majesty Queen Anne intituled "an Act for ascertaining the rates of foreign coins in her majesty's plantations in America," which act the respective governors of the plantations in America have from time to time been instructed to observe and carry into execution, and whereas, notwithstanding the same complaints have been made that the said act has not been observed as it ought to have been in many of our colonies and plantations in America, by means whereof many indirect practices have grown up and various and illegal currencies have been introduced in several of the said colonies and plantations, contrary to the true intent and meaning of the said act and to the prejudice of the trade of our subjects, it is therefore our royal will and pleasure, and you are hereby strictly required and commanded under pain of our highest displeasure and of being removed from your government, to take the most effectual care for the future that the said act be punctually and bona fide observed and put in execution according to the true intent and meaning thereof.

23. **[Tariff rates, discrimination prohibited.]**—And whereas, complaint has heretofore been made by the merchants of our City of London in behalf of themselves and of several others of our good subjects of Great Britain trading to our plantations in America, that greater duties and impositions are laid on their ships and goods than on the ships and goods of persons who are natives and inhabitants of the said plantations, it is therefore our will and pleasure that you do not, on pain of our highest displeasure, give your assent for the future to any law

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wherein the natives or inhabitants of our province of New York under your government are put on a more advantageous footing than those of this kingdom, or whereby duties shall be laid upon British shipping, or upon the products or manufactures of Great Britain upon any pretence whatever.

24. **[Trade and commerce to be encouraged.]**—You are to examine what rates and duties are charged and payable upon any goods imported or exported within our province of New York, whether of the growth or manufacture of the said province or otherwise, and you are to suppress the engrossing commodities as tending to the prejudice of that freedom which trade and commerce ought to have, and to use your best endeavors for the improvement of the trade of those parts by settling such orders and regulations therein with the advice of the council as may be most acceptable to the generality of the inhabitants, and to send to us by one of our principal secretaries of state yearly or oftener, as occasion may require, the best and most particular account of any laws that have at any time been made, manufactures set up, or trade carried on in the province under your government which may in any ways affect the trade and navigation of this kingdom, and it is our express will and pleasure that you do not upon any pretence whatever, upon pain of our highest displeasure, give your assent to any law or laws for setting up any manufactures and carrying on any trades which are hurtful and prejudicial to this kingdom, and that you do use your utmost endeavors to discourage, discountenance and restrain any attempts which may be made to set up such manufactures or establish any such trades.

25. **[Duties on negroes and felons prohibited.]**—Whereas, acts have been passed in some of our plantations in America for laying duties on the importation

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and exportation of negroes, to the great discouragement of the merchants trading thither from the Coast of Africa; and whereas, acts likewise have been passed for laying duties on felons imported in direct opposition to an act of Parliament passed in the fourth year of the reign of King George the First for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons, it is our pleasure, that you do not give your assent to or pass any act imposing duties upon negroes imported into the said province under your government payable by the importer, or upon any slaves exported that have not been sold in the said province and continued there for the space of twelve months; it is our further will and pleasure that you do not give your assent to or pass any act whatsoever for imposing duties on the importation of any felons from this kingdom into the province under your government.

26. [**Governor to transmit laws.**]—You are to transmit authentic copies of all laws, statutes, and ordinances that are now made and in force, which have not yet been sent, or which at any time hereafter shall be made and enacted within the said province, each of them separately under the public seal unto us, by one of our principal secretaries of state, within three months, or by the first opportunity after their being enacted, together with duplicates thereof by the next conveyance, upon pain of our highest displeasure and of the forfeiture of that year's salary, wherein you shall at any time or upon any pretence whatsoever omit to send over said laws, statutes, and ordinances, as aforesaid, within the time above limited, as also of such other penalty as we shall please to inflict: But if it shall happen that no ships shall come from the said province within three months after the making of such laws, statutes and ordinances, whereby the same may be transmitted as aforesaid, then the

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said laws, statutes, and ordinances are to be transmitted by the next conveyance after the making thereof, whenever it may happen, for our approbation or disallowance of the same.

27. **[Report on legislation.]**—And our further will and pleasure is that the copies and duplicates of all acts that shall be transmitted as aforesaid, be fairly abstracted in the margin, and that in every act there be the several dates or respective times when the same passed the Assembly and the council and received your assent, and you are to be as particular as may be in your observations to be sent to us by one of our principal secretaries of state upon every act, that is to say, whether the same is introductive of a new law, declaratory of a former law, or does repeal a law then before in being, and you are likewise to send to us as aforesaid the reasons for passing of such law, unless the same do fully appear in the preamble of the said act.

28. **[Secretary, abstracts of laws.]**—You are to require the secretary of the said province or his deputy for the time being, to furnish you with transcripts of all such acts and public orders as shall be made from time to time, together with a copy of the journals of the council, and that all such transcripts and copies be fairly abstracted in the margin, to the end the same may be transmitted unto us by one of our principal secretaries of state as above directed, which he is duly to perform upon pain of incurring the forfeiture of his place.

29. **[Assembly, transcripts of journals and proceedings.]**—You are also to require from the clerk of the Assembly, or other proper officer, transcripts of all journals and other proceedings of the said assembly, and that all such transcripts be fairly abstracted in the margins, to the end the same may in like manner be transmitted as aforesaid.

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30. **[Court of exchequer.]**—Whereas, it is necessary that our rights and dues be preserved and recovered, and that speedy and effectual justice be administered in all cases relating to our revenue, you are to take care that a Court of Exchequer be called and do meet at such times as shall be needful to inform us by one of our principal secretaries of state whether our service may require that a constant Court of Exchequer be settled and established there.

31. **[Courts, creation and dissolution of, regulated.]**—You shall not erect any new court or office of judicature, nor dissolve any court or office already erected or established, without our especial order, but in regard we have been informed that there is a great want of a particular court for the determining small causes, you are to recommend it to the Assembly of the said province that a law be passed, if not already done, for the constituting such court or courts for the ease of our subjects there.

[Const. 1777, art. 41; 1821, art. 7, § 2; 1894, art. 6, §§ 17, 18.]

32. **[Justice to be speedily and impartially administered.]**—And whereas, frequent complaints have been made of great delays and undue proceedings in the courts of justice in several of our plantations, whereby many of our subjects have suffered, and it being of the greatest importance to our service and to the welfare of our plantations, that justice may be everywhere speedily and duly administered and all disorders, delays and other undue practices in the administration thereof be effectually prevented, we do particularly require you to take especial care that in all courts where you are authorized to preside justice be impartially administered, and that in all other courts established within the said province all judges and other persons therein concerned do like-

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wise perform their several duties without any delay or partiality.

33. **[Appeals in civil cases.]**—Our will and pleasure is that you, or the Commander in Chief of our said province for the time being, do in all civil causes on application being made to you, or the Commander in Chief for the time being, for that purpose permit and allow appeals from any of the courts of common law in our said province unto you or the Commander in Chief and the council of our said province, and you are for that purpose to issue a writ in the manner which has been usually accustomed, returnable before yourself and the council of our said province, who are to proceed to hear and determine such appeal, wherein such of our said council as shall be at that time judges of our said court from whence such appeal shall be made to you, our Captain General or to the Commander in Chief for the time being, and to our said council as aforesaid, shall not be permitted to vote upon the said appeal, but they may, nevertheless, be present at the hearing thereof to give the reasons of the judgment given by them in the causes wherein such appeal shall be made, provided nevertheless, that in all such appeals the sum or value appealed for do exceed the sum of three hundred pounds sterling, and that security be first duly given by the appellant to answer such charges as shall be awarded in case the first sentence be affirmed, and if either party shall not rest satisfied with the judgment of you, or the Commander in Chief for the time being, and council as aforesaid, our will and pleasure is that they may then appeal unto us in our privy council, provided the sum or value so appealed for unto us exceed five hundred pounds sterling, and that such appeal be made within fourteen days after sentence, and good security given by the appellant that he will effectually prosecute the same and answer the condemnation, as also pay

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such costs and damages as shall be awarded by us in case the sentence of you, or the Commander in Chief for the time being, and Council be affirmed, provided nevertheless, where the matter in question relates to the taking or demanding any duty payable to us, or to any fee of office or annual rent, or other such like matter or thing, where the rights in future may be bound, in all such cases you are to admit an appeal to us in our Privy Council, though the immediate sum or value appealed for be of a less value. And it is our further will and pleasure that in all cases where by your instructions you are to permit appeals to us in our Privy Council, execution be suspended until the final execution of such appeals, unless good and sufficient security be given by the appellee to make ample restitution of all that the appellant shall have lost by means of such judgment or decree in case upon the determination of such appeal such decree or judgment should be reversed and restitution awarded to the appellant.

[Const. 1894, art. 6, §§ 2, 9.]

34. [Appeals in criminal cases.]—You are also to permit appeals to us in council in all cases of fines imposed for misdemeanors, provided the fines so imposed amount to or exceed the value of two hundred pounds sterling, the Appellant first giving good security that he will effectually prosecute the same and answer the condemnation if the sentence by which such fines were imposed shall be confirmed.

[Const. 1894, art. 6, §§ 2, 9.]

35. [Judges, appointment and tenure.]—You shall not appoint any person to be a judge or justice of the peace without the advice and consent of at least three of our council, signified in council, nor shall you execute yourself or by deputy any of the said offices, and it is our

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further will and pleasure that all commissions to be granted by you to any person or persons to be judges, justices of the peace, or other necessary officers, be granted during pleasure only.

[Const. 1894, art. 6.]

36. **[Removals.]**—You shall not displace any of the judges, justices, sheriffs, or other officers or ministers within our said province of New York, without good and sufficient cause, which you shall signify in the fullest and most distinct manner to us by one of our principal secretaries of state by the first opportunity after such removal.

[Const. 1894, art. 6, §§ 11, 13; art. 10, § 1.]

37. **[Office, execution by deputy limited.]**— You shall not suffer any person to execute more offices than one by deputy.

38. **[Official fees to be regulated.]**—And you are with the advice and consent of the said council to take especial care to regulate all salaries and fees belonging to places or paid upon emergencies, that they be within the bounds of moderation, and that no exaction be made upon any occasion whatsoever, as also that tables of all fees be publicly hung up in all places where such fees are to be paid, and you are to transmit copies of all such tables of fees to us by one of our principal secretaries of state as aforesaid.

39. **[Offices, inspection, suspension, and compensation.]**—Whereas, there are several offices in our plantations granted under the great seal of this kingdom, and our service may be very much prejudiced by reason of the absence of the patentees and by their appointing deputies not fit to officiate in their stead, you are, therefore, upon your arrival in New York to inspect such of the said offices as are in your government, and to enquire into the capacity and behavior of the persons now exer-

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cising them, and to report thereupon to us by one of our principal secretaries of state what you think fit to be done or altered in relation thereunto, and you are upon the misbehavior of any of the said patentees or their deputies to suspend them from the execution of their places till you shall have represented the whole matter and received our direction therein, and in case of the death of any such deputy, it is our expressed will and pleasure that you take care the person appointed to fill the place until the patentee can be informed thereof and appoint another deputy, do give sufficient security to the patentee, or in any case of suspension, to the person suspended, to be answerable for the profits accruing during such interval by death, or during such suspension, in case we shall think fit to restore the person suspended to his place again. It is nevertheless our will and pleasure that the person executing the place during such interval by death or suspension shall for his encouragement receive the same profits as the person dead or suspended did receive. And it is our further will and pleasure that in case of the suspension of a patentee the person appointed by you to do the office during such suspension shall for his encouragement receive a moiety of the profits which would otherwise have accrued and become due to such patentee, giving security to such patentee to be answerable to him for the other moiety in case we shall think fit to restore him to his place again, and it is our further will and pleasure that you do countenance and give all due encouragement to all our patent officers in their legal and accustomed fees, rights, privileges, and emoluments according to the true intent of their patents.

40. **[Governor not to usurp royal power of appointment.]**—You shall not by color of any power or authority hereby or otherwise granted or mentioned to be granted unto you, take upon you to give, grant or dispose of any office or place within the said province

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which now is or shall be granted under the great seal of Great Britain, or to which any person is or shall be appointed by warrant under our signet or sign manual, any otherwise than that you may upon the vacancy of any such office or place, or suspension of any such officer by you as aforesaid, put in any fit person to officiate in the interval till you shall have represented the matter unto us by one of our principal secretaries of state as aforesaid, which you are to do by the first opportunity, and until the said office or place is disposed of by us, our heirs and successors under the great seal of Great Britain, or until some person shall be appointed thereto under our signet or sign manual, or that our further directions be given therein.

41. **[Report concerning local government.]**—You are to transmit unto us by one of our principal secretaries of state with all convenient speed a particular account of all establishments of jurisdictions, courts, offices and officers, powers, authorities, fees and privileges granted or settled, or which shall be settled, within the said province, together with an account of all the expenses attending the establishments of the said courts, and of such funds as are settled and appropriated for discharging such expenses.

42. **[Public lands, renewal of certain grants.]**—Whereas, by an order in council of the 28th of June, 1708, an act passed at New York the 27th of November, 1702, intituled an act for repealing several acts of Assembly, and declaring other ordinances published as acts of Assembly to be void, was repealed, and whereas, by the said order an act passed at New York the 2d of March, 1698-9, intituled an Act for vacating, breaking, and annulling several extravagant grants of land made by Colonel Benjamin Fletcher, late governor of this province under his majesty, was confirmed and approved, by the confirmation of which act several large tracts of land,

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as by the said act will more fully appear, were resumed to us to be granted as we should see occasion, our will and pleasure therefore is that if any part of such resumed lands shall as yet remain undisposed of, you may regrant unto the late patentees of such resumed grants, or to any persons who shall apply for the same, a suitable number of acres not exceeding one thousand to any one person.

43. **[Public lands, certain grants revoked; quit rents.]**—Whereas, his late Majesty was informed that several exorbitant grants of vast tracts of land have heretofore been made in our said province and particularly within the counties of Ulster and Orange within the said province, and in those parts next adjoining to our province of New Jersey, upon trifling considerations, without any reservations of competent quit rents to us, or any obligations upon the grantees to cultivate and improve the same as reason requires, by means whereof our interest has been greatly prejudiced, and the extending, settling and improving the said province greatly obstructed, we do therefore hereby direct and require you to put in practice all methods whatsoever allowed by law for breaking and annulling such exorbitant, irregular and unconditioned grants, and in case of any difficulty therein, that you report unto us by one of our principal secretaries of state whatever you think may be further necessary or conducive towards effecting the same, and further for preventing of the like practices and inconveniences for the future, we do hereby declare it to be our royal will and pleasure that you do not pass any grant of land within the said province of New York to any person whatsoever, under a less reservation of quit rent than two shillings and six pence sterling for every hundred acres, nor without an obligation on the grantee to plant, settle, and effectually cultivate the same within a reasonable time, under the penalty of the forfeiture of

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such grant, and it is our further will and pleasure that no more than one thousand acres be granted to any one person either in his or her own name, or in the name of any other person in Trust for him or her, and that in the quantity of acres granted to every person due regard be had to the number of persons of which such grantee's family shall consist, and of his or her ability to cultivate the same.

44. **[Public lands, inspection of records.]**—And whereas, nothing can more effectually tend to the further improving and settling our said province, and to the advancement of our revenue of quit rents, than the establishing a regular and proper method of proceeding with respect to the passing of grants of land within the same, in order therefore that we may be exactly informed of the present state of our said revenue of quit rents and of the grants of land within our said province, that the rights of us and our subjects with respect thereto may be ascertained and secured, and all disputes now depending quieted and settled, it is our will and pleasure that you do upon your arrival, or as soon after as you shall see convenient, inspect the several books, entries, and records in the secretaries', auditors', receivers', or surveyors' offices, and order and direct the clerks or other proper officers to lay before you copies or extracts of all grants, or the entries or docquets thereof which have been made since the year 1708, and you are also to inspect and examine into the accounts of the receivers of our revenues of quit rents and to order them to lay before you an account of all the quit rents they have received, at what time, and from whom, distinguishing such accounts as have been audited from those which have not, and in order to prove the truth of those accounts, you are to direct our deputy auditors in the said province to give you the particulars of such accounts as they have audited, and that

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you may be better able to inform yourself what persons have paid their quit rents and what have not, you are to order the said receiver to lay before you copies or extracts of all receipts which have been given for payment of quit rents, and likewise to exhibit to you all books and vouchers in their possession that belonged to any former receivers since the year 1708.

45. [**Public lands, prosecutions required in certain cases.**]—And when you shall have made a careful and diligent enquiry to find out the present possessors of lands within our said province, claiming to hold under grants derived from us, or our predecessors, in case any of the said grants shall appear to you to have been obtained fraudulently and that the quit rents and other conditions upon which the grants were made have not been paid or complied with, or in case any person shall have taken out grants and not seated or cultivated the lands nor paid quit rents for the same agreeable to the terms of their grants, in such cases you shall give public notice to all such possessors of fraudulent grants whenever the quit rents and other stipulated conditions have not been complied with, or such as claim lands by virtue of their having possession of them for some time without any regular patent, and also to all such as have taken out grants and yet have not paid quit rents or cultivated the lands, that they shall be forthwith prosecuted, and you are accordingly to certify the same unto our Attorney General and to direct him to proceed against such defaulters in order to vacate and supersede the grants and recover possession by due course of law of the lands they now wrongfully hold, and it is our further will and pleasure that you do transmit unto us by one of our principal secretaries of state full and circumstantial accounts of all your proceedings in the several matters hereinbefore mentioned relative to quit rents and grants of land, to the end we may

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give such orders and directions therein as the nature and circumstances of the several cases may particularly require.

46. **[Public lands, grants of regulated; registry.]**—It is our will and pleasure that all and every person and persons who shall apply to you for a grant or grants of any land shall previous to their obtaining the same make it appear before you in council that they are in a condition to cultivate and improve the same by settling thereon in proportion to the quantity of acres a sufficient number of white persons or negroes, and in case you shall upon a consideration of the circumstances of the person or persons applying for such grants think it adviseable to pass the same, you are in such case to cause a warrant to be drawn up directed to the Surveyor General, or other proper officer, impowering or requiring him or them to make a faithful and exact survey of the lands so petitioned for, and to return the said warrant within six months at farthest from the date thereof with a plot or description of the land so surveyed thereunto annexed, provided that you do take care that before any such warrant is issued as aforesaid a docquet thereof be entered in the auditor's and receiver's office, and when the warrants shall be returned by the surveyor or other proper officer the Grant shall be made out in due form and the terms and conditions required by these our instructions be particularly and expressly mentioned in the respective grants. And it is our further will and pleasure that the said grants shall be registered within six months from the date thereof in our secretary's office there and a docquet thereof be also entered in our auditor's office there, or that in default thereof such grant shall be void, copies of all which entries shall be returned regularly by the proper officer to our commissioners for trade and plantations within six months from the date thereof.

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47. **[Quit rents.]**—And it is our further will and pleasure that you do make strict enquiry into the method used in our province in collecting, receiving and accounting for our quit rents, and in case you find any fraud, concealment, irregularity or neglect therein, you are to use your utmost endeavors for redressing the same, and to establish a proper method whereby the same may be prevented for the future, and whereby our auditor or his deputy may be enabled more effectually to checque and comptrol the accounts exhibited by the receivers, and if it shall appear necessary to apply to the legislature of the said province for an act of Assembly for the more effectually ascertaining and the more speedily and regularly collecting our quit rents, you are to prepare the proper heads of such a bill as you shall think may more effectually conduce to the procuring the good end proposed, and to transmit the same to us by one of our principal secretaries of state for our further direction therein.

48. **[Public lands, distribution regulated.]**—And it is our further will and pleasure that in all grants of lands to be made by you as aforesaid regard be had to the profitable and unprofitable acres, so that each grantee may have a proportionable number of one sort and the other, as likewise that the length of each tract of land to be hereafter granted do not extend along the banks of any river, but into the main land that thereby the said grantees may have each a convenient share of what accommodation the said river may afford for navigation or otherwise.

49. **[Boundary between New York and New Hampshire.]**—Whereas, we thought fit by our order in council of the 20th of July, 1764, to declare that the western banks of the River Connecticut from where it enters the province of Massachusetts Bay as far north as the 45 degree of northern latitude should be the boundary between our provinces of New York and New Hamp-

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shire; and whereas, we have further thought fit by our order in council of the 24th of July, 1767, to declare that no part of the lands lying on the western side of the River Connecticut within that district heretofore claimed by that province of New Hampshire should be granted until our further pleasure should be known concerning the same, it is therefore our will and pleasure that you do take effectual care for the due observance of the said order in council, and that you do not, upon pain of our highest displeasure, presume to make any grant whatever, or to pass warrants for the survey of any part of the said lands, until our further will and pleasure shall be signified to you concerning the same.

50. **[Lands along Lake Champlain.]**—Whereas, sundry persons proprietors under titles derived from the crown of France when that crown was in possession of Canada, of lands on that part of Lake Champlain now lying within our province of New York, have humbly represented unto us that several parts of the said lands so claimed have already been granted to other persons by letters patent under the seal of Our said province of New York, and have therefore humbly prayed that a proceeding so prejudicial to their rights and pretensions may receive our royal disapprobation, and whereas, it appears both just and equitable that the claims of persons under such titles as aforesaid should not be affected without the fullest examination thereof, it is therefore our will and pleasure, and you are hereby directed and required, in no case to make any grants of lands so claimed as aforesaid upon Lake Champlain to the northward of Crown Point within our province of New York, until the petitions and proposals for grants of any part or parts of such lands shall have been transmitted to one of our principal secretaries of state in order to be laid before us, and until our approbation thereof shall have been signified unto you,

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our said Governor, or to the Commander in Chief of Our said Province for the time being.

51. **[Indian lands, grants of regulated.]**—Whereas, it hath been represented to us that some part of the lands ceded to us by the Indians at the Congress at Fort Stanwix on the 5th day of November, 1768, do lie within the limits of our province of New York, and whereas, it is both just and reasonable that lands, the property of which has been acquired by us at a very considerable expense, should be made subject to other terms and conditions than those prescribed for lands in general within our said Province, it is therefore our will and pleasure that you do cause all applications or proposals that shall be made to you for a grant or grants of any part of the said lands, to be transmitted to us by one of our principal secretaries of state, accompanied with a report from you of the true condition and value of the said lands so petitioned for, to the end that we may give such directions thereupon as shall appear to us to be proper. And it is our will and pleasure that until such reports and proposals shall have been transmitted as aforesaid, and until you shall have received our directions thereupon, you do not presume upon any pretence whatever to pass any grant, or issue any warrant of survey for any part of the said lands.

52. **[Reservation of land in vicinity of forts.]**—Whereas, it hath been represented unto us that the governors of several of our colonies in America have granted lands away close to the forts belonging to us, by which means the garrisons of such forts have been obliged to pay the proprietors of these lands extravagant prices for wood cut for a necessary supply of fuel, and thereby a great and unreasonable expense has been brought upon the military contingencies, it is our express will and pleasure that you do take especial care that in all war-

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rants for supplying of lands adjacent or contiguous to any fort or fortification, whether such warrant be granted upon an original petition to you in council, or upon our order in our Privy Council, there be an express direction to the surveyor that he do reserve to us, our heirs and successors, for the use of the fort near to which the lands shall lie, such a part of the tract petitioned for (being woodland), and in such situation as the commander in chief of the said fort (with whom he is to be required to consult and advise in all such cases), shall judge convenient and sufficient for a permanent and certain supply of fuel for such a garrison as the said fort may be able to contain. And it is our further pleasure that a regular plot of such reserved land describing the bounds, expressing the quantity of acres, and properly signed and attested by such surveyor be delivered by the commanding officer of each fort, to be there publicly hung up, and a duplicate thereof also recorded in the secretary's office, or other proper office of record in our province under your government, and as we judge the due execution of this order to be essential to our service, you are hereby required to take care that the regulations above prescribed be duly entered upon the council books of our said province as a standing order to all persons who may be intrusted with the powers to which they refer.

53. **[Pine trees for masts to be reserved.]**—And it is our further will and pleasure that a clause be inserted in all grants of lands to reserve all white or other sort of pine trees fit for masts, of the growth of twenty-four inches diameter, and upwards at twelve inches from the earth, to us, our heirs and successors, for the masting of our royal navy, and that no such trees shall be felled, cut, or destroyed without our license for so doing first had and obtained on penalty of the forfeiture of such grant, and of the land so granted reverting to the crown.

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54. **[Timber trespasses.]**—And whereas, by an act passed in the 8th year of the reign of King George the First intituled An act giving further encouragement for the importation of naval stores and for other purposes therein mentioned, there are certain forfeitures and penalties inflicted on persons convicted of destroying our woods in America to be recovered in the admiralty courts there, whereof one moiety is by the said act to be paid to us, our heirs and successors, and the other moiety to the informer who shall sue for the same, and whereas, it was represented to our late royal grandfather that if he would be graciously pleased to give up his share of the said forfeitures to the informer it might in some measure prevent such evil practices by giving further encouragement to such as shall detect offenders against the said law, we are pleased to condescend thereunto, and to grant our share of such forfeitures as shall be incurred for the future upon this account to the informer who shall sue for the same, but as effectual care ought to be taken that our condescension in this particular do not induce persons clandestinely to cut down and lay them waste depending upon collusive agreements with informers, our will and pleasure is that no informer shall receive, or be intituled to his moiety of the aforementioned forfeitures, but in such cases only where the Surveyor General of the woods or his deputy shall certify that he hath actually seized the wood or logs for our use for which the respective informations were made. You are to take care that this instruction be punctually put in execution and for that purpose to give due notice thereof to all persons whom it may concern.

55. **[Forest preservation.]**—And whereas, an act was passed here in the third and fourth years of the reign of Queen Anne intituled An act for encouraging the importation of naval stores from her majesty's plantations

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in America, and another passed in the 9th year of the said Queen's reign intituled An act for the preservation of white and other pine trees growing in her Majesty's colonies of New Hampshire, the Massachusetts (Bay) and Province of Maine, Rhode Island and Providence Plantation, the Narragansett country or King's Province, and Connecticut, in New England and New York and New Jersey in America, for the masting of her majesty's navy, and also an act passed in the eighth year of the reign of his late majesty King George the First intituled An act giving further encouragement for the importation of naval stores, and for other purposes therein mentioned, yet nevertheless his late majesty was informed that great spoils were daily committed in the woods in America by cutting and converting to private use such trees as are or may be proper for the service of the royal navy, and it being necessary that all such abuses which tend so evidently to deprive us of those supplies be effectually redressed, it is our will and pleasure that you do take care and give in charge that the said acts, as also that passed in the second year of our late royal grandfather's reign intituled An act for the better preservation of his majesty's woods in America, and for the encouragement of the importation of naval stores from thence, and to encourage the importation of masts, yards and bowsprits from that part of Great Britain called Scotland, and every clause, article and proviso therein be strictly complied with.

56. **[Fisheries regulated.]**—Whereas, for some years past the governors of some of our plantations have seized and appropriated to their own use the produce of whales of several kinds taken upon those coasts upon pretence that whales are royal fishes, which tends greatly to discourage this branch of fishery in our plantations, and prevents persons from settling there, it is therefore our will and pleasure that you do not pretend to any such

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claim, nor give any manner of discouragement to the fishery of our subjects upon the coast of the province under your government, but on the contrary that you give all possible encouragement thereto.

57. **[Remission of certain fines and forfeitures prohibited.]**—You shall not remit any fines or forfeitures whatsoever above the sum of ten pounds, nor dispose of any forfeitures whatsoever, until upon signifying unto our commissioners of the treasury, or our high treasurer for the time being, the nature of the offence and the occasion of such fines and forfeitures, with the particular sums or value thereof (which you are to do with all speed) you shall have received our directions therein, but you may in the meantime suspend the payment of the said fines and forfeitures.

58. **[Relinquishment of forfeitures and escheats regulated.]**—It is our will and pleasure that you do not dispose of any forfeitures or escheats to any person until the sheriff or other proper officer have made enquiry by a jury upon their oaths into the true value thereof, nor until you shall have transmitted to the Commissioners of our treasury or our high treasurer for the time being, a particular account of such forfeiture and escheat, and the value thereof, and shall have received our directions thereupon, and you are to take care that the produce of the said forfeitures and escheats, in case we shall think proper to give you directions to dispose of the same, be duly paid to our Receiver General of the said province, and a full account transmitted to the commissioners of our treasury or our high treasurer for the time being, with the names of the persons to whom disposed, and provided that in the grants of forfeited or escheated lands there be a clause obliging the grantee to plant and cultivate three acres for every fifty within three years after the passing such grant in case the same was not so planted

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and cultivated before, and that there be the proper savings and reservations of quit rents to us, our heirs and successors.

59. **[Receiver general.]** — Whereas, we have thought it necessary for our service to constitute and appoint a Receiver General of the rights and perquisites of the Admiralty, it is therefore our will and pleasure that you be aiding and assisting to the said Receiver General, his deputy or deputies, in the execution of the said office of Receiver General, and we do hereby require and enjoin you to make up your accounts with him, his deputy or deputies, of all rights of Admiralty you or your officers have, or shall, or may receive, and to pay over to the said Receiver General, his deputy or deputies, for our use all such sum or sums of money as shall appear upon the foot of such accounts to be and remain in your hands or in the hands of any of your officers. And whereas, our said Receiver General is directed in case the parties chargeable with any part of such our revenue refuse, neglect, or delay payment thereof by himself or sufficient deputy to apply to our governors, judges, attorneys general, or any other our officers or magistrates, to be aiding and assisting to him in recovering the same, it is therefore our will and pleasure that you, our governor, our judges, our attorneys general and all other our officers whom the same may concern, do use all lawful authority for the recovering and levying thereof.

60. **[Religious toleration.]**—You are to permit a liberty of conscience to all persons, except papists, so they be contented and quiet with a peaceable enjoyment of the same, not giving offence or scandal to the Government.

[Const. 1894, art. 1, § 3.]

61. **[Religious observance to be encouraged.]**—

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You shall take especial care that God Almighty be devoutly and duly served throughout your government, the Book of Common Prayer as by law established read each Sunday and holy day, and the blessed sacrament administered according to the rites of the Church of England.

62. **[Churches and parsonages.]**—You shall be careful that the churches already built there be well and orderly kept, and that more be built as the province shall by God's blessing be improved, and that beside a competent maintenance to be assigned to the minister of each orthodox church, a convenient house be built at the common charge for each minister, and a competent proportion of land assigned to him for a glebe and exercise of his industry.

63. **[Ministers, appointments and removals.]**—You are not to prefer any minister to any ecclesiastical benefice in that our province without a certificate from the right reverend father in God, the Lord Bishop of London, of his being conformable to the doctrine and discipline of the Church of England, and of a good life and conversation, and if any person preferred already to a benefice shall appear to you to give scandal, either by his doctrine or manners, you are to use the proper and usual means for the removal of him.

64. **[Minister to be member of vestry.]**—You are to give orders forthwith, if the same be not already done, that every orthodox minister within your government be one of the vestry within his respective parish, and that no vestry be held without him, except in case of sickness, or that after notice of a vestry summoned he omit to come.

65. **[Report concerning unauthorized ministers.]**—You are to enquire whether there be any minister within your government who preaches or administers the sacra-

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ment in any orthodox church or chapel without being in due orders, and to give an account thereof to the said Lord Bishop of London.

66. **[Bishop of London, jurisdiction of.]**—And to the end the ecclesiastical jurisdiction of the said Lord Bishop of London may take place in that province so far as conveniently may be, we do think fit that you do give all countenance and encouragement to the exercise of the same, excepting only the collating to benefices, granting licenses for marriages, and probate of wills, which we have reserved to you, Our Governor, and to the Commander in Chief of our said province for the time being.

67. **[Schoolmasters to be licensed.]**—We do further direct that no schoolmaster be henceforth permitted to come from England and to keep School in our said province without the license of the said Bishop of London, and that no other person now there, or that shall come from other parts, shall be admitted to keep school in that our said province of New York without your license first obtained.

68. **[Table of marriages.]**—And you are to take especial care that a table of marriages established by the canons of the Church of England be hung up in every orthodox church and duly observed, and you are to endeavor to get a law passed in the Assembly of that province, if not already done, for the strict observation of the said table.

69. **[Disorderly conduct; character of officers; schools to be established.]**—The right reverend father in God, Edmund late Lord Bishop of London, having presented a petition to his majesty, King George the First, humbly beseeching him to send instructions to the governors of all the several plantations in America that they cause all laws already made against blasphemy, profaneness, adultery, fornication, polygamy, incest, prof-

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anation of the Lord's day, swearing and drunkenness in their respective governments to be vigorously executed, and we thinking it highly just that all persons who shall offend in any of the particulars aforesaid should be prosecuted and punished for their said offences, it is therefore our will and pleasure that you take due care for the punishment of the aforementioned vices, and that you earnestly recommend it to the Assembly of New York to provide effectual laws for the restraint and punishment of all such of the aforementioned vices, against which no laws are yet provided, and also you are to use your endeavor to render the laws in being more effectual by providing for the punishment of the aforementioned vices by presentment upon oath to be made to the temporal courts by the church wardens of the several parishes at proper times of the year to be appointed for that purpose, and for the further discouragement of vice and encouragement of virtue and good living, that by such example the infidels may be invited and desire to embrace the Christian religion, you are not to admit any person to public trusts or employments in the province under your government whose ill fame and conversation may occasion scandal. And it is our further will and pleasure that you recommend to the Assembly to enter upon proper methods for the erecting and maintaining of schools in order to the training up of youth to reading and to a necessary knowledge of the principles of religion.

[Const. 1894, art. 9, § 1, common schools.]

70. **[Negroes and Indians, conversion of to be encouraged.]**—You are with the assistance of the council and Assembly to find out the best means to facilitate and encourage the conversion of negroes and Indians to the Christian religion, more especially you are to use your

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endeavors with the Assembly that they make provision for the maintenance of some ministers to inhabit amongst the Five Nations of Indians in order to instruct them, as also to prevent their being seduced from their allegiance to us by French priests and jesuits.

71. **[Census; militia; vital statistics.]**—You shall send to us by one of our principal secretaries of state by the first conveyance an account of the present number of planters and inhabitants, men, women and children, as well masters as servants, free and unfree, and of the slaves in our said province, as also a yearly account of the increase and decrease of them, and how many of them are fit to bear arms in the militia of our said province. You shall also cause an exact account to be kept of all persons born, christened, and buried, and you shall yearly send fair abstracts thereof to us by one of our principal secretaries of state.

[Const. 1894, art. 3, § 4, enumeration of inhabitants; art. 11, militia; public health law (1893, chap. 661), § 22, vital statistics.]

72. **[Negro census.]**—And we do further expressly command and require you to give unto us by one of our principal secretaries of state once in every year the best accounts you can procure of what number of negroes the said province is supplied with.

73. **[Militia.]**—You shall take care that all planters and Christian servants be well and fitly provided with arms, and that they be listed under good officers, and, when and as often as shall be thought fit, mustered and trained, whereby they may be in a better readiness for the defence of our province under your government; and you are to use your utmost endeavors that such planters do each of them keep such a number of white servants as by law is directed, and that they appear in arms when thereunto required.

[Const. 1894, art. 11.]

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74. **[Military exercises to be reasonable.]**—You are to take especial care that neither the frequency nor unreasonableness of their marches, musters and trainings be an unnecessary impediment to the affairs of the inhabitants.

75. **[Martial law restricted.]**—You shall not upon any occasion whatsoever establish or put in execution any articles of war, or other law martial, upon any of our Subjects, inhabitants of our said province, without the advice and consent of our council there.

76. **[Governor to be vice admiral.]**—And whereas, you will receive from our commissioners for executing the office of High Admiral of Great Britain and of our plantations, a commission of vice admiralty of the said province, you are hereby required and directed carefully to put in execution the several powers thereby granted you.

77. **[Letters of marque and reprisal regulated.]**—And there having been great irregularities in the manner of granting commissions in our plantations to private ships of war, you are to govern yourself whenever there shall be occasion according to the commissions and instructions granted in this kingdom, but you are not to grant commissions of marque or reprizal against any prince or state, or their subjects in amity with us, to any person whatsoever without our especial command, and you are to oblige the commanders of all ships having private commissions to wear no other colors than such as are described in an order of council of the 7th of January, 1730, in relation to colors to be worn by all ships and vessels except our own ships of war.

78. **[Public safety; when letters to be destroyed.]**—Whereas, we have been informed that during the time of war our enemies have frequently got intelligence of the state of our plantations by letters from private per-

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sons to their correspondents in Great Britain taken on board ships coming from the plantations, which may be of dangerous consequence if not prevented for the future, our will and pleasure is that you signify to all merchants, planters and others that they be very cautious in giving any account by letters of the public state and condition of our said province of New York, and you are further to give directions to all masters of ships or other persons to whom you may entrust your letters that they put such letters in a bag with a sufficient weight to sink the same immediately in case of imminent danger from the enemy, and you are also to let the merchants and planters know how greatly it is for their interest that their letters should not fall into the hands of the enemy, and therefore that they should give the like orders to the masters of ships in relation to their letters, and you are further to advise all masters of ships that they do sink all letters in case of danger in the manner beforementioned.

79. **[Treasonable correspondence forbidden.]** — And whereas the merchants and planters in America have in time of war corresponded and traded with our enemies and carried intelligence to them to the great prejudice and hazard of the British plantations, you are therefore by all possible methods to endeavor to hinder all such trade and correspondence in time of war.

80. **[Pirates, trial of.]**—And whereas, commissions have been granted unto several persons in our respective plantations in America for the trying of pirates in those parts pursuant to the acts for the more effectual suppression of piracy, and by a commission already sent to our province of New York you as Captain General and Governor in Chief of the said Province are impowered, together with others therein mentioned to proceed accordingly in reference to the said province, our will and pleasure is that in all matters relating to pirates

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you govern yourself according to the intent of the acts and commissions aforementioned.

81. **[Fortifications, defenses and military supplies.]**—Whereas, it is absolutely necessary that we be exactly informed of the state of defence of all our plantations in America, as well in relation to the stores of war that are in each plantation as to the forts and fortifications there, and what more may be necessary to be built for the defence and security of the same, you are as soon as possible to prepare an account thereof with relation to our said province in the most particular manner, and you are therein to express the present state of the arms, ammunition and other stores of war belonging to the said Province, either in any public magazines, or in the hands of private persons, together with the state of all places either already fortified or that you judge necessary to be fortified for the security of our said province, and you are to transmit the same to us by one of our principal secretaries of state, as also a duplicate thereof to the master, general or principal officers of our ordnance, which accounts are to express the particulars of ordnance, carriages, ball, powder, and all other sorts of arms and ammunition in the public stores at your said arrival, and so from time to time of what shall be sent to you or bought with public money, and to specify the time of the disposal and the occasion thereof, and other like accounts half yearly in the same manner.

82. **[Powder duty.]**—Whereas, divers acts have from time to time been passed in several of our colonies in America imposing a duty of powder on every vessel that enters and clears in the said colonies, which has been of great service in furnishing the magazines with powder for the defence of the said colonies in time of danger, it is our express will and pleasure, and you are hereby required and directed to recommend to the Assembly of

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New York to pass a law for collecting a powder duty, and that the law for that purpose be made perpetual, that a certain time in the said act not exceeding twelve months be all allowed for giving notice thereof to the several masters of vessels trading to New York, and that for the more ample notification thereof a proclamation be also published in your said government declaring that from and after the expiration of the time limited by the said act for such notice no commutation shall be allowed of but upon evident necessity, which may sometimes happen, whereof you, or the Commander in Chief for the time being, are to be the judge, in which case the said master shall pay the full price gun powder sells for there, and the monies so collected shall be laid out as soon as may be in the purchase of gun powder. And you are also to transmit every six months to Us by one of our principal secretaries of state an account of the particular quantities of powder collected under the said act in your government, and likewise a duplicate thereof to the master, general or principal officers of our ordnance.

83. **[Military storehouses.]**—You are to take especial care that fit storehouses be settled throughout our said province for receiving and keeping arms, ammunition, and other public stores.

84. **[Indians to be conciliated.]**—And whereas, great complaints have lately been made by the Five Nations or Cantons of Indians that settlements have been made upon their lands by persons claiming the same under pretended deeds of sale or conveyance from the said Indians, by means whereof great prejudice hath arisen to our service, in order therefore to obviate the ill effects which would attend a general discontent of the Indians, and that nothing may be wanting to convince them of the sincerity of our intentions to support and protect them in their just rights, it is our express will and pleasure that

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you do forthwith make the most strict and impartial enquiry into the cause of their complaints, and that you do take the most speedy and effectual methods which the law in such cases will allow to redress their grievances and use your utmost endeavors to quiet the uneasiness and discontent which have of late appeared amongst them.

85. **[Indian contracts.]**—And whereas, purchasing lands from the Indians without a license from us, or from any person acting under our authority, is inconsistent with our rights, and may endanger the peace and security of our said province, it is therefore our will and pleasure that you do not upon any pretence whatsoever make a grant or grants to any person or persons of any lands within our said province purchased of the Indians without a license first had and obtained from you for that purpose, and when any application shall be made to you for a license to purchase lands of the Indians, you shall, before the issuing of such license, cause the lands proposed to be purchased to be carefully and publicly surveyed by a sworn surveyor in the presence of the Indians claiming a right to such land, and in the presence of an interpreter properly authorized, which said surveyor shall within a reasonable time, not exceeding three months, make a return to you of such survey signed or otherways attested and certified by such Indians, with a plot or description of the land and exact buttings and boundings thereof, the particulars whereof shall be fully inserted in the license to be by you granted for that purpose, and you are to take especial care that in all licenses to be granted by you for the purchase of lands from the Indians the quantity of land to be purchased by any one person, either in his or her own name, or in the names of any person or persons in trust for him or her, do not exceed one thousand acres. And you are further to take care that in passing patents for lands purchased of the Indians under a license from

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you as aforesaid you do strictly observe the regulations prescribed in the foregoing articles of these our instructions to you relative to the form and method of passing grants for land.

[Const. 1894, art. 1, § 15.]

86. [Maps of province and Indian country.]—You shall transmit unto us by one of our principal secretaries of state by the first opportunity a map, with the exact description of the whole territory under your government with the several plantations upon it, and all the fortifications, and you are likewise to use your best endeavors to procure a good map to be drawn of the Indian country in the neighborhood of our plantations in those parts, marking the names of the several nations as they call themselves and are called by the English and French, and the places where they inhabit, and transmit the same in like manner.

87. [General condition of province.]—You are likewise from time to time to give unto us by one of our principal secretaries of state as aforesaid an account of the wants and defects of the said province, and what are the chief products thereof, what new improvements are made therein by the industry of the inhabitants or planters, and what further improvements you conceive may be made or advantage gained by trade, and which way we may contribute thereunto.

88. [Governor's authority in extraordinary cases.]—If anything shall happen that may be of advantage and security to the said province which is not herein, or by our commission provided for, we do hereby allow unto you with the advice and consent of our council to take order for the present therein, giving to us by one of our principal secretaries of state speedy notice thereof that so you may receive Our ratification if we shall approve of

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the same, provided always that you do not by color of any power given you commence or declare war without our knowledge or particular commands therein, except it be against the Indians upon emergencies wherein the consent of our council shall be had and speedy notice thereof given to us by one of our principal secretaries of state.

89. **[Governor not to visit Europe without royal leave.]**—And whereas great prejudice may happen to our service and the security of the said province by your absence from those parts, you are not upon any pretence whatsoever to come from your government without having first obtained leave for so doing from us under our sign manual and signet, or by our order in our Privy Council.

90. **[President of council, powers limited.]**—And whereas, we have been pleased by our commission to direct that in case of your death or absence from the said province, and in case there be at that time no person upon the place commissionated or appointed by us to be our Lieutenant Governor or Commander in Chief, the eldest councillor whose name is first placed in these instructions to you, and who shall be at the time of your death or absence residing within the said province, shall take upon him the administration of the government and execute our said commission and instructions, and the several powers and authorities therein contained, in the manner therein directed, it is nevertheless our express will and pleasure that in such case the eldest councillor or president shall forbear to pass any act or acts but such as shall be immediately necessary for the peace and welfare of our said province without our particular order for that purpose, and that he shall not take upon him to dissolve the Assembly then in being, nor to remove or suspend any of the members of our said council, or any judges, justices of the peace, or other officers, civil or military, without the advice and consent of at least seven of the

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council, and the said president is to transmit to us by one of our principal secretaries of state by the first opportunity the reasons for such alterations, signed by himself and the council.

91. **[Governor's compensation regulated.]**— And whereas, we are willing in the best manner to provide for the support of the government of the said province by setting apart a sufficient allowance to such as shall be our Governor, Lieutenant Governor, Commander in Chief or president of our council residing for the time being within the same, our will and pleasure therefore is, that when it shall happen, that you shall be absent from New York, one full moiety of the salary, and of all perquisites and emoluments whatsoever which would otherwise become due unto you, shall, during the time of your absence, be paid and satisfied unto such Governor, Lt. Governor, Commander in Chief or President of the Council, who shall be resident upon the place for the time being, which we do hereby order and allot unto him towards his maintenance, and for the better support of the dignity of that our Governor; Provided nevertheless, and it is our intent and meaning that whenever you shall think it necessary for our service to go into the Colony of Connecticut to view and regulate the militia whereof we have appointed you Our Captain General and Governor in Chief, or whenever we shall think fit to require you by our especial order to repair to any other of our governments on the Continent of America for our particular service, that then and in such case you shall receive your full salary, perquisites and emoluments as if you were then actually residing within the province of New York, anything in these instructions to the contrary notwithstanding.

[Const. 1894, art. 4, § 4.]

92. **[Governor to make full reports of colonial affairs.]**—And you are upon all occasions to send unto

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us by one of our principal secretaries of state a particular account of all your proceedings, and of the condition of affairs within your government.

[NOTE.—Paragraph number 92 closes the regular instructions. These are followed by a schedule of rules relating chiefly to trade and navigation. With two exceptions, they possess no special constitutional or political interest, and I have, therefore, given only a synopsis of them. Two paragraphs—one relating to appointments of court officers, and the other to sales of land to aliens—are given in full.]

SYNOPSIS OF TRADE AND NAVIGATION SCHEDULE.

1. Governor's obligation to enforce laws relating to trade and navigation.

2. Security by naval officers.

3. Naval officers and collectors of customs to reside at the same ports or towns.

4. Importations and exportations to be made in English ships only.

5. Security against violation of navigation laws.

6. Authentication of navigation certificates.

7. Regulations concerning plantation bonds.

8. Payment of duties; right of trade limited to British plantations or Great Britain.

9. Governor to make navigation reports quarterly.

10. Importation of European products limited.

11. Regulations concerning foreign imports.

12. Local navigation laws to be consistent with English statutes and these instructions.

13. Governor to assist English customs officers.

14. Collection of percentage of seamen's wages for royal hospital.

15. Governor to enforce laws against clandestine importations.

16. Jurors in customs actions to be natives of Great Britain, Ireland, or of English plantations.

17. Law and fiscal officers to be natives of Great Britain, Ireland, or English plantations.

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18. **[Courts, officers of, appointments to fill vacancies.]**—And that there may be no interruption or delay in matters of prosecution and execution of justice in our courts of judicature within our said province under your government by the death or removal of any of our officers therein, until we can be advised thereof and appoint others to succeed in their places, you shall make choice of persons of known loyalty, experience, diligence and fidelity to be employed for the purposes aforesaid, until you shall have our approbation of them, or the nomination of others from hence.

19. Governor to furnish information to commissioners of customs.

20. **[Real property, sales to aliens limited.]**—If you shall discover that any persons or their assigns claiming any right or propriety in any island or tract of land in America by charter or by letters patent, shall at any time hereafter alien, sell or dispose of such island, tract of land, or propriety other than to our natural born subjects of Great Britain without the license or consent of us, our heirs or successors signified by our or their order in council first had and obtained, you shall give notice thereof to us and to our commissioners of our treasury, or our high treasurer of Great Britain for the time being.

[Real property law (1896, chap. 547), §§ 4-8.]

21. Proof of owner and registry of ships engaged in plantation trade.

22. Premium on plantation indigo; importation of foreign indigo.

23. Exportation of wool prohibited.

24. Regulating exportation of tobacco.

25. Governor to enforce laws against importations from East Indies and Madagascar.

26. Governor diligently to enforce navigation laws; consequences of his neglect.

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