THE

CONSTITUTIONAL HISTORY

OF

NEW YORK

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

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IN FIVE VOLUMES

VOL. I.

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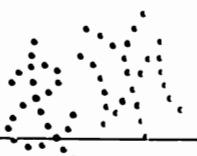

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GENERAL PREFACE.

Soon after the termination of my official service as legal adviser to the governor, and as chairman of the Statutory Revision and Code Commissions, which event occurred on the 31st day of December, 1900, at the close of Governor Roosevelt's administration, I began to gather materials for a history of the Constitution of New York. During my six years in office, constitutional questions were frequently presented which required an immediate answer, but which could not be answered without a careful study of the Constitution, its judicial interpretation, and the genesis and historical development of the particular provision under consideration. It often became necessary to search the records of constitutional conventions, commissions, legislative proceedings, and other sources of information which might offer any explanation of the reason underlying the provision in question, and of its intended scope and application. It was not always practicable to make a thorough examination without more time than was possible during a session of the legislature; therefore my conclusions were sometimes not satisfactory to myself, and in some cases they probably would have been modified if I had been able to find the root of the matter.

I am not aware that any attempt has hitherto been made to write a history of our Constitution. I think every student of this instrument must keenly appreciate the lack of such a history. There is not only no history of the Constitution, showing its origin, evolution, development, and interpretation, but I was surprised to find that few of the great subjects included in the Constitu-

tion had received any special historical consideration. So, on retiring to private life after six years spent in a responsible, but peculiarly congenial, official position, I thought I might render a service to my successors by writing a history of our fundamental law. While engaged in this work I have often wished that the results of my study had been available to me at a time when so many questions were not, as they are now, largely academic, but required immediate and practical solution.

My studies have necessarily covered a wide field, and I have tried to set in order the various elements of our constitutional history in their appropriate relations to one another, so that the reader may readily appreciate the continuity and the unity of our constitutional system. This has required a study not only of the text of the Constitutions and other documents and records, but also of social, political, and commercial conditions out of which have developed the principles which are now embodied in the Constitution. I have therefore studied men as well as measures, and have tried to discover the motives which prompted particular constitutional provisions. I have endeavored to put myself in the place of these men, and appreciate their point of view. One result of this method of studying the subject has been to give the book in many of its parts a personal quality. As I have studied the debates of constitutional conventions, executive messages, documents, reports of committees, petitions to the legislature, judicial opinions, biographies and histories, I have come to feel a personal acquaintance with many men who have made New York great,—have learned somewhat of their mental processes, the scope of their moral perceptions, and their ideals and purposes,—and have become accustomed to expect from them an expression of opinion consistent with their habits of thought and their attitude in relation to important principles of government. Thus in considering great problems of consti-

tutional reform, I naturally turned to certain leaders, to ascertain their opinions or impressions of the proposed policy.

A study of the Constitution may, from some points of view, be deemed dry and uninteresting; but when it is remembered that the constitution of a free people represents in outline the beliefs, the sentiments, the enthusiasms, and the policies which the people themselves approve and illustrate in the various relations of daily life, the Constitution becomes a thing of life, activity, and power. It has a spirit which expresses itself in various forms and by numerous avenues, and, reading between the lines, and beyond the cold letter of the instrument, we discover the struggles, the hopes, the aspirations, the defeats,—often only temporary,—and the final successes of a sovereign people, fully sensible of their opportunities and responsibilities as exponents of the results of a broad and free civilization.

After the larger part of the book had been written, I found, in the Albany Argus, a sentiment which closely accords with my own view of the proper scope of a general work on history. This writer says that "history is most useful and most intelligible when it shows accurately the course of events, the motives underlying them, and the people who shaped them." I have tried to apply this rule in the present work,—to state every fact with all possible accuracy, to discover the motive and purpose of each proposed constitutional reform, and to present a view of the men who shaped the Constitution, so far as this was practicable from reported speeches and other documents purporting to contain a statement of their opinions and intentions.

Plan of the Work.

I have already referred to the continuity of our constitutional history, and I believe that no student of the

following pages can fail to be impressed by its unity. Several features of our constitutional system are very old, and have been prominent in our history from the beginning. We find them in all our Constitutions, even reaching far back into the colonial period; and the elements of our political organization appear to-day in substantially the same form as when Dutch and English colonists began laying in New York the foundations of a new civil society. At the outset of my studies it became necessary to determine whether our history should be treated topically, developing each subject independently from the beginning, or whether a chronological order should be observed, including a separate consideration of each constitutional period. Each constitutional convention marks either the beginning or close of a distinct period, culminating in a new Constitution, intended to embody the latest views of constitutional government, including principles which had been modified by constitutional revision during the preceding period.

Each plan has its advantages. By the topical arrangement it is possible to present a connected view of a subject, from its inception to the result as expressed in the latest constitutional provision; and all aspects of its development may be presented in their natural and chronological order. But, as already suggested, each convention or popular movement for constitutional reform is distinctive. Each convention or commission is composed, for the most part, of a new body of men, often with opinions concerning public affairs quite different from those entertained by their predecessors. These opinions are often based on new experience, and we therefore naturally expect to find in each convention propositions for reform which are here presented for the first time.

Thus it will be observed that the Convention of 1801 was called primarily to construe and determine the powers of the Council of Appointment. It therefore

represented a peculiar political movement, and is unique in our constitutional history. So, the Convention of 1821 was the result of a movement for general constitutional revision. It was called at a time when many states were reconstructing their constitutional systems, and making new Constitutions to take the place of those under which state governments had been organized at the beginning of the Revolution. This convention marked a distinct stage of constitutional development, and its history cannot be repeated. The same remark might be made of the Convention of 1846, which illustrated the reaction against centralized power; and its work was especially significant in the restraints imposed on legislative authority. The Convention of 1867 came soon after the close of the great Civil War, which had compelled men to take new views of Federal authority, and the extent and limitations of the powers possessed by the states. This convention's reconstruction of the judicial system marked a distinct advance in the development of that department of government, and was the crowning feature of its work. The Convention of 1894 was held at a time when it was believed that legislative reorganization, canals, and the judiciary demanded serious attention and possible modifications to meet conditions which could not have been anticipated by earlier constitution-makers. So, the Commissions of 1872 and 1890 represented distinct movements,—the first having been called to consider a general revision deemed necessary because of the failure of a part of the work of the Convention of 1867, and the second, the Commission of 1890, having been charged with the express duty of proposing a plan for the reorganization of the judiciary. Each intervening period between general conventions has been marked by agitation in favor of particular reforms, some of which were adopted in fragments, while others were postponed for consideration by regular conventions.

These periodical movements for constitutional reform seemed to demand separate treatment, and I have therefore adopted the general plan of considering each period or movement by itself. This makes it possible to describe, wherever practicable, the preliminary agitation leading up to a convention or other organized movement for revision, and also makes it possible to present the names, and more distinctively the work, of the men who have been chiefly influential in producing the results accomplished during the several periods.

But a topical treatment has also been applied in many instances. It has been my purpose to give a brief historical sketch of each subject immediately preceding its inclusion in the Constitution; but, for practical reasons, this rule could not always be followed. Sometimes these historical notes seemed most appropriate in discussing the work of a particular convention; but, in several instances, it seemed most desirable to present them in connection with the annotated Constitution, in the fourth volume. Both plans have therefore, to some extent, been combined; and while distinct periods have, in general, been considered in separate chapters, many subjects have been treated topically. Thus, the reader will find special articles on Agricultural Leases, Apportionment, Banking and Currency, Bill of Rights, Bi-partisan Election Boards, Canals, Civil Service, Cornell University, Corporations, Education, Enacting Clause, Executive Department, Forest Preserve, Free Canals, Home Rule, Indian Lands, Judiciary, Legislature, Limiting State Debts, Lotteries, Militia, Prison Labor, State Aid to Private Enterprise, Suffrage (including woman suffrage), Thirty-day Period, and several other subjects less fully. These sketches and historical notes will be found, for the most part, in the first three volumes; but, as already suggested, notes on important historical subjects are presented in the fourth volume.

Our constitutional history includes not only what legislatures, conventions, and commissions have presented for popular consideration, but also judicial interpretation,—the two together constituting the whole body of our history, both formative and judicial. Judicial decisions constitute the history of construction, while the other matter is the history of constitutional formation. Historical matter has been freely presented in the judicial notes, and I have endeavored to use enough of each decision to show the question involved, and the views of the court concerning it. The fourth volume is intended specifically for use in ascertaining the judicial construction which has been applied to the Constitution; but, in many instances, the reader will doubtless find it necessary to consult earlier parts of the work for the history of existing constitutional provisions.

I think special attention should be directed to the tables of statutes which have received judicial interpretation on constitutional grounds. From the beginning of my studies I made notes showing the construction given to particular statutes, and have collected and arranged these statutes in tables, which may be found in the fifth volume. I have made no separate search for such statutes, but have endeavored to include in the list all statutes which have been directly construed by the courts. I think the tables will be found to include most of the statutes involving important constitutional questions. I believe no attempt has hitherto been made to present the statutes in this form, and it is hoped that the tables will be found useful by judges, lawyers, legislators, and others who may wish to ascertain whether the validity of a particular statute has been challenged on constitutional grounds.

It was my original plan to present in an appendix all the Constitutions and amendments heretofore adopted in the state, and also other documents of a similar charac-

ter, including Magna Charta, the New York Charter of Liberties, the Declaration of Independence, the Articles of Confederation, and the Federal Constitution and Amendments, thus enabling the reader to consult, in their regular chronological order, all these great political documents from Magna Charta, in 1215, to the amendment of 1901. On further consideration it seemed more appropriate to place these documents at the beginning of the book. I then wrote the introductory note on the Constitutions of New York, presenting there, in as compact a form as seemed practicable, a preliminary sketch of the development of our constitutional system, from the beginning of the colonial period to the latest amendment. Several subjects appearing here only in outline had already been considered in detail in various chapters, while other subjects have been developed here more fully than elsewhere,—particularly the description of the Constitution of the colony, as expressed in royal commissions and instructions, and the situation which existed during the interregnum caused by the Revolutionary War. Our history is a unit, and I have tried to make the book a unit; therefore the reader need not be surprised to find the earliest as well as the latest history in any part of the work. This arrangement follows the plan already outlined, by which subjects are considered according to their natural development.

Sources of Information.

In many respects, and from many points of view, the sources of information are ample. The records of conventions, legislatures, and commissions are accessible, and, for the most part, these records have been printed, and may be easily examined. Modern legislative and convention records are so well arranged and so fully indexed that it is not difficult to study specific subjects, and

glean from them such information as may be desirable in preparing a history of the Constitution. Some of the earlier records, however, were not so carefully preserved, and it has therefore been necessary to examine many other sources of information to discover not only what was actually done, but especially the motives which prompted action in a particular instance.

The Colonial Documents, edited by Dr. Edmund B. O'Callaghan, and published by the state under an act passed in 1849, have been freely used in studying the history of the colonial period. I have also used Dr. O'Callaghan's History of New Netherland, published in 1846, Mr. Brodhead's History of New York, the records of the legislature, and of the executive and legislative council during the colonial period, and all other sources of information that seemed available, for the purpose of discovering the facts relating to our earlier history.

The colonial constitutional policy at the beginning of the Revolution, so far as specifically expressed in documents issued by the English government, is found in Governor Tryon's commission and the accompanying instructions received by him on his appointment in 1771; but, so far as I have been able to discover, these documents have not heretofore been published. They will be found at the end of the third volume of this work, except that several paragraphs of the instructions containing detailed commercial regulations have been omitted, for the reason that they have no special constitutional or political significance. I found a manuscript copy of the commission in the State Library, but was unable to find a copy of the instructions in this country. I therefore wrote to Hon. Joseph H. Choate, then American Ambassador to Great Britain, requesting his assistance in procuring a copy of the instructions, which are preserved in the archives of the English government. As a result I obtained a manuscript

copy of the instructions, from which I have made such extracts as seemed pertinent in considering various subjects. After using these instructions the document was deposited in the State Library.

The draft of the proposed Constitution submitted to the Convention of 1777 has not hitherto been published, so far as I have been able to discover. The original draft and also the second draft will be found in the second chapter, relating to the work of the first constitutional convention. The records of the colonial executive council have not yet been published, but in several instances have been consulted during the preparation of this work. I was also permitted to examine the papers of the late John Jay, which are now in the custody of his great-grandson, Mr. William Jay, of New York.

Executive messages covering the entire history of the state, legislative and convention journals, public documents, newspapers and other periodicals, histories and biographies, correspondence, debates and various discussions in and out of public bodies, have been studied and used for the purpose of ascertaining facts and determining the history and reason of various constitutional provisions, enactments, and other declarations having a direct or indirect relation to our constitutional history. It has been impracticable to give references to all the authorities consulted, but I believe I am justified in saying that every fact stated in the book is sustained by sufficient evidence, and in most instances the reader will have little difficulty in tracing subjects to their source.

Acknowledgments.

My studies have taken a wide range, and have required the examination of a large mass of materials. The preparation of the work involved a process of selection, and in

many instances it has not been easy to choose between materials finally used and others equally important which have been laid aside. For the most part, the sources of information, in addition to my private library, have been found in the State Library, in the records of the office of the Secretary of State, the Comptroller's office, the University, and the Department of Public Instruction. I also visited the principal public libraries in New York, where I was afforded every possible facility for making the desired researches.

While studying the first Constitution and the work of the convention that framed it, I learned that John Jay's papers were still in existence, and were in the possession of his great-grandson, Mr. William Jay, of New York. Mr. Jay very kindly permitted me to examine these papers for the purpose of discovering any manuscripts relating to the first Constitution, or the organization of the state government. In making this examination I was assisted by Prof. Henry P. Johnston, of the College of the City of New York, who had recently edited John Jay's letters and public papers, in four volumes, and who was therefore familiar with the manuscripts. I take this opportunity of expressing my obligation to Mr. Jay and Prof. Johnston for the rare pleasure of examining the papers of the great patriot who performed such distinguished service in laying the foundations of our government.

The State Library is, however, the great storehouse of materials relating to any part of our state history. Its resources are almost inexhaustible, and I think it should be said here that the people of the state cannot too highly appreciate the services of those who have collected and arranged the rich treasures of this great institution. It is hoped that the condition of public affairs will soon warrant the legislature in providing for the erection of a

new building, in which the resources of the library may be made more available for public use. The library is especially rich in its collection of books, documents, and unpublished manuscripts relating to early colonial and state history, as well as in all branches of literature, both general and historical. Very rarely have I failed to find in the library the information I desired. At the beginning of my studies the resources of the library were placed at my disposal, and I was offered all possible assistance in collecting the materials needed for this work. Mr. J. Russell Parsons, then secretary of the University, and now consul-general at Mexico, gave the most ample directions concerning the use of the library for my purpose, supplementing these directions by his personal attention in many instances. Mr. Melvil Dewey, director of the State Library, who is in immediate charge of the institution, has, from the first, manifested great interest in my work, and has granted every possible favor in the examination of sources of information. The library contains many rare books and manuscripts, some of which cannot be duplicated, and which obviously cannot be loaned. My examination of them was made as easy as possible. I wish most cordially to express my appreciation of the courtesies accorded to me by Mr. Parsons and Mr. Dewey.

A study of a subject which has occupied nearly four years and a half necessarily required frequent visits to the State Library, and the assistance of the library staff in finding and examining books and manuscripts. I very gratefully acknowledge my obligation to the members of the staff for their efficiency, patience, and skill in responding to my numerous requests for information concerning specific topics connected with my work, and I take special pleasure in mentioning Mr. Dunkin V. R. Johnston, reference librarian, and his assistant, Mr. George G.

Champlin, Jr., and also Mr. Judson T. Jennings, former assistant reference librarian, now superintendent of the Carnegie Free Library at Duquesne, Pa.

My researches in the Department of Genealogy and History required special service, which was very satisfactorily rendered by Miss Mary A. Smith, now of La Crosse, Wis., Miss May C. Nerney, and Miss Charlotte J. Van Peyma, assistants in this department.

One of the most interesting places in the State Library is the manuscript room, in which are preserved numerous documents and manuscripts relating to some aspect of our history, many of which have not yet been published. A large part of the unpublished records of the legislature is also deposited here. I had frequent occasion to examine the treasures of this room while searching for information which had not yet appeared in print. My efforts would often have been fruitless without the aid of Mr. Arnold J. F. Van Laer, archivist, and of his assistant, Mr. Peter Nelson, who freely used their expert knowledge in deciphering obscure manuscripts, and enabling me to reach correct results in my examination of ancient documents.

But the Law Library was my chief place of resort while pursuing these studies. Mr. Stephen B. Griswold, who, for thirty-six years, was in charge of this institution, and who has seen the larger part of its growth and development, took a lively interest in the work, and afforded me every possible opportunity to examine books and documents in his department. Mr. Griswold resigned in October, 1904, and Mr. William B. Cook, Jr., the present acting librarian, has continued the policy of his predecessor so far as my relations to the library are concerned. Since the beginning of my studies, he and the other assistants, Mrs. Ellen F. Coe, Mr. Martin F. Lynch, and Mr. Arthur J. Smith, have very cordially rendered every

possible service in my researches among the documents relating to our constitutional history.

The Comptroller's office is a mine of information relating to our financial history, and the student must frequently examine the records of that office if he would intelligently study the subject of state finances. This is especially true as to canals, education, taxation, charities, prisons, and the forest preserve. Mr. Willis E. Merriman, second deputy comptroller, whose long experience in the office makes him an authority on all questions relating to state finance, gave his personal attention to matters on which I desired information, often making special computations to determine results not elucidated in the published reports. In addition to these general financial matters, Mr. William G. Schaible, chief clerk of the Bureau of Canal Affairs, rendered very valuable aid in enabling me to obtain information concerning special subjects under the supervision of his department.

The office of the Secretary of State is the general depository of records relating to state affairs, except those affecting particular departments. All the Constitutions, amendments, and statutes are deposited in that office, and its archives also contain many other documents of great importance in our history. I often had occasion to make inquiries there for specific information. While studying the subject of education, I naturally sought information, particularly relating to statistical matters, at the office of the Regents, and also in the Department of Public Instruction. The results of my inquiries appear for the most part in the article on education, in the third volume. The recent consolidation of the two departments is considered in a note on the University (article 9, § 2), in the fourth volume. I take pleasure in acknowledging the courtesy and prompt attention of the office staff in these departments, and also in the office of the Secretary of State, in responding to my requests.

But the aid that I have received during the progress of the work has not all been rendered by persons in public departments. I have frequently sought information from private sources, and my requests have uniformly received prompt consideration. It would be impracticable to mention here all the sources from which I have received aid during my studies, and I can only say that I am very grateful to every person who has, in any way, contributed to the accomplishment of my desire to write a history of the Constitution which should be not only accurate in its statements of fact, but which should also acquaint the reader with the men who made that history, and the motives that actuated them. Special mention should, however, be made of the service rendered by my son, Mr. LeRoy A. Lincoln, now of Buffalo, N. Y., who assisted me in making the preliminary examination of judicial decisions to be used in this work. I am also under peculiar obligations to the publishers and the readers in their office for their valuable suggestions and their untiring vigilance in reading proof and otherwise perfecting the book during its progress through the press.

Finally, I take great pleasure in expressing my most sincere appreciation of the faithful and intelligent service rendered by my stenographer, Miss Marguerite Elizabeth Griffin, of Albany, N. Y.

C. Z. L.

ALBANY, N. Y.
SEPTEMBER 1, 1905.

PREFACE.

This volume includes a general summary of our entire constitutional history, as expressed in the Introduction, and also a more particular view of constitutional development to the end of the first constitutional period, closing with the adoption of the Constitution of 1821. The subjects treated here are specifically the Colonial Period, the First Constitution, the Convention of 1801, and the Second Constitution. Amendments to the second Constitution will be found in the second volume, for the reason that they were made during the second constitutional period, which began in 1823, and closed in 1847. It has already been pointed out in the general preface that some parts of our history which chronologically might have been placed in the first volume are included in subsequent volumes because of their relation to specific topics which have there received particular consideration for the first time. It is hoped that the Index and Table of Contents will afford ready access to these subjects.

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INTRODUCTION.

The Constitutions of New York.

The sources of our constitutional history are in old-world institutions. The principal and most familiar features of our Constitutions, so far as they are fundamental in character, are, in the main, institutions of the Netherlands or of England, transplanted to the new world, and modified to adapt them to changes incident to colonial conditions. The powers, customs, and traditions of organized society, developing through centuries of fluctuating experience, have been crystallized in our written Constitutions. An examination of our history from the beginning of the colonial period clearly demonstrates the proposition that our Constitution is not a creation, but a growth. Long before it found expression in written forms embodying a statement of principles deemed essential to organized government, constitutional liberty was slowly developing out of the daily needs and experiences of society. It is a natural incident of colonization that the colonists carry with them to their new home the social customs and forms of government with which they are familiar; and if the colony goes with the sanction or under the patronage of the home government, that government imposes its own authority on the new community, and seeks to foster there the customs and principles which have

molded its own structure. These characteristics have marked colonization from the beginning of history; and the settlement of New York by the Dutch and English immigrants was no exception to the general rule. Dutchmen were Dutchmen still and Englishmen were Englishmen still after they crossed the ocean and began laying the foundations of a new society in a new world. This society was not at first new, but the settlers were a long distance from home, and communication with the old world was not easy or frequent; hence, they were compelled to rely upon their own resources for protection against the adverse forces, seen and unseen, with which they were surrounded. This situation naturally produced independence in opinion and in conduct; and while they were loyal to the home government, they protested against the constraints which that government sometimes imposed upon the colonies, and against a too parental administration. They knew they were freemen and entitled to the rights of freemen in the countries from which they came, and they insisted upon the same rights in their new home; consistently resisted all attempts to restrict those rights; and persistently protested against the exercise of arbitrary power by governors who were sent out to administer colonial affairs. They rejected any form of personal government in a community composed of freemen. Out of these general conditions, modified from time to time to meet peculiar needs, came the customs, policies, statutes, and ordinances which together made the Constitution of the colony. This Constitution was always subject to some modification at the instance of the home government; but, by the middle of the colonial period, the general principles of constitutional government now deemed so essen-

tial—namely, a legislative, an executive, and a judicial department, each substantially independent of the other—had become firmly established, and after the revival of the assembly, in 1691, no question seems to have been raised as to the perpetuity or general characteristics of these features of colonial government.

Our colonial history is naturally divided into three periods, of unequal length:

First, the original Dutch period, from the discovery of Manhattan, by Henry Hudson, in 1609, to the English conquest, in 1664,—fifty-five years.

Second, the period covered by the proprietary government of the Duke of York,—from 1664 to 1685,—when the Duke became King. This was practically twenty-one years, though there was an interruption of nearly a year during parts of the years 1673 and 1674, when the Dutch regained and held possession of the colony.

Third, the period during which New York was a royal province, beginning on the accession of the Duke of York to the throne of England, in February, 1685, and continuing until the Revolution. This period closed with 1775, and therefore covers ninety-one years.

These periods will now be considered in their order

Early Dutch Charters.

These charters sometimes conferred mere trading privileges, without any governmental features, but in some instances the recipients of the charters were vested with large and even extraordinary powers of government, and they became governmental agencies in the settlement of the colony and the adminis-

tration of its affairs. The powers of government thus expressed in charters were of the same general character as the powers expressed in modern constitutions, and related to all the departments into which a government is now usually divided. These charters, therefore, became, in a very practical sense, the Constitutions of the colony.

DUTCH WEST INDIA COMPANY, 1621.

The first and most conspicuous instance of this class during the Dutch period was the charter granted to the Dutch West India Company, which bore date the 3d of June, 1621, and was to be in effect from the first day of the following July. The charter created primarily a business corporation for the purpose, as expressed, of promoting "navigation, trade, and commerce" in Africa, the West Indies, and parts of America, including what is now New York. It established a commercial monopoly for twenty-four years. But the charter went far beyond the ordinary necessities of a business corporation. It was the repository of political power, and became, in distant lands, the direct representative of the States General of the United Netherlands. This delegation of authority was expressed in the following provision:

"That moreover, the aforesaid company may, in Our name and authority, within the limits herein before prescribed, make contracts, engagements, and alliances, with the princes and natives of the countries comprehended therein, and also build any forts and fortifications there, to appoint and discharge governors, 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 again,

others in their places to put, as they, from the situation of their affairs, shall see fit; moreover, they may advance the peopling of fruitful and unsettled parts, and do all that the service of these countries, and the profit and increase of trade, shall require; and the company shall successively communicate and transmit to Us such contracts and alliances as they shall have made with the aforesaid princes and nations; and likewise the situations of the fortresses, fortifications, and settlements by them taken."

The authority thus conferred was not, however, exclusive, but the company's acts in the exercise of it were subject to approval by the home government. The charter proceeds:

"Saving, that they having chosen a governor-in-chief, and prepared instructions for him, they shall be approved, and a commission given by Us: And that further, such governor-in-chief, as well as other deputy governors, commanders, and officers, shall be held to take an oath of allegiance to Us and also to the company."

The charter further provides:

"And if it should be necessary, for the establishment, security, and defense of this trade, to take any troops with them, We will, according to the constitution of this country, and the situation of affairs, furnish the said company with such troops, provided they be paid and supported by the company.

"Which troops, besides the oath already taken to Us and to his Excellency, shall swear to obey the commands of the said company, and to endeavor to promote their interest to the utmost of their ability."

The government agreed to protect the company, furnish it a subsidy of one million guilders, and pro-

vide naval assistance in case of need; it also guaranteed to the company the undisturbed enjoyment of the "privileges, freedoms, and exemptions" conferred by the charter.

Controversies having arisen between the English and the Dutch as to the right to make settlements in Connecticut and on Long Island, the States General, on the 23d of January, 1664,—only a few months before the English conquest of New York,—issued an order describing and confirming the charter granted to the Dutch West India Company in 1621, and declaring that, by the charter, the company "was and is still empowered to establish colonies and settlements on lands unoccupied by others," within the limits of the territory assigned to it.

FREEDOMS AND EXEMPTIONS, 1629.

The Assembly of XIX. issued, in June, 1629, a charter of "Freedoms and Exemptions," which was ratified by the States General, conferring special privileges and powers on "all patroons, masters, or private persons who will plant colonies in New Netherland." It contained numerous details relative to colonization, but which are not especially pertinent here. The patroons, within the territory assigned to them, were vested "with the chief command and lower jurisdictions," and it was further provided that, "in case any one 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;" but from "all judgments given by the courts of the patroons for

upwards of fifty guilders," an appeal was allowed "to the company's commander and council in New Netherland." Settlers were to receive "instructions in order that they may be ruled and governed conformable to the rule of government made, or to be made, by the Board of Nineteen, as well in the political as in the judicial government." The charter also contained provisions for the encouragement of religion and education.

FREEDOMS AND EXEMPTIONS, 1640.

In July, 1640, a new charter of "Freedoms and Exemptions" was granted, which contained numerous provisions not found in the original charter of 1629. By the new charter the patroons were vested with "high, low, and middle jurisdiction." Municipal authority was specified to be exercised in "towns," instead of in "cities," as provided by the original charter, with the important addition that if settlements grew to such an extent "as to be accounted towns, villages, or cities, the company shall give orders respecting the subaltern government, magistrates, and ministers of justice, who shall be nominated by the said towns and villages in a triple number of the best qualified, from which a choice and selection is to be made by the governor and council; and those shall determine all questions and suits within their district." Thus, the company reserved to itself a large measure of municipal supervision. An appeal from local courts to the governor and council was allowed from "definitive judgments" for an amount "exceeding one hundred guilders, or from such as entail infamy, also from all sentences pronounced in matters criminal,

on ordinary prosecution, conformable to the custom" of the Netherland.

There was no religious toleration in this charter; on the contrary, it provided that "no other religion shall be publicly admitted in New Netherland except the Reformed, as it is at present preached and practised by public authority in the United Netherlands; and for this purpose the company shall provide and maintain good and suitable preachers, schoolmasters, and comforters of the sick." A liberal policy on this subject had been suggested in the articles relating to colonization, proposed in 1638, from which I have quoted in the chapter on the Colonial Period, but which were not approved by the States General. One article provided for the established church, but expressly declared that it was not intended as a restraint upon the conscience of any person.

Each settlement on a river, bay, or island was permitted to designate a deputy, once in two years, who should annually report to the governor and council, and assist them in promoting the interests of such settlement. This was home rule. The company reserved to itself the right of mintage, laying out highways, "erecting forts, making war and peace, together with all wildernesses, founding of cities, towns, and churches, retaining the supreme authority, sovereignty, and supremacy, the interpretation of all obscurity which may arise out of this grant, with such understanding, however, that nothing herein contained shall alter or diminish what has been granted heretofore to the patroons in regard to high, middle, and low jurisdiction."

The comprehensive authority vested in the Dutch West India Company was clearly expressed in the following provisions relating to the powers of the gov-

ernor and council, in whom were combined the executive, legislative, and judicial departments of the colonial government:

"The Company shall, accordingly, appoint and keep there a Governor, competent Councillors, Officers and other Ministers of Justice for the protection of the good and the punishment of the wicked; which Governor and Councillors, who are now, or may be hereafter, appointed by the Company, shall take cognizance, in the first instance, of matters appertaining to the freedom, supremacy, domain, finances and rights of the General West India Company; of complaints which any one (whether stranger, neighbor, or inhabitant of the aforesaid country) may make in case of privilege, innovation, desuetude, customs, usages, laws or pedigrees; declare the same corrupt or abolish them as bad, if circumstances so demand; of the cases of minor children, widows, orphans, and other unfortunate persons, regarding whom complaint shall first be made to the Council holding prerogative jurisdiction in order to obtain justice there; of all contracts or obligations; of matters pertaining to possession of benefices, fiefs, cases of *læsæ majestatis,* of religion and all criminal matters and excesses prescribed and unchallenged, and all persons, by prevention, may receive acquittance from matters there complained of; and generally take cognizance of, and administer law and justice in, all cases appertaining to the supremacy of the Company."

The patroon system established by the foregoing charters of "Freedoms and Exemptions" had a marked but not always beneficial influence in the development of New York. Some aspects of this peculiar land system are considered in the preliminary article on Agricultural

Leases, in the chapter on the Third Constitution, in the second volume of this work.

FREEDOMS AND EXEMPTIONS, 1650.

In May, 1650, a revised charter of "Freedoms and Exemptions" was approved by the States General. In most respects it is identical with the charter of 1640, and the additions do not introduce any changes of principle.

DUTCH DIRECTORS AND COUNCILS.

The chief executive officer of the colony during the Dutch period was officially known as the director, but was sometimes designated as the director general, the commander, or the governor. He was vested with extraordinary powers, and might, and often did, exercise arbitrary authority, independent of the council, with which he was supposed to act. It is a curious and noteworthy fact that this colonial officer should have been clothed with such irresponsible authority by a government which would not have tolerated it for a moment in its own country.

I have not had access to the commissions issued to the earlier Dutch governors. The only commission I have been able to find is the one issued to Peter Stuyvesant on the 28th of July, 1646. It was issued by the States General at the request of the Dutch West India Company. Only about twenty years had elapsed since the beginning of organized government in the colony, under Peter Minuit, who came to New Netherland as director in the spring of 1626, though he was not the first who bore this title. We may probably, therefore, reasonably as-

sume that Stuyvesant's commission was substantially in the form used in previous cases. Stuyvesant was the last of the Dutch governors, and held office through a period of eighteen years, until the English conquest, in 1664. His administration, therefore, covers nearly half of the period of actual Dutch administration in the colony. The commission appointed Stuyvesant director in New Netherland and other countries which need not here be named. His general powers and duties were expressed in the provision that he was "to administer, with the council as well now as hereafter appointed with him, the said office of director, both on water and on land, and in said quality, to attend carefully to the advancement, promotion, and preservation of friendship, alliances, trade, and commerce; to direct all matters appertaining to traffic and war, and to maintain, in all things there, good order for the service of the United Netherlands and the General West India Company; to establish regularity for the safeguard of the places and forts therein; to administer law and justice, as well civil as criminal; and, moreover, to perform all that concerns his office and duties in accordance with the charter, and the general and particular instructions herewith given, and to be hereafter given him."

Dr. O'Callaghan, in his History of New Netherland, 1846, vol. 1, p. 244, thus summarizes the director's powers:

"Though a servant himself of the West India Company, nominated by the Assembly of the XIX., and commissioned by the States General, the Director was in fact absolute in New Netherland, and beyond all control within the colony. As representative of the sovereign authority, he extinguished Indian titles to land, and sanctioned all purchases from the aborigines. No contracts, engagements, transfers, bargains, nor sales were

valid, except such as were passed before and written by his secretary. He erected courts; appointed, either directly or indirectly, all public officers, except such as came out with commissions from Holland; made laws; issued ordinances; incorporated towns; imposed taxes; levied fines; inflicted penalties; and could affect the value of any man's property at a moment, by raising or lowering the value of wampum, which constituted the chief currency at this period of the country. He not only acted in an executive and legislative, but also in a judicial, capacity. He decided all civil and criminal questions without the intervention of a jury, such an institution being unknown in the province; and before him were brought all appeals from inferior courts. When we add to this the fact that all such municipal regulations as circumstances demanded emanated from him and his council, we cannot be surprised to learn that many things were left undone which ought to be attended to; that many things were performed which might better have been left undone; and that dissatisfaction necessarily prevailed among the sturdy sons of that republic, who ever evinced a lively and honorable jealousy of despotic power."

The council was, at least in theory, a constituent part of the government. The governor was required to act with the council, but he seems to have ignored its advice or authority in many cases and acted on his own judgment, sometimes in an arbitrary manner. This subject is considered in several aspects in the chapter on the Colonial Period. The actual relation of the council to the government, as viewed by many citizens during Stuyvesant's administration, is clearly pointed out in notes to a remonstrance dated December 11, 1653, presented to the Director by a convention of delegates from different parts of the colony, which met in New Amsterdam

on the 10th to consider various aspects of colonial affairs. Explaining the charge in the remonstrance that there was danger of the establishment of an arbitrary government, the notes state that "the entire government of this country is directed and controlled exclusively according to the pleasure and caprice of Director Stuyvesant or one or two of his favorite sycophants; in divers cases decisions were given without the knowledge, yea, frequently without summoning, his adjoined councilors, who have no further power to decide except as the Director permits them, his will being a law absolute, whereby everything is controlled." Director Stuyvesant replied to the remonstrance on the 12th, treating the charge of establishing an arbitrary government as applicable to the council as well as to himself, and asserting his and their authority under the commission and orders of their superiors. The notes or specifications, amplifying the remonstrance, bear date the 30th of December, eighteen days after the Director's reply to a remonstrance which did not specifically charge him with ignoring the council. This charge seems to be sustained by the facts of history, but in this arbitrary exercise of power Stuyvesant was not the first offender. He followed in the footsteps of his predecessors in office, all of whom apparently regarded the council as an encumbrance, and ignored it as much as possible.

In the powers delegated to the governor and council, which powers were, at least in form, executive, legislative, and judicial, we find the original of the general division of power among the three departments of the state government under the Constitution. The powers thus delegated to a few men seem and were extremely arbitrary. The States General had undertaken the task of settling Holland's part of the new world by means of a great corporation, which was made a governmental

agency. It did not seem practicable to transplant to America all the political rights and institutions which were enjoyed at home, and the situation was doubtless influenced by the fact that the primary object of the company was commercial rather than political; but the two objects were necessarily combined, because commercial growth would not be practicable without inhabitants in sympathy with the general purposes of the corporation, and loyal to home institutions; therefore the company was given authority to establish government in all its aspects, and to administer public affairs substantially in the same manner and to the same extent as the States General might have done if personally present. However objectionable this method of governing a new colony may now seem to us, I think it is not too much to say that, at least in theory, it was practicable and suited to existing conditions. There was government enough, and if it had been fairly administered, in the spirit with which it was evidently established, the colony might have been spared many painful experiences, and its growth and development would not have been retarded, as now seems clear, by the unfortunate policies adopted and enforced by the officers sent out to administer its affairs. The council was evidently intended to be a co-ordinate branch of government; and while it did not reach the fulfilment of its mission during the earlier years of its existence, it is worth while to remember that this part of the Dutch colonial administration was continued without material change under English rule, and soon came to occupy a double relation to the government; namely, as the executive council, associated with the governor in ordinary affairs, and also as a part of the colonial legislature, developing into the senate under the state Constitution.

The Duke of York

The evolution of colonial affairs now brings us to the proprietary government of the Duke of York, and a change of sovereignty of the Netherlands to England. We have little to do here with the controversies between the two nations which led to this result, and our interest in it lies in the fact that it changed the course of constitutional development in the colony. The conquest of New Netherlands by the English, in 1664, was only the culmination of a dispute which had continued many years, and the final consummation of ancient English claims to the territory. England's claims reach back as far as 1498, when Jean and Sebastian Cabot sailed along the Atlantic coast and claimed for England all the land they saw. But this claim lay dormant many years, awaiting the time for colonization, and more than a century passed before the world saw English settlements firmly established in America.

Omitting many details, suffice it to say that on the 10th of April, 1606, King James I. of England granted a charter to Sir Thomas Gates and others, authorizing them to "deduce a colony . . . into that part of America commonly called Virginia, and other parts and territories in America, either appertaining unto us, *or which are not now actually possessed by any Christian Prince or People,*" all along the sea coasts, between the 34th and 45th degrees of north latitude, including the mainland and islands within one hundred miles. This embraced practically all the coast between Cape Fear and Nova Scotia. The patentees were divided into two companies; one, known as the London Company, was authorized to make settlements between the 34th and 41st degrees of latitude; and the second, known as the Plymouth Company, was authorized to make settlements

between the 38th and 45th degrees. It will be observed that the two grants overlapped each other three degrees, between the 38th and 41st degrees, but the charter contained provisions intended to prevent any collision between the two companies. The general charter embraced territory now within the state of New York.

Captain Henry Hudson's discovery of New York Bay in September, 1609, his exploration of the river which now bears his name, and his examination of adjacent lands, was the foundation for the Dutch claim to what was afterwards known as New Netherland. This country was within the territorial limits embraced in the Virginia charter granted by King James, but it was not occupied by Europeans, and was therefore said to be within the exception specified in the Virginia charter, namely, that it was not then actually "possessed by any Christian Prince or People." The English consistently resisted this interpretation, and apparently on every occasion asserted English dominion over this part of the Atlantic coast, under the charter of 1606. Thus we are told that Captain Argal of Virginia visited Manhattan Island in November, 1613, found there a Dutch settlement of four houses, and compelled Hendrick Corstiaensen, the leader of the settlement, to acknowledge the sovereignty of the King of England and of the governor of Virginia, and also exacted from him an agreement to pay tribute.

Again, in 1621, after the incorporation of the Dutch West India Company and other active preparation in Holland for the colonization of the territory about New York Bay, several members of the Plymouth Company presented a remonstrance to the English government against this projected Dutch movement, whereupon the King directed the English ambassador to the Netherlands to protest against it, alleging that English sover-

eigns had, "for many years since, taken possession of the whole precinct, and inhabited some parts of the north of Virginia, by us called New England, of all which countries his Majesty hath, in like manner, some years since, by Patent, granted the quiet and full possession unto particular persons." This protest seems to have produced no effect, for, as already shown herein, Dutch colonization was continued and encouraged, and a permanent government established in New Netherland. The controversy was renewed in 1632, in consequence of the detention in England of a Dutch ship trading with New Netherland. At this time it was claimed by the Dutch West India Company that by reason of lapses or otherwise the English had lost the right, if they ever possessed it, to the territory between the 39th and 41st degrees of latitude. The English denied this, claiming the territory "by first discovery, occupation, and the possession which they have taken thereof, and by the concessions and letters patent they have had from our Sovereigns, who were, for the above reasons, the true and legitimate proprietors thereof in those parts."

The English continued to assert their claims, and in vindication thereof encouraged English settlements in what is now Connecticut, and on the eastern end of Long Island. The Dutch regarded these settlements as encroachments on their territory, and protested against them. There were frequent negotiations by colonial authorities relating to boundaries, but there is no evidence that the English government ever relinquished or seriously modified its claim to the territory of New Netherland. On the contrary, this claim was asserted in the most positive manner by the charter granted on the 12th of March, 1664, by King Charles II. to his brother James, Duke of York. This charter included the territory then occupied and claimed by the Dutch

within the limits of the present state of New York. It was a conveyance to the Duke, his heirs and assigns, of the territory described therein, to be held to his and their "only proper use and behoofe," in "free and common soccage," with an annual tribute of forty beaver skins.

POWERS CONFERRED BY THE CHARTER.

The Duke is described in one of the documents of the period as the first proprietor of New York. The charter vested in him what is known as a proprietary government. It granted to him, "his heirs, Deputyes, Agents, Commissioners and assigns . . . full and absolute power and Authority to Correct, punish, pardon, Governe and Rule all such the Subjects of Us Our Heires and Successors, as shall from time to time adventure themselves into any the parts or places aforesaid, or that shall or doe at any time hereafter, Inhabite within the same, according to such Lawes, Orders, Ordinances, Directions, and Instruments, as by Our said Dearest Brother, or his Assignes, shall be established, And in defect thereof in Cases of necessity, according to the good discretions of his Deputyes, Commissioners, Officers or Assignes respectively, as well in all Causes and matters Capitall and Criminall, as Civill, both Marine and others, Soe alwayes, as the said Statutes, Ordinances & proceedings be not contrary to, but as neare as conveniently may be Agreeable to the Lawes Statutes & Government of this Our Realme of England."

Appeal.—"And Saving and reserving to us, Our heirs and Successors the receiving hearing and determining of the Appeale and Appeales of all or any person or persons, of, in, or belonging to the Territoryes or Islands

aforesaid, in or touching any Judgment or Sentence to be there made or given."

Officers.—"And further, that it shall and may be Lawfull, to & for our said Dearest Brother, his heires and Assignes by these presents, from time to time, to nominate, make, constitute, ordaine and confirme by such name or names, Stile, or Stiles as to him, or them shall seeme good, and likewise to revoke discharge, Change and Alter, as well all and Singular Governors Officers & Ministers which hereafter shall be by him or them, thought fitt and needfull to be made or used within the aforesaid parts & Islands."

Ordinances.—"And also to make Ordain, and Establish all manner of Orders, Lawes, directions Instructions, formes and Ceremonyes of Government and Magistracy fitt and Necessary for and concerning the Government of the Territoryes and Islands aforesaid so always as the same be not contrary to the Lawes and Statutes of this Our Realme of England, but as neare as may bee Agreeable thereunto And the same at all times hereafter to put in Execution, or abrogate, revoke or Change not only within the precincts of the said Territoryes, or Islands, but also upon the Seas in going and coming to and from the same, as hee or they in their good discretions, shall thinke to be fittest for the good of the Adventurers, and Inhabitants there."

Martial law.—"That such Governors Officers and Ministers, as from time to time shall be Authorized, and appointed in manner and forme aforesaid, shall and may have full power and Authority, to use and Exercise Marshall law, in Cases of Rebellion, Insurreccon and Mutinie, in as large and Ample manner as our Lieutenants in our Countyes within Our Realme of England, have, or ought to have by force of their Com-

mission of Lieutenancy, or any Law or Statute of this our Realme."

Regulation of trade.—"That it shall and may be Lawfull, to and for the said James Duke of Yorke his heires and Assignes, in his or their discretions from time to time, to admitt such, and so many person and persons to Trade and Traffique unto and within the Territoryes and Islands, aforesaid, and into every or any part & parcell thereof, and to have possesse and Enjoy, any Lands, or hereditaments in the parts and places aforesaid, as they shall think fitt according to the Lawes, orders, Constitutions, and Ordinances, by Our said Brother, his heires Deputyes Commissioners and Assignes, from time to time to be made and established, by vertue of, and according to the true intent and meaning of these presents and under such conditions, Reservations and Agreements as Our said Brother, his heires or Assignes shall set downe, Order, direct, and appoint and not otherwise, as aforesaid."

The charter also provided for the encouragement of colonization, and conferred all needed powers of military defense. The Duke having received a conveyance of the territory, the next step was to get possession of it. This he proceeded at once to do, and sent an armed fleet to New Netherland for that purpose. Governor Stuyvesant surrendered to the English on the 27th of August, 1664. The Articles of Capitulation contained liberal provisions relative to the rights and privileges of the Dutch settlers. Several of these provisions are quoted at length in the chapter on the Colonial Period. The new government was at once instituted under the authority of the Duke of York, which continued with only a temporary interruption until the Duke became King James II. by the death of King Charles II., in February, 1685.

It may be observed here that there was some similarity between the powers conferred on the Duke of York by this charter, and the powers conferred on the Dutch West India Company by its charter of 1621. The Duke has been called the first proprietor of New York, and his government is known as a proprietary government. This is doubtless true because, in general terms, the charter was equivalent to a conveyance of land conferring on him the right of possession, control, and government, subject only to the limitation that the government must be consistent with the laws of England. But the charter did not carry with it a transfer of sovereignty; that was reserved to the Crown by the provision for tribute, by the right of appeal, and by other incidental provisions. I think the powers conferred on the Dutch West India Company by its charter were essentially proprietary. It received a grant of territory with the right to exercise extraordinary, if not always exclusive, jurisdiction over it, and it was expressly charged with the duty of establishing settlements and colonizing the territory. As interpreted by the order of the States General bearing date January 23, 1664, from which I have already quoted, the company was "empowered to establish colonies and settlements on lands unoccupied by others," and establish and maintain government therein. The States General retained sovereignty by several provisions similar to those included in the Duke's charter, among them one requiring the company's officers to take an oath of allegiance, not only to the company, but to the home government; another, requiring commissions to the chief officers to be issued by the States General, and another, giving the right of appeal from colonial tribunals to the home government. The "Freedoms and Exemptions" of 1629 and of 1650 indicate the same

general policy of conferring on the company the proprietary control of the colony, subject to the limitations already suggested. From a merely administrative point of view, it may fairly be said that, by the charter to the Duke and the possession of the colony which he soon afterward acquired by conquest, the colony ceased to be the property of a Dutch corporation, and became the property of an English duke.

FORM OF GOVERNMENT.

The Duke of York might have come to his new possessions and might there have established a government under his personal direction, with himself as chief executive; but he elected to administer his government through governors, councils, and other officers appointed by himself. These appointments were held during his pleasure, and he seems to have maintained a careful personal supervision of colonial affairs. This is manifest from the official correspondence of the period, and is particularly illustrated by the code known as the Duke's Laws, which the Duke caused to be promulgated in the colony on the 1st of March, 1665. He found an organized government, and by the Articles of Capitulation local officers were continued until the customary time for new elections.

Colonel Richard Nicolls, who was placed in charge of the expedition to reduce New Netherland, under the Duke's charter, brought with him a commission as deputy governor, and assumed the duties of that office after the capitulation. The commission, dated April 2, 1664, recited the substance of the Duke's charter, and appointed Nicolls "to perform and execute all and every the powers which are, by the said letters patent, granted"

unto the Duke, to be executed by his "Deputy, Agent, or Assignes." The inhabitants of the new territory were required to give obedience to the deputy governor "in all things, according to the tenor of His Majesty's said Letters Patents," and Nicolls was commanded to obey such instructions as he might, from time to time, receive from the Duke. The commission was accompanied by a set of instructions concerning the details of administration. I have not had access to this document, which seems to have been lost, and I am therefore unable to state the provisions contained in it. This commission and the accompanying instructions continued a custom initiated by the Dutch, and which was followed during the remainder of the colonial period. The general authority of the governor was expressed in a commission, and his powers were amplified, sometimes with considerable detail, in the instructions. In many subsequent appointments both documents have been preserved, and we are therefore able to study the scope of the authority conferred on the governor and other colonial officers, and ascertain the kind of government instituted, and the methods of administration.

On the 1st of July, 1674, following the re-establishment of the Duke's authority after a temporary re-occupation of the territory by the Dutch, a commission was issued to Edmund Andros, who was thereby appointed to be the Duke's "lieutenant and governor;" otherwise the commission is substantially in the same form as that issued to Colonel Nicolls. Andros received instructions concerning his administration, embracing many prudential regulations, and also others of a fundamental character. The governor was recommended to continue existing courts of justice, and was vested with the power of appointment of new officers and magistrates. The governor was required to appoint a council

of not more than ten members, who were to be inhabitants of the colony, with whom he was commanded to consult on all extraordinary occasions relating to the Duke's service and the good of the country. The councilors were to hold office during the Duke's pleasure, and they and all other officers and magistrates were required to take an oath of allegiance to the King and an oath of fidelity to the Duke.

The Articles of Capitulation of 1664 contained a provision that "the Dutch here shall enjoy the liberty of their consciences in Divine worship and church discipline." The Dutch were Protestants and were required to maintain the reformed religion, and the "Freedoms and Exemptions" of 1640 declared that no other religion should be publicly admitted in New Netherland. This was evidently not construed as excluding adherents of other religious faiths, for it seems clear that there were many such persons in the colony at a time when the law recognized the established church only. All persons, without regard to their religious faith, were welcome in the colony, and their rights of conscience were respected. The Duke of York, who had recently become a Roman Catholic, made, in the instructions to Governor Andros, the following provision for religious toleration:

"You shall permit all persons of what religion soever, quietly to inhabit within the precincts of your jurisdiction, without giving them any disturbance or disquiet whatsoever, for or by reason of their differing opinions in matter of religion; provided they give no disturbance to the public peace, nor do molest or disquiet others in the free exercise of their religion."

The reader cannot fail to mark the spirit of this provision, and to note its similarity with the provision incorporated in the first state Constitution and which

still continues as the guaranty of religious liberty. The provision is also quite similar to that contained in the Charter of Liberties of 1683, the full text of which appears in a subsequent part of this Introduction, and also in the new Charter of Liberties of 1691; but there a proviso was added that "nothing herein mentioned or contained shall extend to give liberty for any persons of the Romish religion to exercise their manner of worship contrary to the laws and statutes of their majesties kingdom of England." In the chapter on the Colonial Period I have called attention to the fact that the proviso relating to Catholics was not in the charter as it came from the assembly, but was added while the bill was pending in the legislative council.

All legal process was required to be in the King's name.

The governor and council constituted the colonial legislature until the assembly was created in 1683. It seems that immediately after the accession of Andros as governor the people of the colony demanded a legislative assembly. In letters transmitted near the end of the year 1674 Andros communicated this demand to the Duke, who replied in the following April, denying the request, for the reason, among other things, that it was inconsistent with the form of government established in the colony, and not necessary "for the ease or redress of any grievance that may happen."

September 30, 1682, Thomas Dongan was appointed governor of New York, and received instructions dated the 27th of the following January, which show a marked advance in ideas concerning constitutional government. The Duke's views had evidently experienced a material change since the appointment of Andros, in 1674. I note some of the more important provisions in the Dongan instructions.

The council was continued with somewhat enlarged powers. The governor was required to consult the council in matters relating to public affairs, and its members were to have "freedom of debates and vote in all affairs of public concern." The governor was given power to suspend a councilor for good cause, and was required to report the suspension, with the findings on which it was made, to the Duke, for his final action.

The governor was directed to issue writs of election for an assembly of not more than eighteen members. This subject is considered at length in the chapter on the Colonial Period, in this first volume, and in the article on Apportionment in the chapter on the Constitution of 1894, in the third volume. The first assembly met on the 17th of October, 1683.

General laws were to be made "indefinite and without limitation of time," but temporary laws might be limited in duration. Laws impairing the Duke's revenue could not be passed without his special leave or command.

The governor was prohibited from removing any colonial officer without good cause; he was also prohibited from executing any local office by himself or his deputy, and no person could execute more than one office by a deputy.

The 39th article of Magna Charta was expressed in the following form:

"And I do hereby require and command you that no man's life, member, freehold, or goods, be taken away or harmed in any of the places under your government but by established and known laws not repugnant to but as nigh as may be agreeable to the laws of the Kingdom of England."

The efficiency of the civil service was guarded by the provision that "none be admitted to public trust and employment whose ill fame and conversation may bring

scandal thereupon." Perhaps this idea was borrowed from article 45 of Magna Charta, in which King John promised not to make "Justiciaries, Constables, Sheriffs, or Bailiffs, excepting of such as know the laws of the land, and are well disposed to observe them."

The governor might, with the advice of the council, take such action as he might deem proper in matters not specifically included in the instructions, reporting thereon to the Duke for his approval; but the governor could not engage in or declare war without the Duke's knowledge and particular commands therein.

The governor was required to get a law passed, if possible, fixing the qualifications of jurors.

The governor, with the advice of the council, was authorized to establish such courts of justice as might be deemed proper "for adjudging and determining all matters, civil and criminal," making them, so far as practicable, conformable to the courts of England. The erection of courts was to be subject to the Duke's approval, but they were authorized to act until he signified his pleasure to the contrary.

The governor was authorized to make grants of public land at a yearly rent and service to be reserved to the Duke and his heirs, and to be fixed by the governor and council.

The governor was authorized to pardon or remit fines, also to "pardon and remit all manner of crimes before or after conviction" except high treason and murder, and in these cases he was given the power of reprieve, awaiting the Duke's final action.

The governor and council were required to provide for the erection of needed custom houses, and also to maintain an adequate force of militia.

The governor was prohibited from levying or collect-

ing any customs or imposts except as authorized by statute, to be enacted by the legislature.

The governor was directed to purchase additional tracts of Indian lands, and also report to the Duke concerning the propriety of granting to the city of New York privileges and immunities not enjoyed by other parts of the Duke's territories.

The deputy governor was authorized to act in case of the absence or inability of the governor.

Other parts of the instructions related more especially to administrative details.

Here was a complete outline of a constitution. It provided for legislative, executive, and judicial departments of the government, with several provisions relating to personal rights and limitations of power. So far as I have been able to discover, the plan of government here outlined has no parallel in any earlier colonial document. All our state Constitutions are constructed upon the same general plan, differing in detail, and amplified in many particulars to meet modern conditions. It is worth while to remember that the essential principles of Dutch and English liberty, including a parliamentary form of government, were established under a policy of which commercialism was the most conspicuous characteristic. The Dutch West India Company was distinctively a commercial corporation, yet it was charged with the duty of colonizing a portion of the new world and of establishing within its territory laws, social and political institutions, and policies of administration, which were to be of such a high character that they would attract immigration, encourage investments, and at the same time promote the general welfare of a community intended to be in America what its name implied,—a New Netherland. The Duke of York had been assured that his American possessions

might reasonably yield him an annual revenue of thirty thousand pounds sterling. He was desirous of reimbursing himself for large outlays in establishing his government, and also wished to receive the revenue which a prosperous colony promised; and while the business side of his policy cannot be overlooked, it must be conceded that the instructions to his governors are marked by a sincere desire to foster in America the institutions which had so largely contributed to England's greatness.

Royal Commissions and Instructions.

We come now to the last period of colonial history. By the death of Charles II., in February, 1685, his brother, the Duke of York, became James II. of England, and his title as proprietor of New York was merged in his higher title as king. New York thereupon ceased to be a proprietary colony, and became a royal province. The attitude of James toward the colony was necessarily changed, and he was obliged to consider his American possessions from the point of view of the reigning sovereign.

June 10, 1686, King James issued a new commission to Governor Dongan, who, in this commission, was called "captain general and governor in chief,"—a title which was continued through the remainder of the colonial period. No provision was made for an assembly, but the governor and council were vested with general legislative and executive powers. The council was to be composed of seven members. This commission, like its predecessor of 1682, conferred on the governor and council power to erect courts and appoint judges. Appeals involving large amounts were authorized to the governor and council, and afterwards to the King. The

pardoning power conferred by the previous commission was continued substantially in the same form. Provision was made for continuing the government in case of the governor's absence or inability to act, and, in the absence of the governor or his substitute, the government was, for the time being, to devolve upon the council. Other provisions are substantially repetitions of the former commission. The new commission calls New York a province. The instructions accompanying this commission contained only directions and requirements relating to navigation and the enforcement of English navigation laws.

Governor Dongan was superseded by Sir Edmund Andros, who, on the 7th of April, 1688, received a commission as captain general and governor in chief of a new domain, including what is now New England, New York, and East and West Jersey. The commission repeated in large part the provisions contained in the Dongan commission of 1686. It vested legislative and executive power in the governor and council, and provided for details of administration much like its predecessor. It provided for a lieutenant governor, which, I believe, is the first time this office is named in any colonial commission. The instructions accompanying the commission contained one provision which enunciated a principle quite contrary to a provision of our Constitution which guarantees a free press. The instructions say that "forasmuch as great inconvenience may arise by the liberty of printing within our said Territory, under your government, you are to provide by all necessary orders, that no person keep any printing press for printing, nor that any book, pamphlet, or other matter whatsoever be printed without your especial leave and license first obtained."

December 11, 1688, nine months after this proposed

combination of colonial interests under the administration of Governor Andros, James abandoned the English throne and was succeeded by William and Mary. November 14, 1689, the new government appointed Henry Sloughter to be captain general and governor in chief of the province of New York. The commission, which bears date January 4, 1690, conforms generally to commissions issued to previous governors, but it contains some exceptions which should be noted. It revived the assembly, and established that branch of government upon a lasting foundation. The governor, council, and assembly were together to constitute the legislature, and had power to enact all statutes relating to the colony. The governor was given an absolute veto on all laws, and any laws approved by him were still subject to veto by the Crown. The governor might adjourn, prorogue, or dissolve the assembly.

The instructions to Governor Sloughter which accompanied his commission contained the following provisions relating to religion and education:

"You shall take care that God Almighty be devoutly and duly served throughout your Government, The Book of Common Prayer as it is now established, read each Sunday and Holy Day, and the blessed Sacrament administered according to the rites of the Church of England."

Church appointments were to be made subject to the approval of the Bishop of London, who was given ecclesiastical jurisdiction in the province.

"You are to permit a liberty of Conscience to all Persons (except Papists) so they be contented with a quiet and Peaceable enjoyment of it, not giving offense or scandall to the Government."

This provision relating to religious toleration appears in subsequent instructions to colonial governors, and is

repeated in the instructions to Governor Tryon, which bear date February 7, 1771. It was therefore in force at the beginning of the Revolution, and was the rule of the colony on this subject when the first state Constitution was framed, in 1777. The instructions to Governor Sloughter continue:

"You are, with the assistance of our Council, to find out the best meanes to facilitate and encourage the conversion of Negroes and Indians to the Christian Religion.

"We do further direct that no School master be henceforth permitted to come from England & to keep school within our Province of New York without a License of the said Bishop of London and that no other Person now there, or that shall come from other parts be admitted to keep school without your License first had."

The instructions repeated the civil service provision contained in the Dongan instructions of 1683, and also provided that councilors and the other principal colonial officers should be "men of estate and ability and not necessitous people or much in debt. And that they be persons well affected to our government." This imposed a property qualification which was continued as to many officers during the colonial period and under the state government until abolished by the amendment of 1845. A property qualification is still imposed by statute in many cases, especially as to municipal officers.

The instructions repeated the prohibition against a free press which has already been quoted from the Andros instructions of 1688. The instructions also prohibited any change of value in current coin, either domestic or foreign, without the royal approval.

The form of government provided by Governor Sloughter's commission and instructions continued without substantial change in its essential features through

the remainder of the colonial period, which, for all practical purposes, except as to the southern portion of the province, closed in 1775. Many governors held office in the province during this period, all of whom received commissions and instructions conforming in general to those issued to Governor Sloughter; it would therefore be needless repetition to give even a synopsis of these commissions and instructions here. Some of the instructions were brief, some quite prolix, one set including nearly one hundred articles. The amplifications were usually incident to the development of English commercial interests, to the additional subjects requiring executive attention, and to the inclusion of Connecticut as a part of the military jurisdiction of the governor of New York. These commissions and instructions, with additional special instructions frequently communicated to the governor, constituted the form or frame of government, or what was known in the official correspondence of the time as the Constitution of the colony. This term is often used in official documents and correspondence, and manifestly refers to the framework of local government, including not only the specific powers conferred by the commissions and instructions, but also the implied powers expressed through colonial legislation, and customs and forms of procedure which were the result of many years of experience in administering colonial affairs.

William Tryon became governor of New York on the 9th of July, 1771, and continued to hold office until the 23d of March, 1780, when he was succeeded by James Robertson. Tryon was the last colonial governor who exercised actual jurisdiction over the whole province. I have recounted in the first and second chapters of this work some of the features which interrupted the course of orderly government in New York, developing

into independence, the separation of the province, and the erection of state government. The colonial period closed during Governor Tryon's administration, but he continued to be governor nearly three years after the adoption of the state Constitution, although his jurisdiction was confined to a very small part of the state. Indeed, civil jurisdiction was practically suspended; for when he went out of office, in 1780, the province was and had been for some time under martial law, with Sir Henry Clinton in chief command.

Treating the governor's commission and the accompanying instructions as elements of a constitution, we are able to examine, at least in part, the theory of constitutional government in New York immediately before the erection of the new state. A manuscript copy of Governor Tryon's commission may be found in the New York State Library, in volume 4 of Commissions. In its general outlines this commission conforms to the commissions issued to previous governors, beginning with the commission issued to Governor Sloughter in 1690, after the abdication of King James and the accession of William and Mary. It therefore stands as the last expression of the royal will concerning government in New York prior to the Revolution. Governor Tryon took the oath of office July 9, 1771. Five years later, on the anniversary of this day, July 9, 1776, the Provincial Congress of New York ratified the Declaration of Independence, and assumed the administration of public affairs, except as to those portions of the province actually occupied by the British army.

I have elsewhere expressed the opinion that Governor Tryon was one of the ablest executives New York had during the entire colonial period. He was governor of North Carolina several years before his appointment to New York. His long official service enabled him to

acquire an extensive and accurate knowledge of public affairs. He was therefore peculiarly qualified to answer the question

"WHAT IS THE CONSTITUTION OF THE GOVERNMENT?"

which, with twenty-one other questions (including one applicable only to West Florida), was propounded by the home government to the governors of the American colonies in a document which bears date July 5, 1773, and which required detailed information concerning various aspects of colonial affairs. Governor Tryon replied for New York on the 11th of June, 1774, in a document which will well repay perusal by every student of our history. Several extracts from his answer to the foregoing question are made in different parts of this work, but for convenience it is given here in full. It contains a summary of the powers conferred upon him, and a description of several features of colonial government, many of which originated in colonial legislation.

Governor Tyron says:

"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 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 Renselaerswyck, Livingston and Cortlandt each send one; in the whole forming a Body of Thirty one Representatives.

"The Governor by his commission is authorized to convene them with the advice of the Council, and adjourn, prorogue or dissolve the General Assembly as he shall judge necessary.

"This body has not power to make any Laws repugnant to the Laws and Statutes of Great Britain. All Laws proposed to be made by this Provincial Legislature, pass thro' each of the Houses of Council and Assembly, as Bills do thro' the House of Commons and House of Lords in England, and the Governor has a Negative voice in the making and passing all such Laws. Every law so passed is to be transmitted to His Majesty under the Great Seal of the Province, within three Months or sooner after the making thereof and a Duplicate by the next Conveyance, in order to be approved or disallowed by His Majesty; And if His Majesty shall disallow any such Law and the same is signified to the Governor under the Royal Sign Manual or by Order of his Majesty's Privy Council, from thenceforth such law be-

comes utterly void.—A law of the Province has limited the duration of the Assembly to seven years.

"The Common Law of England is considered as the Fundamental law of the Province and it is the received Doctrine that all the Statutes (not local in their Nature, and which can be fitly applied to the circumstances of the Colony) enacted before the Province had a Legislature, are binding upon the Colony; but that Statutes passed since do not affect the Colony, unless by being specially named, such appears to be the Intention of the British Legislature.

"The Province has a Court of Chancery in which the Governor or Commander in Chief sits as Chancellor, and the Practice of the Court of Chancery in England is pursued as closely as possible. The Officers of this Court consist of a Master of the Rolls newly created.—Two Masters.—Two Clerks in Court.—A Register.—An Examiner, and a Serjeant at Arms.

"Of the Courts of Common Law the Chief is called the Supreme Court.—The Judges of which have all the Powers of the King's Bench, Common Pleas & Exchequer in England. This Court sits once in every three months at the City of New York, and the practice therein is modell'd upon that of the King's Bench at Westminster.—Tho' the Judges have the powers of the Court of Exchequer they never proceed upon the Equity side.—The Court has no Officers but one Clerk, and is not organized or supplied with any Officers in that Department of the Exchequer, which in England has the care of the Revenue.—The Judges of the Supreme Court hold their Offices during the King's Will & Pleasure and are Judges of Nisi prius of Course by Act of Assembly, & annually perform a Circuit thro' the Counties. The Decisions of this Court in General are final unless where the value exceeds £300 Sterling, in which case

the subject may be relieved from its errors only by an Application to the Governor and Council, and where the value exceeds £500 Sterling an appeal lies from the Judgment of the latter to His Majesty in Privy Council.

"By an Act of the Legislature of the Province suits are prohibited to be brought in the Supreme Court where the value demanded does not exceed £20 Currency.

"The Clerk's office of the Supreme Court, has always been held as an appendage to that of the Secretary of the Province.

"There is also in each County an Inferior Court of Common Pleas, which has the cognizance of all Actions real, personal and mixed, where the matter in demand is above £5 in value.—The practice of these Courts is a mixture between that of the King's Bench and Common Pleas at Westminster.—Their errors are corrected in the first Instance by Writ of Error brought into the Supreme Court; and the Judges hold their Offices during pleasure.—The Clerks of these Courts also hold their offices during pleasure and are appointed by the Governor, except the Clerk of Albany who is appointed under the King's mandate.

"Besides these Courts the Justices of peace are by Act of Assembly empowered to try all causes to the Amount of £5 currency, (except where the Crown is concerned, or where the Title to Lands shall come into Question;—and Actions of Slander), but the parties may either of them demand a Jury of Six Men.—If wrong is done to either party, the person injured may have a Certiorari from the Supreme Court, tho' the remedy is very inadequate.

"The Courts of Criminal Jurisdiction are Correspondent to those in England.—The Supreme Court exercises it in the City of New York, as the King's Bench does at Westminster.—The Judges when they go the Circuit

have a Commission of Oyer and Terminer and General Gaol Delivery; and there are Courts of Sessions held by the Justices of the Peace; the powers of which and their proceeding correspond with the like Courts in England.—The Office of Clerk of Sessions, is invariably connected with that of the Clerk of the Inferior Court of Common Pleas in the respective counties.

"By acts of the Provincial Legislature the Justices of the Peace have an extraordinary Jurisdiction with respect to some offences by which any three Justices, (one being of the Quorum, where the Offender does not find Bail in 48 Hours after being in the custody of the Constable, may try the party without any * or a Jury, for any Offence under the Degree of Grand Larceny; and inflict any punishment for these small offences at their Discretion, so that it exceeds not to Life or Limb.—And any three Justices of the Peace (one being a Quorum) and Five Freeholders have power without a Grand or Petty Jury to proceed against and try in a Summary Way, Slaves offending in certain cases, and punish them even with Death.

"The Duty of His Majesty's Attorney General of the Province, is similar to the Duty of that Officer in England, and the Master of the Crown Office: He is appointed by the Crown during pleasure, and His Majesty has no Sollicitor General nor Council in the Province, to assist the Attorney General upon any Occasion.

"There are two other Courts in the Province. The Court of Admiralty which proceeds after the Course of the Civil Law in matters within its Jurisdiction, which has been so enlarged by divers statutes, as to include almost every breach of the Acts of Trade.—From this Court an appeal lies to a Superior Court of Admiralty, lately Established in North America by statute; before

*Blank in original.

this Establishment an appeal only lay to the High Court of Admiralty of England.

"The Prerogative Court concerns itself only on the Probate of Wills in matters relating to the Administration of the Estates of Intestates and in granting Licenses of Marriage. The Governor is properly the Judge of this Court but it has been usual for him to Act in general by a Deligate.

"The Province is at present divided into fourteen Counties, viz., The City and County of New York—The County of Albany—Richmond (which comprehends the whole of Staten Island) King's, Queen's and Suffolk (which include the whole of Nassau or Long Island.) Westchester, Dutchess, Ulster, Orange, Cumberland, Gloucester, Charlotte and Tryon.—For each of these Counties a Sheriff and one or more Coroners are appointed by the Governor, who hold their offices during pleasure.

"As to the Military power of the Province, the Governor for the time being is the Captain General and Commander in Chief and appoints all the Provincial Military Officers during pleasure."

In addition to the foregoing statement it appears from Governor Tryon's commission that the province had a lieutenant governor who might succeed to the governorship in cases similar to those provided for under our state Constitutions. The governor had power to suspend the lieutenant governor and also members of the council. The pardoning power was vested in the governor except as to treason and murder, which could only be pardoned by the Crown. The colonial government was authorized to erect forts and other means of defense, and establish and maintain a militia. Public money was to be paid out only on the governor's warrant, approved by the council. This provision may be found in many

previous commissions. A provision for a temporary gubernatorial succession was continued from former commissions. In case of a vacancy in the office of governor and lieutenant governor, or the absence or inability of these officers to act, the eldest councilor whose name was first placed in the instructions, and who, at the time of the vacancy, was residing in the colony, was to assume and exercise the executive office until the vacancy should be filled. The commission gave the governor little opportunity for the exercise of arbitrary power, for it was expressly provided that he should administer public affairs according to the terms of the commission and the instructions, and also "according to such reasonable laws and statutes as are now in force or hereafter shall be made and agreed upon" by the colonial legislature. The commission contains several details of an administrative character which need not be noticed here.

This brings us to the close of the colonial period, and we find a constitutional form of government which was continued without material change in the first state Constitution.

The Interregnum.

Constitutional government in New York, as understood and explained by Governor Tryon in the foregoing statement, was, of course, interrupted by the Revolution, which put an end to existing conditions and required the creation of a new form of government. It already appears that Governor Tryon took office in July, 1771. He found an organized government which had continued without substantial change for eighty years,—since the revival of the assembly in 1691. Governor Tryon found an assembly which had been chosen under writs of election issued January 14, 1769, and returnable

February 14. The limit of an assembly was then seven years. August 7, 1771, the Governor submitted to the council the question whether the present assembly should be continued or dissolved. The council unanimously recommended that it be continued. No new assembly was chosen during Governor Tryon's administration. The last legislation by this assembly was enacted on the 3d of April, 1775. The assembly was prorogued at different times, but did not meet again.

On the 23d of December, 1775, Governor Tryon submitted to the council the question of dissolving the assembly, and on the 26th a majority of the council recommended its dissolution and the election of a new assembly, but the Governor said that he had communicated with the chief justice on the subject, and had been advised by him that it was inexpedient to dissolve the assembly at this time. Several prorogations followed, the last being to April 17, 1776. This was past the limit of seven years fixed by the law for the existence of an assembly. The failure to prorogue the assembly from April 17 caused its dissolution. Governor Tryon notes this circumstance in a letter to Lord Germain, dated the 18th of April, 1776, and, in explanation, says the council, by whose advice it was prorogued to the 17th inst., had not been permitted to wait on him, agreeable to his summons, in order to advise concerning the further prorogation of it. The dissolution of the assembly suspended the legislative power of the province, and it was not revived. Governor Tryon evidently did not deem it expedient to call another assembly. The majority of the late assembly had adhered to the cause of the King, and had opposed the movement for independence; but it is quite probable that if a new election had been ordered the patriots would have controlled the new assembly. A few weeks after the dissolution of the assembly, July

4, 1776, the colonies were declared to be free and independent states; and on the 9th this action was ratified by the New York convention. From that time until the British evacuation, in November, 1783, New York was under two governments: the city of New York and some adjacent territory, being actually occupied by the British army, continued under the colonial government, which was administered by Governor Tryon and his successor under such limitations as were imposed by the fact that it had no legislature, and that it was under martial law.

Civil authority was practically suspended. Governor Tryon mentions this in one of his letters, and says that his official functions have been materially circumscribed by the situation incident to military government. The functions of the executive council were likewise rendered substantially dormant during this period, for the same reason. The southern part of the state, including the counties of Westchester, New York, Richmond, Kings, Queens, and Suffolk, were under British dominion after the arrival of the army in the summer of 1776. In the chapter on the First Constitution it has been noted that the Fourth Provincial Congress was called to meet in New York early in July, 1776, but it was not deemed prudent to meet there on account of the approach of the enemy's forces, and for that reason the first meeting of this congress was held at White Plains. The southern portion of the state remained under British control until the close of the war. The official correspondence of the period shows that the people quite readily acknowledged the situation in which they were placed, and either because of the presence of the army, or for other reasons, a large number of citizens took the oath of allegiance to the Crown. Governor Tryon, in a letter to his government dated February 11, 1777, says that 3,020 citizens

of the city of New York had taken the oath of allegiance, and that, in his opinion, not more than one hundred had failed to take the oath. According to the census of 1771 New York had 5,083 white males between 16 and 60,—the military age,—the whole population being 18,726 whites and 3,137 blacks. There must have been a numerous migration from the city in consequence of the Revolution, if there were only about 3,000 citizens left at the beginning of the year 1777. We know that many left the city and remained away until the close of the war, including prominent citizens like John Jay, James Duane, Robert Harpur, John Morin Scott, Isaac Roosevelt, and others who were actively engaged in the service of the new state. Similar action relating to oaths of allegiance was taken in the Long Island counties. Governor Tryon also reported, on the 15th of February, 1777, that at his instance a paper was being signed by the inhabitants of the city revoking and annulling "all powers and authorities of Congress, Committees, and Conventions over them." This was done, he said, so that the delegates from New York to the Provincial Convention and to the Continental Congress could no longer pretend that they were representing the people of the city.

The instructions to Governor Robertson, who took office March 23, 1780, informed him that Sir Henry Clinton had power to restore to peace the whole or any part of the province, if he should judge it fitting, in which case the civil Constitution should revive and the Governor's civil authority become competent under his commission. The Governor was admonished to appoint to office only persons of assured loyalty. The calling of an assembly, on the restoration of civil authority, was left to the discretion of the Governor and council. The instructions further say "that it is the King's wish to give

that proof to the inhabitants of New York, and of all the other provinces, that it is not His Majesty's intention to govern America by military law, but to allow them all the benefits of a local legislature, and their former Constitution." But martial law was continued and civil authority was not restored.

The temper of the English people, and their opinion concerning the probable outcome of the struggle with the colonies, is clearly shown by the action of the House of Commons early in 1782, in relation to the war. February 27 the House of Commons voted an address to the King, reciting, among other things, that, in the judgment of the House, "the further prosecution of offensive war on the continent of North America, for the purpose of reducing the revolted colonies to obedience by force, will be the means of weakening the efforts of this country against her European enemies; tends, under the present circumstances, dangerously to increase the mutual enmity so fatal to the interests both of Great Britain and America; and, by preventing a happy reconciliation with that country, to frustrate the earnest desire graciously expressed by His Majesty, to restore the blessings of public tranquillity." The King made a favorable reply, which was presented to the House on the 4th of March, whereupon the House adopted the following:

"That, after the solemn declaration of the opinion of this House, in their humble address, presented to His Majesty on Friday last, and His Majesty's assurance of his gracious intention, in pursuance of their advice, to take such measures as shall appear to His Majesty to be most conducive to the restoration of harmony between Great Britain and the revolted colonies, so essential to the prosperity of both, this House will consider as enemies to His Majesty and this country, all those who shall endeavor to frustrate His Majesty's paternal

care for the ease and happiness of his people, by advising, or by any means attempting, the further prosecution of offensive war on the continent of North America, for the purpose of reducing the revolted colonies to obedience by force."

Subsequently Governor Robertson sought, on two occasions, to re-establish civil authority. The first was on the 21st of March, 1782, at which time he probably had not received information of the action of the House of Commons, practically terminating the war. He presented to the council a written communication, in which he said that soon after the Governor assumed his office the commander in chief had declared that he judged the "restoration of civil government would be prejudicial to His Majesty's service, and impede the progress of his arms, the subduing of the rebellion being the first object;" but that since the surrender at Yorktown the commander in chief had intimated that he would no longer oppose the revival of civil government, and the Governor therefore submitted to the council the question whether the restoration of civil government was advisable under existing circumstances. The council, Chief Justice Smith dissenting, expressed the opinion that they did not consider that "the eligible moment for the restoration of civil government." On the 4th of May following Governor Robertson laid before the council the foregoing resolves of the House of Commons and the King's action thereon, and informed the council that he had been appointed commander in chief of the King's forces in America, and that he could, "without soliciting the consent of any other person, make the suppression of civil government in this province cease," and was ready to take this measure if it should be approved by the council. The council, Chief Justice Smith again dissenting, replied that, in their judgment, "no good consequence to the King's interest

or to the happiness of the people can arise from the restoration of civil government at this time and under the present circumstances."

The wisdom of the council's action on the proposition to restore civil government seems very clear. The war was practically over, peace negotiations had already begun, and independence was an assured fact. The people in that part of the state north of Westchester county were enjoying a real republican government, fully organized in all its departments, state and local, which had been in operation since early in September, 1777, and it was therefore impracticable to try to re-establish the old colonial form of government, which, at most, could be put into operation only in the city of New York and vicinity. While the members of the council were undoubtedly loyal, they must have become convinced, by the course of events, that colonial government, as it existed prior to the Revolution, could not be restored; they therefore wisely determined to live under martial law a little longer and wait for the peace with independence which must soon come, after which the state government already organized would be extended over the territory then under British control. The people in the northern part of the state had six years more of real constitutional government than their neighbors in the city of New York and vicinity. Provisional articles for a treaty of peace were signed on the 30th of November, 1782, and the definitive treaty was signed on the 3d of September, 1783.

The last session of the state legislature prior to the definitive treaty of peace was held at Kingston, and adjourned in March, 1783, to meet again at a time and place to be specified in a proclamation to be issued by the Governor for that purpose. The British evacuated New York on the 25th of November, 1783, and on the

same day General Washington, with a detachment of the American army, entered the city. He was accompanied by Governor George Clinton, who at once assumed civil authority. On the 9th of December following the Governor issued a proclamation convening the legislature in the city of New York on the 6th of January, 1784. A quorum was not present until the 21st. The legislature was then organized, and Governor Clinton delivered the customary speech in the presence of both houses. Referring to the close of the war, he said:

"By the favor of Divine Providence, the seal is put to our independence; our liberties are established on the firmest basis; and freedom in this district seems to derive additional luster from the objects which remind us of the despotism that so lately prevailed. . . . While we survey the ruins of this once flourishing city, and its vicinity, while we sympathize in the calamities which have reduced so many of our virtuous fellow citizens to want and distress, and are anxiously solicitous for means to repair the wastes and misfortunes which we lament, how ought our hearts to overflow with love and gratitude to our adorable Creator, through whose gracious interposition bounds have been set, and probably forever, to such scenes of horror and devastation." Commenting on the relations to the state which the people had assumed under the new form of government, Governor Clinton says that "though fear may support a despotism, and a hereditary nobility uphold the throne of a limited monarch, nothing but good faith and public virtue can give authority or credit to a free republic."

When the British moved out, the New York state government moved in, and after more than seven years civil authority under a written constitution was established in all parts of the state. Thus ended British rule in New

York, and thus ended a long interregnum during which constitutional government was in abeyance.

We turn now to the part of the state in which independence was asserted and established. Here the interval between the suspension of civil power in the colony, and the establishment of a state government under the new Constitution, was comparatively short. Martial law, which was in force in the southern part of the state, obviously could not reach beyond the range of British military operations; hence it had no application in that part of the state under the immediate control of the patriot convention and army. The dissolution of the colonial assembly in April, 1776, was not of itself a serious interruption of civil government, because another assembly might have been chosen and legislative power might have been re-established. The higher courts were closed as a result of martial law, and the powers of the judges were temporarily suspended. The Governor, who, by reason of his appointment and relations to the Crown, could not have been expected to sympathize with the movement for independence, did not attempt to exercise executive functions even where martial law was not in force. Therefore, to prevent anarchy, it became necessary to institute the best government that seemed then available. This new government was administered for the time being by a congress or convention composed of deputies chosen from various parts of the state not under British control, and this convention, for more than a year, assumed and exercised large executive, legislative, and judicial powers. This subject is considered in the second chapter, and needs little further attention here.

A congress, called a convention, met in the city of New York on the 22d of May, 1775. It was chosen for the purpose of considering subjects relating to the welfare of the country in view of the impending struggle for

independence. It acted in conjunction with the Continental Congress, but chiefly devoted its energies to military preparations. This congress continued in session until November 4, 1775, with some intermediate adjournments, during which a committee of safety, created by the congress, acted in its place and performed certain specified functions. This congress directed the election of a new congress, to meet on the 14th of November, 1775, but it was not organized until the 6th of December. It adjourned May 13, 1776. According to the journal of this congress resolutions were adopted on the 11th of March, 1776, directing the election of a new congress, to meet on the 14th of May, but the resolutions are not entered in the journal, and diligent search has failed to discover a copy of them. In April, 1776, elections were held in accordance with the directions contained in these resolutions, and deputies were chosen to constitute a new congress, to meet on the 14th of May, 1776. It was organized on the 22d of May and adjourned on the 30th of June. The deputies to the two previous congresses had been chosen for the term of six months, but the deputies to this congress were chosen for one year. The short duration of this congress is due to its decision concerning its own powers under a resolution of the Continental Congress, which had been adopted after this provincial congress was elected, but before it met. The Continental Congress, on the 10th of May, adopted a resolution recommending that a regular government be established in each state. The New York Provincial Congress, which was organized on the 22d of May, 1776, decided that it had no power to erect a state government, and therefore determined to go back to the people for the requisite authority. Another election was accordingly ordered, which was held in June, for a new congress, which was directed to meet on the 8th of July. This

congress was organized on the 9th of July, 1776, at White Plains, and on the same day ratified the Declaration of Independence. The next day it changed its name from "The Provincial Congress of the Colony of New York" to the "Convention of the Representatives of the State of New York." By the recent election the Convention had received authority sufficient to administer some kind of government while it was preparing a written constitution. The history of this period will be found in the chapter on the First Constitution, where I have quoted the resolutions of the Convention providing for a temporary government.

Government during the interval before the adoption of the Constitution was administered sometimes by a convention, and sometimes by committees and councils of safety. There was little ordinary governmental administration. The Convention could do little, and had little to do beyond conducting necessary military operations, either directly, on behalf of the state, or in conjunction with the Continental Congress. It did, however, borrow large sums of money and issue bills of credit, and pledged the faith of the new state for their payment. The principal business of this Convention and of the government which it organized was war for the purpose of actually accomplishing the independence which had been declared.

The Constitution was adopted on the 20th of April, 1777, and went into operation immediately. On the 8th of May following the Convention adopted an ordinance for the purpose of establishing the new government. The text of this ordinance will be found in the second chapter. The extraordinary powers possessed and exercised by the first convention were manifested in a peculiar manner by the election by the Convention itself of members of assembly and the senate from that part of

the state then under British control. This was deemed necessary for the purpose of organizing the new government. Elsewhere elections were held for members of both branches of the legislature, and also for governor and lieutenant governor. The senate was organized on the 9th, and the assembly on the 10th, of September, 1777. The judges of the supreme court and various state and county officers had already been appointed by the Convention. The new government was necessarily limited in its territorial jurisdiction, owing to the British occupancy of the southern part of the state. The formal organization of the legislature terminated the interregnum caused by the suspension of the colonial government.

State Constitutions.

The history of the state Constitutions will be found in subsequent parts of this work. The text of the Constitutions and of various amendments is given in the Introduction. I have tried to give every constitutional provision that has ever been in force in this state, and present it in its appropriate relation to other parts of our constitutional system. Little need be said here concerning these constitutional provisions, but it may be profitable to mention each Constitution and amendment in its chronological order, with a brief note concerning its general features.

1777. The First Constitution.

The framers of this instrument were familiar with constitutional government on the English basis. They had lived under a colonial government which possessed ample powers, with an assembly chosen by

the people, with officers who were, for the most part, selected from their own number, and under which the people possessed a degree of independence which substantially relieved them from direct obligation to the Crown, so far, at least, as concerned the ordinary needs and functions of society. All the essential elements of government existed in the colony, and the constitution-makers found there all the forms of government needed for a new state. But it became necessary to adapt some of the old forms to new conditions. The people, having declared their own sovereignty, were entitled to select the chief executive, who, under the former system, had been commissioned by sovereign authority. It also became necessary to modify the parliamentary system, and as a result of this process of reconstruction the House of Lords and the Colonial Council became the state senate. The Constitution was brief, but it described all the necessary elements of government. Many things were doubtless taken for granted, and existing forms and policies of administration were continued without being specifically defined.

The English Constitution is largely based upon statute law, combined with judicial decisions, customs, forms of procedure, and policies of administration. These elements together make up the unwritten Constitution. I have already quoted Governor Tryon's statement in relation to the colonial Constitution, in which the common law and statutes are expressly mentioned as elements of the constitutional system. Nothing in the first Constitution evinces a higher degree of wisdom than article 35, which continued in force in the new state the English common and statute law, and the legislation of the colony, so far as they were applicable under the new form of government. This transferred to the new state the English and colonial legal systems, which were really

constitutional systems, and English constitutional government, so far as applicable in a republic, became the inheritance of the new state. This transfer carried with it powers of government and details of administration which, with the new forms established by the Constitution, enabled the statesmen of that period to carry on the new government almost as smoothly as if the Revolution had not occurred.

Amendments.

1801. Five amendments were adopted by the Convention of 1801, four of which related to the reorganization of the legislature, and one construed article 23, relating to the powers of the Council of Appointment.

1821. THE SECOND CONSTITUTION.

The previous Constitution and amendments were carefully revised, and a new Constitution was adopted, more scientific in its arrangement, and more elaborate in its details, than its revolutionary predecessor.

Amendments.

1826. The suffrage article was amended by abrogating all property qualifications, except as to colored voters.

1826. The method of choosing justices of the peace was changed from appointment by judges of the county court and boards of supervisors to an election by the people of the towns.

1833. Authorizing a reduction of the duty on salt.

1833. For the election of the mayor of New York by the people.

1835. Relating to duties on goods sold at auction.

1839. Providing for the election of mayors in all cities.

1845. Abrogating property qualifications of public officers.

1845. Regulating the procedure on the removal of judicial officers.

1846. THE THIRD CONSTITUTION.

Many of the provisions in previous Constitutions and amendments were continued, but many new subjects were included, and the whole constitutional system of the state was revised and enlarged. A large part of this Constitution is still in force. Its detail may be studied from the text, which appears in a subsequent part of the Introduction.

Amendments.

1854. Providing for canal revenues, expenditures, and sinking fund.

1864. Authorizing absent soldiers and sailors to vote in time of war.

1867. A constitutional convention met this year and continued its labors until the spring of 1868. It proposed a complete Constitution, which was submitted to the people at the November election in 1869. The Constitution was all rejected except the judiciary article. The rejected part of this Constitution will be found at the end of the chapter on the Convention of 1867.

1869. The judiciary article proposed by the Convention of 1867.

1872. Relating to the commission of appeals.

1874. A series of amendments proposed by the Commission of 1872, with some modifications by the legislature of 1873. The amendments were included in thirty-four sections, and embraced many new provisions, some of which had been recommended by the Convention of 1867. The amendments related to qualifications of voters, bribery at elections, assembly apportionment, compensation, powers of the legislature, boards of supervisors, private and local laws, official term and compensation of governor and lieutenant governor, executive consideration of bills, the thirty-day period, canal expenditures, revenues, and sinking funds, extra compensation, savings banks, state aid, limitation of municipal aid, compensation of constitutional officers, oath of office, bribery (new article), and time when amendments take effect.

1876. Creating the office of superintendent of public works, defining his powers and duties, and abolishing the office of canal commissioner.

1876. Creating the office of superintendent of state prisons, defining his powers and duties, and abolishing the office of inspector of state prisons.

1879. Providing for an additional justice of the supreme court in the second judicial district.

1880. Authorizing judges of the city court of Brooklyn to be detailed for service in the supreme court in Kings county.

1880. Providing for judicial pensions.

1882. Providing for an additional general term of the supreme court, and for additional justices in several districts.

1882. Abolishing canal tolls.

1882. Authorizing taxation for the payment of the canal debt.

1882. Including the Black River canal in the prohibition against disposing of the canals.

1884. Limiting and regulating municipal indebtedness.

1888. Providing for a second division of the court of appeals.

1894. Authorizing an additional county judge in Kings county. A similar provision was included in the Constitution of 1894, which, by its terms, superseded the independent amendment.

1894. THE FOURTH CONSTITUTION.

A general revision proposed by the Convention of 1894, and including several distinct amendments. These relate to drainage of agricultural land, poolselling, code commissioners (abrogating provisions relating to this subject), actions to recover damages for injuries causing death, qualifications of voters, bribery at elections, inmates of public institutions, registration of voters, manner of voting, bi-partisan election boards, structure of legislature and apportionment of members, temporary president of senate, manner of passing bills, riders on appropriation bills, prison labor, official term of governor and lieutenant governor, gubernatorial succession (adding the speaker of the assembly), changing time of election of state officers to even numbered years, civil service, reorganization of judicial system (article revised), forest preserve, canal improvement, liability of stockholders of banks, regulation of municipal indebtedness, state board of charities, state commission in lunacy, state commission of prisons, charitable institutions, common schools, regents of the university, sectarian aid, coroners (constitutional office abolished), terms of county officers in New York and Kings and in any county conterminous with a

city, annual meeting of legislature, militia (article revised), city laws, elections in certain cities, free passes, and constitutional amendments and conventions.

Amendments.

1899. Excepting counties in Greater New York from the provision requiring a board of supervisors in each county.

1899. Providing for relief of the court of appeals by the appointment of justices of the supreme court to serve therein.

1899. Authorizing additional justices in the appellate division of the supreme court.

1899. Relating to indebtedness of counties in Greater New York.

1901. Prohibiting special laws exempting property from taxation.

The National Constitution.

A study of the Constitution of the United States is not within the scope of this work, but it must receive some attention for the obvious reason that every state is a part of the Federal system, and subject to the Federal Constitution. The subordination of the states to the Federal Constitution is declared in the provision, article 6, § 2, that

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the

judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Therefore every state Constitution and every state statute must be tested by its provisions. Neither the legislature of a state, nor the people themselves, in their collective capacity, can enact any law or constitutional provision which will not bear this test. The fourth volume contains numerous references to judicial decisions, state and Federal, in which New York statutes are tested by the Federal Constitution. Notes of such decisions are indispensable in a constitutional history which aims to consider all aspects of constitutional construction made necessary by the action of the state, either through its legislature or directly by the people. The Federal Constitution and the amendments to it are given in the Introduction, with notes showing the action of New York in relation to each of them.

The same course has been followed in relation to the Articles of Confederation. New York joined the movement for independence at its inception, and adhered to the cause without interruption until the object sought was finally consummated by the creation of a new nation. New York was a willing member of the Confederation, and promptly ratified the articles intended to provide a scheme of union and some provision for an effective administration. The state even went farther, and when it became manifest that the approval of the Articles of Confederation by all the states could not be secured without great delay, New York consented to be bound by them without such unanimous approval. By the notes on this subject, taken in connection with the notes showing the action of the state on the Federal Constitution and amendments, and the judicial decisions collated in the

fourth volume, I have tried to present a complete view of the history of the state, so far as it relates to the national constitutional system.

Conclusion.

New York is almost old enough to have ancient history. Two hundred and eighty years elapsed between the first positive written directions concerning government in the colony, which were contained in the Dutch West India Company's charter of 1621, and the latest constitutional amendment, which was adopted in 1901. Of this long period one hundred and fifty-six years are covered by the time prior to the adoption of the first state Constitution, and the remaining one hundred and twenty-four years are included in the time subsequent to the adoption of that instrument, and prior to the latest amendment.*

But our constitutional history is older than the charter to the Dutch West India Company. English legal writers say that Magna Charta is the basis of the English Constitution. As the basis of that Constitution it became the basis of the colonial Constitution, and later of the state Constitution. An examination of that great charter, which follows (page 64), will show that, while many of its provisions were temporary, many others were fundamental, and have endured, either in form or in principle, through all subsequent developments of popular government. The chief feature of that instrument, so far as modern political institutions are concerned, is the 39th article, which protects citizens in the enjoyment of their private rights. The Duke of York expressly imposed on Governor Dongan, in 1682, the duty of observing this provision, and it was incorporated in the Char-

*See volume IV. for amendments submitted in 1905.

ter of Liberties of 1683 and also in the new charter of 1691. It has had a place in all our state Constitutions, and it may be called the connecting link between constitutional liberty, as now enjoyed in 1905, and the liberty granted by a reluctant king to the people of England in 1215.

Various aspects of colonial constitutional history are presented in different parts of this work, in connection with specific subjects, but such a presentation is necessarily fragmentary. I have therefore sought to give, as briefly as seemed practicable, a statement of the principles and rules which constituted the colonial Constitution, with sufficient elucidation to show the relations of different sovereigns, governments, and public officers to the subject. It is believed that, with the foregoing synopsis, and the charters, Constitutions, and amendments which follow this note, the reader will be able easily to trace the various steps that have marked the progress of constitutional government in New York.

CHAPTER I.

The Colonial Period.

The colonial history of New York has often been written, and is easily accessible to the general reader. Historians have considered it from various points of view, and have apparently discovered all available sources of information which would aid in showing the inception, progress, and development of the colony. Unfortunately many records covering this early period are lost. De Witt Clinton fully appreciated the value of these early records, and in 1814, then being vice president of the New York Historical Society,—three years before he became governor,—he prepared a memorial to the legislature, stating the object of the society, its inability to procure, unaided, the invaluable and ample materials then accessible relating to our early history, and urging the legislature to render suitable assistance to the society in its efforts "to preserve the history of the state from oblivion;" but the legislature did not respond to this appeal. At that time the voluminous records of the Dutch West India Company were in existence, and would have been willingly presented to the state by the Dutch government, but when, in 1841, the state undertook to collect this information, it was found that the records had been sold at auction in 1821 by order of the government. We may conjecture how the keen historical instinct of a Macaulay, a Motley, or an Irving would have reveled in this mass of material, bringing from it a clear statement of the affairs of this great corporation, and

incidentally the story of the early development of our commonwealth.

Enough remains, however, to show the evolution of the customs and principles which found a place in our first Constitution, and which became the basis of much of the governmental machinery of the state.

A history of the colony of New York is not within the scope of this work, but the following brief summary of the more important events will doubtless be found useful in tracing the development of our constitutional system.

1609, September 3. Captain Henry Hudson, an Englishman, in the Half Moon, a ship belonging to the Dutch East India Company, and carrying the Dutch flag, first entered New York bay. The next day he sailed up the river which now bears his name.

1610. Amsterdam merchants sent a shipload of goods to be used in trading with the Manhattan Indians for furs.

1611. The trading enterprise of the Dutch was greatly stimulated by the information acquired during the voyage of the preceding year.

1612. Residents of various cities in Holland applied to the States General for information concerning the new discoveries in America.

1613. Trading with the Indians continued. At this time there were four houses on Manhattan Island.

1614, March 27. The States General of the United Netherlands passed an ordinance authorizing the inhabitants of the United Netherlands to undertake the discovery of new "courses, havens, countries, and places," and giving to such discoverers the exclusive right to make four voyages to the places so discovered.

1614, October 11. Charter granted to several Amsterdam merchants and others, giving them the exclusive right to trade with the newly discovered countries, which

then for the first time were called New Netherlands. The company was given the right to make four voyages within three years from January 1, 1615. This charter expired by its own limitation January 1, 1618.

1619. Subscriptions were opened for stock in a new corporation to be called the Dutch West India Company.

1620. The English government called the attention of the States General to the patents which James I. granted to the Plymouth and London companies, and to its broad jurisdiction, claiming, in substance, that the Dutch discoveries in America were within the jurisdiction conferred on these companies.

1621, June 3. A charter was granted to the Dutch West India Company. This gigantic corporation was invested with the most comprehensive administrative and judicial powers. The central power of the corporation was divided among five branches or Chambers representing the different cities in the Netherlands.

The Amsterdam Chamber was especially charged with the administration of the company's affairs in New Netherlands. The central power of the corporation was vested in an Assembly of XIX., composed of delegates from the several constituent cities. Among other things, the company was authorized "to appoint and remove governors, officers of justice, and other public officers, for the preservation of the places, keeping good order, police, and justice, in like manner for the promoting of trade." All officers were required to take an oath of allegiance to the company, and also to the States General.

1623. The Dutch West India Company began the colonization of New Netherlands. The affairs of the colony were under the supervision of Captain Cornelis Jacobsen May, the first Director appointed by the Amsterdam Chamber.

1625. William Verhulst succeeded May as Director.

1626. Peter Minuit was appointed Director, and with him was associated a Council of Five. The members of the council were appointed by the Director, who, with such council, possessed all executive, legislative, and judicial powers; subject, however, to certain appellate jurisdiction of the Assembly of XIX., which jurisdiction was afterwards transferred to the Amsterdam Chamber. The will of the company, as expressed in its instructions, was to be the law of New Netherlands. Cases not provided for were to be governed by the Roman law, the imperial statutes of Charles V., and the edicts, resolutions, and customs of the Fatherland.

1629, June 7. Charter of Freedoms and Exemptions. Persons who would undertake to plant colonies of fifty souls were to be acknowledged as patroons, and given the possession and enjoyment of all lands lying within the limits of their settlements, "together with the fruits, rights, minerals, rivers, and fountains thereof; as also the chief command and lower jurisdiction, fishing, fowling, and grinding, to the exclusion of all others, to be holden from the company as a perpetual inheritance, without it ever devolving again to the company. . . . And in case anyone 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." Each colony was permitted to choose one deputy, "who shall give information concerning his colony to the commander and council." This charter is especially significant in our history, for it transplanted to the colony the feudal system, and established a policy of local administration whose effects continued many years.

1638, August 30. An amended charter was proposed, which modified in many respects the provisions of the Charter of Freedoms and Exemptions of 1629. The new charter contained the following provision concerning religious worship:

"And, inasmuch as it is of the highest importance that, in the first commencement and planting of the population, proper order should be taken for public worship, according to the practice established by the government of this country, the same religion shall be taught and preached there, according to the Confession and Formularies of Unity here publicly accepted in the respective churches, with which everyone shall be satisfied and content; without, however, it being by this understood that any person shall be hereby, in any wise, constrained or aggrieved in his conscience; but each shall be free to live in peace and all decorum, provided he take care not to frequent any forbidden assemblies or conventicles, much less collect or get up any such; and abstain forthwith from all public scandals and offenses." The charter guaranteed "equal justice" to all inhabitants of the colony.

1638, March 28. William Kieft, the new Director, arrived at Fort Amsterdam. He reorganized the administration of the colony, but, for the purpose of retaining power, constituted a council of one member, giving this member one vote, and retaining two votes for himself.

1641, August 28. This date marks the beginning of representative government in the colony. The masters and heads of families met at Fort Amsterdam, in response to a summons from Director Kieft, to consider what action ought to be taken towards the Indians in consequence of the murder of Claes Smits by one of their number. The Director wished to take severe measures

for the punishment of the Indians, but evidently was unwilling to take the entire responsibility of any movement for this purpose. He therefore sought the advice of the masters and heads of families. The population of Manhattan at this time was about 400.

At this meeting the assembly elected Twelve Select Men as their representatives to consider the matters submitted by the Director. These Twelve Men constituted the first representative body chosen in the colony, and their names should be preserved in our constitutional history. They were: Jacques Bentyn, Jan Dam, Hendrik Jansen, David Pietersen De Vries, Jacob Stoffels, Maryn Adriaesen, Abram Molenaer, Fredrik Lubbertsen, Joachim Pietersen, Gerrit Dircksen, George Papelje, and Abram Plank.

They objected to the Director's propositions, and his project was temporarily abandoned; but he soon renewed it, and after some delay obtained a reluctant consent to make war on the Indians.

The Twelve Men used the opportunity presented by their election to try to reform some abuses which had become apparent in the administration of the colony, and to secure for the people some share in the government. They noted the reduction of the council to one member, and the reservation of complete control by the Director, and they demanded that the council should be increased to five, and, to "save the land from oppression," four persons elected by the commonalty should act as councilors; two of these four should annually be replaced by two others to be chosen from the Twelve Men selected by the people. They reminded the Director that in the Fatherland each village had a Council of at least five schepens, and they demanded a continuance of these features of local administration in the colony.

The Director admitted the justice of some of the com-

plaints presented by the Twelve Men, and promised to reform the council. In his reply to their memorial he took occasion to say that the Twelve Men had exceeded their authority, because they were chosen to consider only the question submitted by him relative to the course to be pursued towards the Indians.

1642, February 18. Director Kieft, apparently alarmed at the independent spirit manifested by the Twelve Men, issued a proclamation forbidding any further meetings without his authority, on the ground that such meetings "tend to dangerous consequences and to the great injury, both of the country, and of our authority."

The new popular movement was thus checked for the time, but the people were not discouraged. Another opportunity came soon, for the troubles of the colony compelled the Director to call on the people again.

1643, August. The Director again summoned the people to meet in the fort for the purpose of considering the affairs of the colony. He requested them to "elect five or six persons from among themselves, who should consider such propositions as the Director and council should lay before them."

The people declined to elect these men, but expressed their willingness to act on nominations made by the Director and council, reserving the right to reject any unsatisfactory nominations.

1643, September 13. The people chose a new representative body composed of eight men, "maturely to consider the propositions submitted to us here by the Director and council," and approving any action they might take in the premises.

1643, September 15. The Eight Men held their first meeting. This body continued in existence about a year, and made several attempts to consider various subjects

concerning colonial affairs. The Director submitted to it various propositions affecting the administration, and it exercised some legislative powers.

1647, May 27. Kieft having been recalled, Peter Stuyvesant, "the last and most celebrated of the Dutch Governors," arrived at New Amsterdam.

1647. Director Stuyvesant, acting on the advice of the council, issued a proclamation to the people in the several parts of the colony, requesting them to choose eighteen men "from among the most honorable, reasonable, honest, and respectable of the colonists." From this number the Director and council were to select nine men, "as is customary in the Fatherland." This was the origin of the body known as the Nine Men. They were to assist the Director and council in their deliberations, "to the end of promoting the common welfare."

Stuyvesant called these men the "Tribunes of the People." Three were chosen from the merchants, three from the citizens, and three from the farmers.

1647, September 25. The Director General and council issued a proclamation or charter, containing the names of the Nine Men selected, and prescribing their duties.

The charter provided that the Nine Men, "as good and faithful interlocutors and trustees of the commonalty, shall endeavor to exert themselves to promote the honor of God, and the welfare of our dear Fatherland, to the best advantage of the company, and the prosperity of our good citizens: to the preservation of the pure Reformed Religion as it here, and in the Churches of the Netherlands, is inculcated."

Three of the number in regular rotation were to be admitted to the council and form a part of the court in civil causes.

The share in government which the people obtained by way of the Nine Men was very limited; but the crea-

tion of the body was at least a concession to the people, and even the meager powers and jurisdiction conferred on this body marked an advance toward constitutional government by the people, which was sure to come.

By the charter the people themselves had no voice in selecting persons to fill vacancies, nor in the election of new members. This power was practically reserved to the Director General. After a few years, it seems that he neglected to fill vacancies, and in this manner suffered this representative body to become extinct. I have not been able to find any record of it after 1652.

1652, April 4. The Amsterdam Chamber made an order providing for the establishment of a municipal government in New Amsterdam, and recommended the election of one schout, two burgomasters, and five schepens.

1653, February 2. Director General Stuyvesant, in accordance with the order of the Amsterdam Chamber, established a city government in New Amsterdam. The Director, instead of permitting an election of the first city officers, appointed the burgomasters and schepens, and delegated the company's provincial schout to act also for the city. The new city, at the time of its incorporation, had a population of about 800, which in 1656 had increased to 1,000.

1653, November 25. In consequence of the troubles existing in the colony, two delegates from each of the towns of Flushing, Hempstede, Middleburgh, and Gravesend met at the City Hall to consider the condition of the colony, and devise some means of suppressing the existing disorders. Two representatives of the Director and council also appeared at this meeting, but the delegates from Long Island objected to their presence, and refused to sit with them.

Dr. O'Callagahan in his "History of New Nether-

lands," volume 2, beginning at page 239, gives a very interesting account of this meeting, and the discussion connected with and resulting from it. From this account it appears that the English delegates from Long Island threatened to form a union among themselves for mutual protection, if the Director could not properly govern the colony. These delegates, in conference among themselves and with their Dutch neighbors in New Amsterdam, determined to call a general convention of delegates from all parts of the colony to meet on the 10th of December following. It seems that the Director objected to this meeting, but the delegates and others, with characteristic independence, said that they should meet on the day appointed, and "he might prevent it if he could."

On the 3d of December Director Stuyvesant took occasion to comment on the previous proceedings, among other things saying that the refusal of the delegates to associate with the representatives of the Director and council "smelt of rebellion." He also intimated that assemblies such as that held and the one proposed were "pregnant with evil."

The Director, however, consented to a meeting on the day appointed, to be held "under the direction of two members of the council, to agree on a remonstrance to the patroons on the actual condition of the country."

The delegates were chosen from the towns already named, and also from Breukelen, Amersfoort, Midwout, and Newtown.

1653, December 10. This convention was in many respects the most important yet held in the history of the colony. It asserted principles that were destined to grow and ultimately to find a place in the established policy of the colony and of the state.

The convention adopted a formal remonstrance to the

Director and council and States General, setting forth the condition of the colony and the grievances of the colonists, and praying for immediate relief. The remonstrance was written by George Baxter, an Englishman, formerly secretary to the Director.

The remonstrance objected to "arbitrary government;" it denied the right of one or more men to arrogate to themselves "the exclusive power to dispose, at will, of the life and property of any individual;" it asserted the principle that "our consent, or that of our representatives, is necessarily required in the enactment of laws and orders" affecting the lives and property of the people.

The remonstrance also asserted that several officers were "acting without the consent or nomination of the people." Several other grievances were stated, but they do not concern us here.

The remonstrance was presented to the Director, who replied to it at length. He claimed, among other things, that the towns of Midwout, Breukelen, and Amersfoort "had no jurisdiction, and therefore were not entitled to send delegates," and that the meeting of the other delegates was illegal. He said that the Englishmen in the colony "actually enjoyed greater privileges than the New Netherland exemptions allow to any Dutchman." He said, further, "that in all affairs in which the country at large was interested the general ordinances have always been sanctioned by the qualified members of the whole province."

Concerning the choice of magistrates, the Director said that "the magistrates of New Amsterdam are proposed to the commonalty in front of the City Hall, by their names and surnames, each in his quality, before they are admitted or sworn into office. The question is then put, Does anyone object?" The names of militia officers are also submitted to their company before election.

In reply the members of the convention vindicated the legality of the meeting "by appealing to the law of Nature, which authorizes all men to associate and convene together to protect their liberties and property."

The controversy did not end here, but was continued with special reference to matters of administrative detail and the general affairs of the colony, without involving the rights claimed by the people and denied by Stuyvesant. It was clear that the agitation resulting in this convention, and the remonstrance submitted by it, with the reply of the Director General, could not fail to strengthen the movement for representative government; and the sequel shows that, while the people gained little directly from this popular movement, they gained indirectly by the propagation of the doctrine of popular rights, and the discussion of the principles on which true government ought to be founded.

1664, April 10. Another convention was held at the City Hall in New Amsterdam, composed of representatives from twelve towns. It was convoked by the Director and council on the recommendation of the burgomasters and schepens, and its object was to consider the "unhappy situation of affairs and the menaces of the hostile Indians;" but, on account of the imminent danger of an attack by the English, the convention confined its attention principally to devising means for resisting the enemy.

1664, August 27, O. S. New Amsterdam surrendered to the English, and soon afterwards the name was changed to New York. The Articles of Capitulation contain some provisions that are pertinent to our subject. These provisions relate especially to personal rights, magistrates, freedom of conscience, quartering soldiers, and popular representation.

Article III. "All people shall still continue free denizens, and shall enjoy their lands, houses, goods, whereso-

ever they are within this country, and dispose of them as they please."

IV. "If any inhabitant have a mind to remove himself, he shall have a year and six weeks from this day to remove himself, wife, children, servants, goods, and to dispose of his lands here."

VIII. "The Dutch here shall enjoy the liberty of their consciences in divine worship and church discipline."

X. "That the townsmen of the Manhattans shall not have any soldiers quartered upon them without being satisfied and paid for them by their officers, and that at this present, if the fort be not capable of lodging all the soldiers, then the burgomasters, by their officers, shall appoint some houses capable to receive them."

XVI. "All inferior civil officers and magistrates shall continue as now they are (if they please) till the customary time of new elections, and then new ones to be chosen by themselves, provided that such new chosen magistrates shall take the oath of allegiance to His Majesty of England, before they enter upon their office."

XXI. "That the town of Manhattans shall choose deputies, and those deputies shall have free voices in all publick affairs, as much as any other deputies."

1664, March 12. A patent was granted to James, Duke of York, embracing, with other territory, Long Island, Manhattan Island, and New Jersey. The character of the tenure is described as that "of our mannor of East Greenwich, in our county of Kent, in free and common soccage, and not *in capite* nor by knight service."

The Duke was also authorized to appoint and discharge governors, and other officers for the administration of provincial affairs, and also "to make, ordain, and establish all manner of orders, forms, and ceremonies of government and magistracy fit and necessary for and concerning the government of the territories and islands

aforesaid," which, however, must be conformable to the law of England.

The Duke was vested with full governmental powers, but there was no provision establishing civil liberty of the people. Thus was inaugurated for New York a system of proprietary government which continued many years.

1665, February 28. The Hempstede convention. In response to a popular demand, Governor Nicolls called a convention of delegates to be chosen by the towns of Long Island and Westchester. New York and other parts of the province were omitted from this call, and were not represented in the convention.

The delegates, when assembled, were to give the governor "their advice and information in the settlement of good and known laws within this government." This convention was not vested with any legislative power, and was given authority only to ratify the orders of the Governor. It prepared an address to the Duke of York, which was so servile in its tone as to excite the wrath of the people, who even threatened personal violence against the delegates.

The principal work of this convention was the promulgation of the code known as the "Duke's Laws,"—a body of law compiled by Lord Chancellor Clarendon, principally from the laws and ordinances in force in other English colonies, with some new matter. There is little in this code which affects the development of constitutional government; but a few of its provisions are important.

On the subject of religious toleration it provided that "Sundays are not to be prophaned by Travellers, Labourers, or vicious Persons," and that "no congregations shall be disturbed in their private meetings in the time of prayer, preaching, or other divine service; nor shall any

person be molested, fined, or Imprisoned for differing in Judgment in matters of Religion, who profess Christianity."

Popular government was limited to the election of eight overseers in each town, who were required to be "men of good fame and life, chosen by the plurality of voices of the freeholders in each town." Four overseers were to be elected each year.

The code also contained the following provision for local suffrage: "All votes in the private affaires of Particular Townes shall be given and Determined by the Inhabitants, freeholders, householders, and in matters committed to Arbitration, or att session, either as to Jureys in all cases or to Justices on the Bench, where the law is not cleare shall bee carried by the Major part of the Suffrages, The minor to be concluded by the vote of the Major."

It will be noted that the Duke's Laws relate principally to administrative detail, and contain very few provisions relating to the principles of government or popular rights. Some of these will be considered in subsequent chapters.

1665, June 12. Under the Articles of Capitulation the municipal government of New York had continued as it existed prior to the surrender. Governor Nicolls on this date issued a proclamation changing the local government, and instituting the offices of mayor, alderman, and sheriff, to take the place of those of schout, burgomaster, and schepen. He appointed five aldermen, three of whom, with the mayor, were authorized to administer the affairs of the city. They were given authority to apply the Duke's Laws, and also all "such peculiar laws as are or shall be thought convenient or necessary."

1669, November 9. A petition was presented to the court of assizes, signed by representatives of the principal towns, stating, in substance, that "at the surrender of

the province they had been promised all the privileges of His Majesty's other English subjects in America; and they contended that participation in legislation was one of those privileges." This petition was not well received. The court referred it to the Governor, who considered it a seditious document, and ordered it burned by the public hangman.

1671. Governor Lovelace had a council of eight members, including the mayor and secretary of the province. Here was an opportunity for reasonable popular representation, and a means by which the people could bring their views to the attention of the Governor; but it is doubtful whether even this large council had much influence in actual administration.

1673, August 9. New York was retaken by the Dutch.

1674, February 19. Treaty of Westminster, by which New York was retransferred to the English. The transfer was directly to the English King, which doubtless had the effect to extinguish the title granted to the Duke of York, in 1664.

1674, June 29. Second patent to the Duke of York. It is substantially a repetition of the patent of 1664.

1674, November 10. Possession and sovereignty of New York were formally transferred by Anthony Colve, the Dutch governor, to Sir Edmund Andros, the new governor appointed by the Duke of York. Thus ended the Dutch dynasty in New York.

1675, April 6. The powers of government vested in the Duke of York, in both patents, were practically absolute, and in marked contrast with the policy adopted toward other colonies.

The people, cherishing the privileges that they had enjoyed in the Fatherland, both in the Netherlands and in England, and also because of the superior advantages which had been conferred on their neighbors, were dis-

contented under the Andros government, and strenuously objected to the arbitrary power which he sought to enforce. Several early conventions have already been noted, and, while these conventions had failed to produce any substantial power, so far as actual participation in the government was concerned, they were not without fruit in the creation of an independent spirit, and a desire for a share in the administration of colonial affairs. The doctrine of "no taxation without representation" was already firmly established in the Netherlands, and the colonists considered this right a heritage which they were entitled to enjoy in their new home.

As the population of the province increased, and its business and political interests were enlarged, the agitation for representative government grew apace, and frequent attempts were made to secure this right. Governor Andros vigorously opposed all such attempts, treating them as seditious.

The demands for an assembly were communicated to the Duke, who also resisted them, and on this date (April 6) said:

"Touching Generall Assemblyes which the people there seem desirous of in imitacon of their neighbour colonies, I thinke you have done well to discourage any mocon of that kind, both as being not at all comprehended in your instructions nor indeed consistent with your forme of government already established, nor necessary for the ease or redresse of any grievance that may happen, since that may be as easily obtained, by any peticon or other address to you at their General Assizes (Which is once a year) where the same persons (as Justices) are usually present, who in all probability would be their Representatives if another constitution were allowed."

1676, January 28. The Duke, in another letter to

Governor Andros, commenting on the subject of popular assemblies, said:

"I have formally writt to you touching assemblies in those countries and have since observed what several of your lattest letters hint about that matter. But unless you had offered what qualifications are usual and proper to such assemblies, I cannot but suspect they would be of dangerous consequence, nothing being more known than the aptness of such bodies to assume to themselves many privileges which prove destructive to, or very oft disturb, the peace of the government wherein they are allowed. Neither do I see any use of them which is not as well provided for, whilest you and your council govern according to the laws established (thereby preserving every man's property inviolate) and whilest all things that need redress may be sure of finding it either at the Quarter Sessions or by other legal and ordinary ways, or lastly by appeal to myself. But howsoever, if you continue of the same opinion, I shall be ready to consider of any proposals you shall send to that purpose."

This shows an inclination on the part of the Duke to relax his opinions concerning popular assemblies. He was at least willing to listen to any proposal on the subject.

1681, January 11. Governor Andros sailed for England in response to a request from the Duke of York, for the purpose of conferring with the Duke on the affairs of the colony. His departure was somewhat hasty, and he neglected to make a formal order continuing the customs duties. The New York merchants, taking advantage of this oversight, refused to pay duties on imports. William Dyer, the collector, attempted to collect the duties, apparently relying on the general provision in the instructions left by the Governor. The people, availing themselves of the absence of the Governor, assumed more

liberty of conduct and of speech than they had been accustomed to exercise. Dyer was charged with high treason, and was indicted by the grand jury for "traitorously exercising regal power and authority over the King's subjects contrary to Magna Charta, the Petition of Right, and the Statutes of England." He was put on trial, but, on his questioning the authority of the court, the court decided to send him to England, to be proceeded against there according to the King's direction. This proceeding against Dyer, based on the Governor's omission to continue the customs duties, had a most significant political effect. It provoked great agitation in the colony, with much freedom of discussion of the discord and the unsettled condition which had resulted from Andros's administration, and led to a petition for an assembly.

The grand jury that indicted Dyer presented to the court of assizes the want of an assembly as a grievance against the government. A petition to the Duke of York was thereupon prepared, praying for an assembly as a constituent part of the colonial government.

1681, June 29. The petition to the Duke of York was prepared by the council of the province, the aldermen of New York, and the justices assembled at a special court of assizes held at the city of New York. The petitioners, after referring to the "great pressure and lamentable condition" of the colonists, and reciting that "the only remedy and ease of those burdens is that an assembly of the people may be established by free choice of the freeholders and inhabitants," say that "for many years past they have groaned under inexpressible burdens by having an arbitrary and absolute power used and exercised over them, by which a yearly revenue is exacted from us against our wills, and trade grievously burdened with undue and unusual customs imposed on the mer-

chandise without our consent, our liberty and freedom inthraled, and the inhabitants wholly shut out and deprived of any share, vote, or interest in the government, to their great discouragement, and contrary to the laws, rights, liberties, and privileges of the subject; so that we are esteemed as nothing, and have become a reproach to the neighbors in other his Majesty's colonies, who flourish under the fruition and protection of his Majesty's unparalleled form and method of government in his realm of England, the undoubted birthright of all his subjects."

The petitioners then prayed that "for the redress and removal of the said grievances, the government of this your colony may for the future be settled and established, ruled, and governed by a governor, council, and assembly; which assembly to be duly elected and chosen by the freeholders of this Your Royal Highness' colony. . . . Which will give great ease and satisfaction to all His Majesty's subjects in this colony."

1682, September 30. Thomas Dongan appointed governor in New York.

1683, January 27. Instructions were issued to Governor Dongan concerning his administration.

These instructions mark the dawn of a new era in the colony. After forty-two years of agitation and struggle for representative government since Director Kieft asked the advice of the people in the Smits case, and after many haltings, fluctuations, and defeats, the people of the colony had won their cause; and the Duke, evidently deeming it futile longer to resist the progress of reform in his colony, yielded to the popular demand, and directed the new Governor to call an assembly of the people.

Governor Dongan, by these instructions, was directed, with the advice of the council, in the name of the Duke, to issue writs for the election of a general assembly, and

to state in such writs that the Duke "had thought fit that there shall be a general assembly of the freeholders by the persons who they shall choose to represent them in order to consulting with themselves and the said council what laws are fit and necessary to be made and established for the good weal and government of the said colony and its dependencies and of all the inhabitants thereof." The writs were to be issued at least thirty days before the time fixed for the meeting, which was to be in New York.

The Duke, by these instructions, also directed the Governor to inform the assembly at its first meeting that "for the future it is my resolution that the said general assembly shall have free liberty to consult and debate among themselves all matters as shall be apprehended proper to be established for laws for the good government of the said colony of New York and its dependencies."

This grant conferred ample power on the assembly, and vested it with full legislative authority, subject to a veto by the Governor and the Duke. The Duke also promised by the instructions: "If such laws shall be propounded as shall appear to me to be for the manifest good of the country in general, and not prejudicial to me, I will assent unto and confirm them."

The instructions also gave to the Governor an absolute veto, for each law must have received his approval before being transmitted to the Duke for his confirmation. This made a double veto on the laws passed by the general assembly, and the assembly had no power to pass a bill over the veto. In this respect the assembly differed widely from the modern legislature, which, under the Constitution, has the absolute power of legislation, even against an executive veto, if two thirds of the members of each house favor the passage of the law. By these instructions the assembly had full power to pass such laws as it

deemed best, but the laws, to be effectual, must have been approved by the Governor and also by the Duke.

The instructions contained the further provision that a law passed by the assembly and approved by the Governor should be "good and binding" until the Duke should notify the Governor of his disapproval, after which time such laws "shall cease and be null and void to all intents."

The instructions also gave the Governor power to adjourn and dissolve an assembly and call a new one at any time.

The instructions contained provisions relative to revenue bills, the time a law should be in force, and the tenure of office, but without involving any question of principle now under consideration, and also the following important provision, which states, in substance, the rights conferred by the famous 39th Article of Magna Charta:

"And I doe hereby require and command you that noe mans life, member, freehold, or goods, be taken away or harmed in any of the places under your government but by established and knowne laws not repugnant to, but as nigh as may be agreeable to, the laws of the Kingdome of England."

The importance of these instructions in the development of our constitutional history can scarcely be overestimated. The seeds of liberty had been planted in the colony long before the Duke of York became its owner, and it was inevitable that an absolute personal government must soon come to an end in a colony composed of such heterogeneous people, and working out a new destiny on the free soil, and breathing the free air of a new world. It was a place and a time eminently congenial to the development of free institutions, and the Duke could not hope to keep in subjection, either to his own will or the will of any governor, the political opin-

ions, conduct, and personal rights of the people in a colony with a population that already numbered 15,000, and was rapidly increasing in political and commercial importance.

A proprietary government could not long be maintained in a colony with such a history and with such a future, and against the popular unrest necessarily produced by the form of the existing government and its method of administration, and also by the fact that its neighbors enjoyed the right of representative government.

1683, October 17. The first general assembly.—Seventeen of the eighteen delegates chosen under the governor's writ assembled at Fort James in the city of New York and organized the first assembly in accordance with the instructions issued by the Duke of York. It is greatly to be regretted that the journals of this assembly are lost. I have not been able to ascertain the names of all the delegates; their names are gone, and while we cannot accord to them here the fame they deserve by preserving their names in our history, their work, nevertheless, remains and will endure. From the laws passed by this assembly we learn that Mathias Nicolls was speaker, and John Spragge, who was also a member of the council, was clerk. The governor's council was a constituent part of the legislature, sustaining the relation to that body which the senate sustains to the modern legislature. The following were members of the council at this time: Anthony Brockholls, Frederick Flypsen, Stephen Van Courtland, Lucas Santen, John Spragge, and John Youngs.

It is said that the majority of the delegates to the assembly were Dutchmen, but both Dutch and English had long been familiar with the principles of popular government. It is a noteworthy fact that the great principles enunciated in the Charter of Liberties are drawn

from the immortal Magna Charta, which had for nearly five centuries been the source and strength of English free institutions; yet these Dutchmen, no less zealous for liberty than their English neighbors, were willing to accept, adopt, and assert as their own, the rights of citizens as defined by the Great Charter.

The first assembly was not slow to appreciate its opportunity. The new legislature was a colonial parliament, differing from its great original in name and somewhat in organization; but it asserted and exercised the same general powers which had so long been possessed by its English prototype. It should not be forgotten as an item in our constitutional history that the first act of the first legislature was a charter intended to declare the principles that ought to be applied in the government of the colony, and these principles were to be applied to a proprietary government the same as in a royal province. The Duke of York was recognized as the proprietor, but his government was to be subject to the laws with which Englishmen had long been familiar. This charter, closely resembling our modern constitutions in form and substance, and containing many provisions which have been continued in those instruments, might properly be called the original constitution of New York. It established free parliamentary government in the colony a century before the independence of the new nation was acknowledged by England. This instrument is entitled "The Charter of Libertyes and priviledges granted by his Royall Highnesse to the Inhabitants of New Yorke and its dependencyes."

The assurances contained in the instructions to Governor Dongan led the assembly confidently to expect the approval of this law by the Duke, and if it had received his final confirmation it would have become the general charter of the colony as a result of the joint action of

the Duke, the Governor, the council, and the assembly, thus combining and representing all the departments of government under the new policy.

This charter was passed by the assembly on the 30th of October, 1683. This day must forever remain one of the golden days in the history of New York. It marked a new departure in constitutional government, and it deserves to rank with that other famous day, almost a century later, when on April 20, 1777, the colony became a state, and adopted a new charter of liberties and privileges which we call the Constitution. The Charter of Liberties appears in full in another part of this work.

This charter and fourteen other laws passed by the assembly were formally published in front of the City Hall on the 7th of November, and were carried by Captain Mark Talbot to England for the Duke's confirmation. The Duke actually signed the charter October 4, 1684, but, while it was awaiting some technical formality, Charles II., on the 6th of February, 1685, died, and the Duke thereupon became King James II. of England. His accession to the throne changed his point of view, and he then concluded that the charter was too broad. His title of proprietor had become merged in his higher title as King. The experience of his immediate predecessors evidently led him to the conclusion that a colonial legislature, like the English Parliament, would be an inconvenient adjunct of government, and might interfere with the exercise of the royal prerogative.

Besides, the charter was drawn with reference to the proprietorship of the Duke of York, and acknowledged his authority as such proprietor. By becoming King he had ceased to be proprietor, and the charter was therefore inaccurate in form. This of itself was deemed a sufficient objection to its approval by the King. But in disposing of the matter the King made the significant observation

that the words "The People met in General Assembly" were not in any other Constitution in America. This charter, therefore, stands as the pioneer among charters, or constitutions conferring on the people the right of representative government. This charter was vetoed by the King on the 3d of March, 1685. The assembly held another session in October, 1684. At the conclusion of this session it adjourned to meet in September, 1685.

1685, August 13. Governor Dongan issued a proclamation dissolving the assembly. This action was deemed necessary in consequence of the death of Charles. The question was raised whether by his death the assembly was not, *ipso facto*, dissolved, and whether it could sit again as a legally constituted legislative body. The Governor and council, after mature consideration, concluded to remove any doubt by formally dissolving the assembly, and issuing writs for the election of another.

1685, October 20. The second general assembly began its sessions. It passed six laws. At the close of the session this assembly adjourned to meet September 25, 1686; but on the 4th of September, 1686, Governor Dongan prorogued the assembly until March 25, 1687. But the assembly never met again, for on the 20th of January, 1687, it was dissolved by proclamation of the Governor.

1686, June 10. King James issued a new commission to Governor Dongan appointing him Captain General and Governor in Chief of the province of New York. The commission conferred on the Governor power, "with the advice and consent of the council, or the major part of them, to make, constitute, and ordain for the colony laws, statutes, and ordinances," which should conform as nearly as practicable to the laws and statutes of England. Such laws were to be sent to England within three months

for the King's approbation. The council was to be composed of seven members.

The Governor and council were given power to impose taxes, raise revenue, establish courts, appoint officers, and, generally, to administer the affairs of the colony. No provision was made for an assembly, but the legislative power was vested in the Governor and council, subject to the King's approval. Here the King receded from his policy of a representative government, which he had inaugurated while Duke of York, and retained in his own hands the control of colonial affairs.

1686, December 9. Governor Dongan and his council held their first meeting under the new commission. They ordered that "all the branches of revenue, and all other laws that have been made since the year 1683, except such as His Majesty has repealed, remain and continue as they now are till further consideration."

The Governor and council constituted the only legislative body in the colony, and proceeded substantially according to the practice then observed in parliamentary bodies. The Governor presided, and a bill was read three times before final passage.

1688, April 7. The province of New York was annexed to New England by a commission issued by the King to Sir Edmund Andros, who was appointed Captain General and Governor in Chief. The powers of government and administration were substantially the same as those conferred on Governor Dongan by his commission of June 10, 1686.

1688, December 11. James II. fled from Whitehall and abandoned his throne.

1689, February 13. The English Crown was tendered to William and Mary and accepted by them. The executive power was vested in the King. "Thus for the third time a Dutchman reigned in New York."

1689, November 14. Henry Sloughter was appointed Captain General and Governor in Chief of the province of New York, by a commission, substantially in the form used on the appointment of Governor Dongan. Governor Sloughter was authorized, with the advice and consent of the council, to call a general assembly, to be chosen and constituted substantially like the earlier assemblies.

The Governor, "by and with the advice and consent of the council and assembly, or the major part of them," was authorized to enact for the colony "laws, statutes, and ordinances" which should conform as nearly as practicable to the laws and statutes of England. The Governor was given a veto of all laws, and they were also subject to final confirmation by the Crown. Here we have a revival of the policy of representative assemblies, which had been inaugurated by the Duke of York in 1683, but which had been abandoned when the Duke became King.

1690, April 24. An assembly was held under a call issued by Jacob Leisler, who had taken possession of the government of the province after the abdication of King James. This assembly was doubtless an unauthorized body, for the right to hold assemblies had been in effect revoked by the second commission to Governor Dongan, and by the commission to Governor Andros on the annexation of the colony to New England. These commissions vested legislative power in the Governor and council. Besides, a new commission had been issued by the new English government to Henry Sloughter, as Governor of New York. He, alone, was authorized to call an assembly. The Leisler assembly passed one law at its first session.

1690, September 15. The Leisler assembly held another session, and passed two laws.

1691, March 19. Governor Sloughter arrived in New

York, and immediately published his commission and proclaimed his authority. He ordered an election of a new assembly to meet on the 9th of April, 1691.

1691, April 9. A new assembly, called under the authority of the new English monarchy, met in the city of New York, and resumed the functions of representative government by the people, which had been interrupted during the reign of James II.

Thenceforth the assembly was a regular department of colonial government until the Revolution, when the assembly, without being regularly dissolved, ceased to exist, or, at least, to exercise its functions, after April 3, 1775. Its successor was the first assembly under the Constitution, which met at Kingston September 10, 1777.

1691, May 13. The new Charter of Liberties.—The first Charter of Liberties, passed October 30, 1683, had been at first approved by James as Duke of York, but later was disapproved by him as King. Under the reorganized English government of William and Mary the new colonial assembly, which seemed now to promise permanency, deemed it important to reassert the principles contained in the original charter. The change of the government and the new status of the colony towards the home government were indicated in the titles of the two statutes The first, 1683, is "The Charter of Libertyes and priviledges granted by His Royall Highnesse to the Inhabitants of New Yorke and its dependencyes." This, though in form a statute enacted by the colonial legislature, is really a grant of constitutional powers and privileges by the proprietor and lord of the colony. When the new statute of 1691 was passed the title of the proprietor had become merged in the Crown; so here we have "An Act Declaring What are the Rights and Privileges of Their Majestyes Subjects Inhabiting within

Their Province of New York." This indicated a new relation, which was continued until the Revolution.

New York, from its condition as a Dutch commercial settlement under the jurisdiction and control of a foreign corporation, and then as a colony under an English lord proprietor, had become in the process of evolution a province of the English government; and the people of the province could exercise for themselves only such powers of local government and possessed only such privileges as were conferred on them by the Crown.

The bill for a new charter was introduced on the 27th of April, 1691, by the speaker, James Graham, one of the most distinguished men of the colony, was passed on the 8th of May, and sent to the council. On the 12th the council, Governor Sloughter presiding, amended the bill, reducing the required quorum in the council from seven to five, defining a freeholder, and adding the provision against Catholics. The bill in its final form was passed on the 13th of May.

The new charter is in many respects quite like its earlier prototype. The preamble to the act states that the representatives are "deeply sensible of their Matys most gratious favor in restoring to them the undoubted rights and privileges of Englishmen," by providing for "assemblies of the inhabitants, being freeholders," and vesting them with powers of local government, which is declared to be a "most excellent constitution," and one "much esteemed by our ancestors."

The act then recites that the "supreme legislative power and authority" shall be and reside in a governor and council appointed by the Crown, "and the people by their representatives, mett and convened in general assembly." The act provided for annual sessions of the assembly; it conferred the right to vote for representatives on "every freeholder within this province and freeman in any

corporation;" a freeholder was defined to be one who had "fourty shillings P. Annum in freehold;" it contained an apportionment of members of future assemblies; it made the assembly the judge of the election and qualifications of its members; it exempted members from arrest during the session, and while going to and returning from the same; it provided for elections to fill vacancies in the office of representatives; it fixed the quorum in the council at five; it reasserted substantially the rights of citizens stated in the 39th and 40th Articles of Magna Charta, and also other provisions of that great instrument; it provided for a grand jury in criminal cases, and for a trial jury of twelve in all cases; it contained provisions against quartering soldiers, and also against commissions under martial law; it declared all lands "freehold and inheritance in free and common soccage according to the tenure of East Greenwich" in England; it made a conveyance by a married woman invalid, unless on a private examination she acknowledged that the conveyance was made "freely and without threats or compulsion of her husband;" it conferred religious liberty on those who "profess faith in God by Jesus Christ His only Son," excepting "persons of the Romish religion," "who were prohibited from exercising their manner of worship contrary to the laws and statutes" of England.

On the 16th of May the Governor, council, and assembly met at the fort and proceeded in a "solemn manner" to the City Hall, where the act, with others, was read and proclaimed.

Under Governor Sloughter's commission, authorizing an assembly and providing for local government by the people through a colonial legislature, this act became effectual on its approval by the Governor and council, but subject to its disapproval or repeal by the home government. The act was committed to the Lords of

Trade for their consideration, who, on the 11th of May, 1697, reported adversely, objecting, among other things, that the act gave to the representatives "too great and unreasonable privileges during the sitting of the assembly;" also that the exemption from quartering soldiers was too broad. They also objected that the act contained "several large and doubtful expressions." (Perhaps these were the quotations from Magna Charta.) The Lords of Trade recommended that the act be repealed, and that a charter substantially like that recently granted to Virginia be proposed for New York and passed by the assembly.

While this act did not receive the royal assent, it was in force in the colony more than six years, and probably its repeal by the Crown did not materially affect any principle declared in it.

The Colonial Legislature.

"There is no new thing under the sun." Old things appear in new forms. Things which we call new are evolutions or variations from earlier forms, or the application of forces already existing, but hitherto unknown, or not understood. There is little actually new in our modern forms of government. They continue, often with very slight variations, conditions and methods which have long been in use. The genesis of our modern legislature is not hard to find. It is a lineal descendant of the colonial legislature, and the origin of that body is found far back in the history of organized society.

Under the new arrangement, inaugurated in 1691, the legislature took on the form which it has since retained, an elective senate under the Constitution being substituted for an appointive council. The assembly of 1905 is substantially the assembly of 1683; more numerous than its early predecessor and chosen by a constituency

with broader qualifications, but illustrating in its selection the same general principles of representation. The first assembly was chosen primarily on the principle of locality, combined with the principle that the larger settlements were entitled to a larger representation. Thus, in the first assembly we find that Staten Island, Schenectady, and Pemaquid had one delegate each, Martha's Vineyard and Nantucket together one, Esopus, and each of the three ridings on Long Island, two each, Albany with Rensselaerwyck two, and New York with Harlem four, making eighteen in all.

These two principles of locality and population were, on the organization of the state and Federal governments, adopted as the most satisfactory principles of representation. In the state Constitution the county was made the unit of representation in the assembly, and in the Federal Constitution the state was made the unit of representation in the House of Representatives.

The early colonial legislative system, like that of to-day, was divided into three parts, namely, the governor, the council,—now the senate,—and the assembly. The council and the assembly sustained to each other practically the relations which exist now between the senate and assembly. The status of the governor in relation to legislation was somewhat different in the early days, for he then had an absolute veto on all legislation. No bill could become a law without his assent. The legislature had not then been vested, as it is now, with supreme legislative power, independent of any authority, within the limitations of the Constitution. The colonial governors possessed complete control over legislation. That condition has no parallel under our modern Constitution, except during the "thirty-day period" following the final adjournment of the legislature, during which time no bill can become a law without the governor's approval.

At first, while the governor sat with the council, he passed on bills at a session of the council, the assembly not being present. After he discontinued sitting with the council, in consequence of the decision of the Lords of Trade in 1735, it was the custom for the governor to meet the council and assembly in joint session, and there consider the bills, and sign such as met his approval. After such approval, it was the custom for the governor, the council, and the assembly, and sometimes the mayor and common council of New York, to proceed in a "solemn manner" to the City Hall, in front of which the new laws were read and published. Copies were thereupon sent to the King for his approval.

For obvious reasons the relation of the King to legislation is omitted from our consideration in this examination of the colonial legislative system; for the King, although he had delegated to the governor, council, and assembly the power to make laws for the colony, and did not himself initiate legislation, reserved an absolute veto on all bills; and in practice, according to the records, he sometimes "repealed" laws, and from that time they had no effect.

The colonial council antedates English sovereignty in New York. Its existence began in 1626 under the administration of the Director General, Peter Minuit, who had a council of five. His successor, Van Twiller, had a council of four; the next Director, Kieft, reduced the council to one member; it was increased to six under Peter Stuyvesant, the last of the Dutch governors. Under the first English governor, Richard Nicolls, the council was composed of five members. From that time through the remainder of the colonial period the number varied. Governor Bellomont had a council of thirteen; some governors were authorized to have a council of ten members, others seven. In 1721 there were twelve members,

in 1739, nine, and in 1767 the number was limited to twelve.

Members of the council usually received their appointment from the Crown, but the governors had a qualified right to fill vacancies. Governor Fletcher's commission authorized him to appoint members of the council, who held their office until disapproved by the Crown; but the Crown reserved the right to appoint in case of vacancy, and persons appointed by the Crown held in preference to those appointed by the governor. Governor Bellomont had the right of appointment, and also of nomination, in case of vacancy.

The instructions to Governor Sloughter, which accompanied his commission, directed him "to permit the members of our council to have and enjoy freedom of debate, and vote in all things to be debated of in council."

The functions of the council are thus defined by the attorney general and solicitor general in their opinion, dated January 15, 1735, concerning the governor's right to act as a member of the council: "The council sits in two capacities; namely, as one part of the legislature, and as a council to advise and assist in all political cases, and governors are restrained by their instructions not to act without the advice and consent of the majority of them."

This double function of the early colonial council has continued in our modern senate, and the provision in our Constitutions and statutes requiring the confirmation of executive appointments by the senate gives the senate jurisdiction in "political cases," with substantially the powers vested in its colonial predecessor. The phrase "by and with the advice and consent" of the senate, so often used in modern statutes and constitutions, has an ancient origin: it is found in the royal commissions issued to the colonial governors, who were permitted to act in certain cases only "by and with the advice and consent"

of the council. The phrase also appears in the enacting clause of English statutes from a very early period, and in which clause the law is said to be enacted by the King "by and with the advice and consent" of Parliament. The framers of the first Constitution were familiar with this limitation on executive authority, and when the transition from the colony to the state was effected it was but natural that it should be continued under the new conditions by which the province became a sovereign state, combining all the powers, which before were divided between the colonial and home governments.

Members of the council were required to be freeholders, inhabitants of the province, "men of estate and ability, and not necessitous people, or much in debt." It will be noted that by the first Constitution members of the senate, which succeeded the colonial council, were also required to be freeholders and be chosen by freeholders.

At first, after the permanent establishment of a legislative system in 1691, under the Sloughter commission, the governor was deemed a member of the council, sitting with it, voting at his pleasure on any proposition, and also as its presiding officer, giving a casting vote in case of a tie. He thus had two votes as a member of the council; then, as governor, he acted on each bill, and so had, or might have had in some cases, three votes. It is said that this condition continued without question until 1733, when, in consequence of a controversy between Governor Cosby and some members of the council, the suggestion was made that he could not legally act as a member of the council. The matter was referred to the law officers of the home government, who, after consideration, decided that the governor should not "in any case sit and vote as a member of the council." This decision was rendered in 1735, and was duly communicated to the colonial government. Beginning with 1736 the governor did not

sit with the council, and that body chose its own presiding officer, who was called the speaker. The chief justice was at first chosen speaker, but, the business of the court preventing his attendance, a rule was adopted that the oldest councilor present should preside at its sessions.

On the 21st of October, 1736, the common council of New York adopted a resolution tendering the use of the common council chamber for the legislative council, reciting "that the legislative council, while acting in a legislative capacity, are to act as a distinct body by themselves without the presence of the governor or commander-in-chief of this province." The resolution further recited that the assembly was already holding its meetings in the same building, and that if the council also held its meetings there "both houses of the legislature may have speedy recourse to each other."

A significant feature of this resolution is the use of the phrase "both houses of the legislature," treating the governor's council as a distinct and independent branch of the legislature.

After the decision, by the law officers of the home government, that the governor could not sit with the council while acting in a legislative capacity, the governor's relation to legislation became practically the same as that sustained by the governor under the Constitution, except that his approval was necessary in all cases before a bill could become a law. The council took the name of the "legislative council," but it acted also as an executive council, and was known in official correspondence of the period as "His Majesty's Council."

The council conducted its legislative business according to the usual parliamentary forms, and its journals—at least in outline—read much like the journals of modern legislative bodies. The council read bills three times, referred them to a general committee, practically a com-

mittee of the whole, amended bills, and occasionally, but not often, proposed original bills. In 1705 the council sought to amend a money bill which had been passed by the assembly. The right of the council to make such amendments was denied by the assembly, which claimed exclusive jurisdiction of money bills, thus asserting an ancient right of the House of Commons. The question was submitted to the Lords of Trade, who, in 1706, informed the Governor that, in their opinion, the council had as much right as the assembly to originate money bills, or to amend such bills passed by the assembly. The controversy was renewed on the same grounds in 1710, with the same result; but the opinions expressed by the Lords of Trade did not affect the judgment of the assembly, nor its claim that it had exclusive power to originate and control money bills. The colonial records show that even as late as 1751 a money bill which was originated and passed by the council was rejected by the assembly because that body had the exclusive right "to begin all bills for raising and disposing of money."

The colonial legislature was a miniature Parliament. The governor, coming from England with the King's commission, represented the sovereign; the council was the House of Lords, and the assembly the House of Commons. The governor exercised in the colony, especially in relation to the legislature, substantially the prerogative of the King in relation to Parliament. The procedure on the organization of an assembly was very similar to that incident to the organization of a new House of Commons. The Encyclopædia Britannica (vol. 18, p. 311) gives the following description of the organization of Parliament:

"On the day appointed by royal proclamation for the meeting of a new Parliament, both Houses assemble in their respective chambers, when the Lords Commissioners

for opening the Parliament summon the Commons to the bar, by the gentleman usher of the black rod, to hear the commission read. The Lord Chancellor then states that, when the members of both Houses shall be sworn, Her Majesty will declare the causes of her calling this Parliament; and, it being necessary that a Speaker of the House of Commons shall be first chosen, the Commons are directed to proceed to the appointment of a Speaker, and to present him, on the following day, for Her Majesty's royal approbation. The Commons at once withdraw to their own House and proceed to the election of their Speaker. The next day the Speaker-elect proceeds, with the House, to the House of Lords, and, on receiving the royal approbation, lays claim, in the accustomed form, on behalf of the Commons, 'to their ancient and undoubted rights and privileges.' The Speaker, now fully confirmed, returns to the House of Commons, and, after repeating his acknowledgments, reminds the House that the first thing to be done is to take and subscribe the oath required by law. Having first taken the oath himself, he is followed by other members, who come to the table to be sworn. The swearing of members in both Houses proceeds from day to day, until the greater number have taken the oath, or affirmation, when the causes of summons are declared by Her Majesty in person, or by commission in the 'Queen's speech.' This speech being considered in both Houses, an address in answer is agreed to, which is presented to Her Majesty by the whole House, or by 'the Lords with White Staves' in one House and Privy Councilors in the other."

The journal of the legislative council for April 9, 1691, when the first Sloughter assembly was organized, affords an interesting parallel to the organization of Parliament. The journal reads: "The Representatives appeared in their accustomed method and presented Mr. James Gra-

ham their speaker, who, being approved of, desired their former Rights and Privileges, *viz.*, that none of their members nor their servants be arrested nor molested during the Sessions; that they may have freedom of accesse to his Excellency and Council when Occasion presents; that they may have liberty of speech and a favourable construction made upon all Debates that may arise amongst them, and for the removeall of all misunderstandings that a Committee of the Council may Joyne with a Comittee of their House to conferr on what matters may occurr, and this their demande may be approved by his Excellency and Council and entered in their Council book; which are allowed and approved of accordingly."

The journal of the Colonial Assembly shows, without exception, that on the organization of the legislature, following the election of a new assembly, from the first assembly, of 1691, to the last, in 1769, the speaker was approved by the governor, and the assembly demanded and received a confirmation of its ancient privileges. In this procedure the Colonial Assembly followed the ancient custom of the House of Commons.

It is not surprising that the governor, council, and assembly, with four centuries of parliamentary experience behind them, should have adopted the procedure of the home legislature, with which they were familiar, nor that they should have tried to reproduce in the city of New York some of the stately ceremonial of Westminster.

The journals of the colonial council and assembly show that on the day when the writs of election were returnable the governor, the council, and the assembly met together; the governor sometimes directed the assembly to choose a speaker and present him to the governor for his approval, and the speaker was sometimes chosen without such formal direction. The governor, after the approval

of the speaker, made a speech in the presence of both houses concerning colonial affairs, and recommending such measures as he thought pertinent for the consideration of the legislature. A copy of this speech was delivered to each house and entered on its journal. The journals also show that the council and assembly usually gave formal consideration to the governor's speech, and presented an address, in reply to which the governor sometimes presented a formal answer.

The first speech of the governor that I have been able to find was made to the legislature in 1692. This speech, and subsequent speeches by the governor during the colonial period, do not differ materially in form from the modern messages transmitted to the legislature by the governor under the Constitution. The governor's speech will be considered again in the chapters on the first and second Constitutions, but it is worth noting here that the custom of making a speech to the legislature, initiated in 1691, continued one hundred and thirty-two years, when it was abolished by the second Constitution, which took effect December 31, 1822.

The formalities observed in that early period are indicated by an entry in the council journal, September 12, 1693, which informs us that the governor, in closing his speech addressing the assembly, said: "I leave these things before you for your consideration, which consists of but three heads: Your duty to God, your loyalty and affection to the best of Kings, and your own safety and defense. Soe, Gentlemen, you may withdraw to your house. I pray God to direct you to proceed in these things which are most consistent with conscience and honour."

"The representatives made a bow and withdrew."

Under the Dongan commission, which authorized the first assembly of 1683, the maximum number of members

was fixed at eighteen, and writs were issued by the Governor for the election of this number. The commission to Governor Sloughter, under which the assembly of 1691 was called, did not fix or limit the number of members. This assembly was composed of seventeen representatives.

Governor Sloughter, by his commission, received authority to "adjourn, prorogue, and dissolve" the assembly at his discretion. The power of proroguing the House of Commons had already been exercised by English sovereigns for more than two centuries, and it was a familiar element of the parliamentary system. It was frequently exercised by the colonial governors, and the tenacity of habit, even in public affairs, is illustrated by the continuance of this feature of executive authority under the first Constitution. General George Clinton, the first Governor of the state, prorogued the first legislature twice before it actually met, but I find no instance of the exercise of this power afterwards, except once in 1812 by Governor Tompkins, and the authority to prorogue the legislature was discontinued by the second Constitution.

Under the commission issued to Governor Sloughter, the members of assembly were required to take "the oaths appointed by act of Parliament to be taken instead of the oaths of Allegiance and Supremacy, and the Test." The first oath referred to was prescribed by 1 William and Mary, c. 8 (1688 [9]), in the following form:

"I, A. B., do sincerely promise and swear, that I will be faithful and bear true allegiance to Their Majesties King William and Queen Mary; so help me God."

"I, A. B., do swear that I do from my heart abhor and detest and abjure, as impious and heretical, that damnable doctrine and Position, that Princes excommunicated or deprived by the Pope or any authority of the See of Rome may be deposed or murdered by their subjects, or any other whatsoever."

"And I do declare, that no foreign Prince, Person, Prelate, State, or Potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God, etc."

This statute applied to all cases after the 1st of May, 1689.

The "Test" refers to the requirements of 25 Car. II., c. 2 (1672), by which no person was entitled to hold a public office unless he had "received the sacrament of the Lord's Supper according to the usage of the Church of England," and had also made a written declaration against the doctrine of transubstantiation. These oaths were continued during the colonial period.

On the organization of the first assembly, April 9, 1691, all the representatives took both oaths, except the two burgesses elected from Queens county, who, being Quakers, "made some scruple of taking the oaths, but were willing to sign the Test and engage to perform the Tenor of the oaths under the Penalty of Perjury." On their refusal to take the formal oath they were "dismissed."

The first Constitution contained no provision on the subject of official oaths, but in the second Constitution (1821) the official oath was prescribed with the additional provision, since continued, that "no other oath, declaration, or test shall be required as a qualification for any office of public trust."

A few general notes concerning the colonial period will close this part of our subject. The laws enacted by the colonial legislature were published and distributed in 1897 by the Statutory Revision Commission, under the authority of the state, and are accessible to all who may wish to study the legislation of this period. Incidentally, it should be noted, as an item in the transition from Dutch to English control, that in 1687 Governor Andros and his

council, there being no assembly, enacted a law requiring all legal documents to be in the English language. The apparent need of legislative counsel appears from the request of the assembly in May, 1691, that the governor appoint the attorney general or some other fit person to draft bills for the assembly.

By an act passed in 1699, voters for members of assembly must have been freeholders three months before the test of the writ of election. In 1701 a statute was passed providing that any "Papist or Popish recusant" might be challenged by the sheriff or any candidate for assembly, and his vote excluded, unless he should take the oath and subscribe the test required of members of assembly. In 1737 a law was passed requiring annual meetings of the assembly, and fixing the maximum term of representatives at three years. This law also required the governor to issue writs for a new election within six months after a dissolution of an assembly. This act was repealed by the King November 30, 1738, without assigning any reason. In 1743 a law was passed fixing the term of representatives at seven years. In 1769 nonresident freeholders were given the right of suffrage the same as if they were residents, and were entitled to vote for representatives in assembly. By the same act representatives in the assembly must have resided at least six months in the district from which they were elected, and were further required to have been qualified freeholders for the same period. Voters in New York and Albany must have been freemen there at least three months before the election. In 1770 judges of the supreme court were declared ineligible as representatives in the assembly. This provision was by the statute based on the "ancient usage of Parliament," which excluded judicial officers from seats in the House of Commons.

The assembly, from a membership of eighteen in 1683,

and seventeen as reorganized in 1691, gradually increased in numbers during the colonial period, but apparently not in proportion to the increase in population. The last colonial assembly had a membership of thirty-one. This number was evidently deemed too small for the new state, and the framers of the first Constitution therefore provided for a larger assembly, fixing the minimum number at seventy, and providing for a gradual increase to three hundred.

The Colonial Judiciary.

It has been said that the judicial system of the state of New York is a growth of the soil. It has been developed from small beginnings, and has a mixed Dutch and English origin. The system, which is the pride of the Empire state to-day, is the result of many struggles, much halting and uncertainty, and numerous compromises. The judicial system of any commonwealth is an index of its character, customs, and civilization. The rude judicial tribunals of the early colonial period were copied from those of European countries, with the modifications required by pioneer conditions and the necessary simplicity of provincial life. The development of those tribunals is an interesting study; and it will be profitable to trace briefly the growth of our judicial system from the earliest Dutch occupation of Manhattan Island, reserving for subsequent chapters a more detailed history of particular courts.

The colony of New Netherland was planted by the great West India Company, a commercial corporation of Holland. "It was exclusively intrusted with the administration of justice in the colonies it should establish, having the right to appoint officers of justice, to maintain order and police, and generally, in the language of the charter, to do all that the service of those countries might

require." From the discovery of Manhattan Island by Captain Henry Hudson, in 1609, to 1623 no regular attempt had been made to establish a colony; but in the latter year the colony of New Netherland was formally organized, and a settlement was established at Manhattan, the present site of the city of New York. Whether under the administration of May, the first director, or that of his successor, Verhulst, any provision was made for judicial tribunals cannot now be determined. The number of the colonists was so small, and they were so fully occupied in providing for their immediate wants, that there could be little, if any, occasion for organizing courts.

Minuit came out as Governor in 1626, and "he had, to assist him, a council of five, who, with himself, were invested with all legislative and judicial powers, subject to the supervision and appellate jurisdiction of the Chamber at Amsterdam." There was also attached to the body an officer well known in Holland by the name of the "schout-fiscal." "He was a kind of an attorney general, uniting with the power of a prosecuting officer the executive duties of a sheriff." The administration of justice was left to this body—the governor, the council, and the schout-fiscal—during the six years of Minuit's incumbency and the four of his successor, Van Twiller,—that is, from 1626 to 1637. In what manner judicial proceedings were conducted is unknown. Records were kept under Van Twiller, but they are utterly lost.

William Kieft came out as governor in 1638, and he misgoverned the colony for nine years, ruling with a high hand, and retaining in his own hands the sole administration of justice. He was obliged to have a council, but he reduced it to one member, reserving two votes to himself. The administration of Kieft was so oppressive and tyrannical that he was constantly in trouble with his people,

who demanded the establishment of the courts to which they had been accustomed in Holland. This agitation finally resulted in Kieft's recall. He was succeeded in 1647 by Peter Stuyvesant, who immediately established a court of justice with power to decide "all causes whatsoever," subject to appeal to the governor in certain cases.

The desire for popular government had manifested itself very strongly during Kieft's administration; and soon after Stuyvesant's arrival he found the sentiment so vigorous that he was obliged to make some concessions. He provided for the tribunal of the Nine Men to which I have already referred. "These Nine Men were to hold courts of arbitration weekly, and were to give advice to the Director and council in all matters submitted to them." As already stated, "three were taken from the merchants, three from the burghers, and three from the farmers. Thus was preserved and continued the system of municipal organization in the Netherlands." Three of their number attended in rotation upon every court day, to whom civil causes were referred as arbitrators. But there was constant collision between the Governor and the people. His government became insufferably oppressive. The colonists appealed to the home company, and after five years of struggle succeeded in procuring an order for the establishment in the colony of a municipal court of justice, to be composed of one schout, two burgomasters, and five schepens. A burgomaster was a kind of mayor; a schepen was an officer resembling an alderman; and a schout combined the functions of a sheriff and a district attorney. "On the 2d of February, 1653, Governor Stuyvesant issued a proclamation appointing as burgomasters Arent Van Hatten and Martin Krieger, and as schepens Paulus L. Van der Grist, Maximilian Van Gheel, Allard Anthony, Peter W. Cowenhoven, and William Beekman; Cornelius Van Tienhoven was schout,

and Jacob Kip was clerk." The magistrates met on the 7th and gave notice that the court would meet at the City Hall "every Monday morning at 9 o'clock" for hearing and determining all disputes between parties as far as practicable. The City Hall not being in readiness on the following Monday, the next meeting took place four days afterwards at the fort, when the court was organized for the despatch of business, and the proceedings were opened with prayer. This court was called the "Worshipful Court of the Schout, Burgomasters, and Schepens." Stuyvesant did not like the court. He and the members of it were frequently in collision, and he sometimes contemptuously referred to it as "the little bench of justice;" but it seems to be well established that "the court was composed, in the main, of magistrates who were men of intelligence, independence, and high moral character, evincing an unswerving adherence to established rules and customs, sterling good sense, and a strong love of justice." The procedure in this court was simple and summary, and strongly resembles, in many respects, the procedure established for the Roman people by the law of the Twelve Tables. The court exercised unlimited civil and criminal jurisdiction, except the infliction of punishment in capital cases. When judgment was given against a defendant for a sum of money, time was given for payment,—usually fourteen days for the discharge of one half, and the remainder in a month. If he did not pay within the time fixed, proceedings were taken to levy on his goods, which were taken by the officer and detained six days subject to redemption; at the end of that time, if not redeemed, the property was sold at auction in a very peculiar manner. "The officer lighted a candle and the bidding went on while it was burning, and he who had offered the most at the extinction of the candle was declared the purchaser."

The court did a general business, and was also a court of admiralty, and court of probate in taking proof of last wills and testaments and in appointing curators to take charge of the estates of widows and orphans. Some of its proceedings in the exercise of this branch of its jurisdiction will serve to illustrate how tenaciously the Dutch clung to old forms or legal ceremonies; as, when a widow, to relieve herself from certain obligations, desired to renounce her husband's estate, it is, in all such cases, recorded that the intestate's estate "has been kicked away by his wife with the foot," and that she had duly "laid the key on the coffin."

It is worthy of note that the origin of a fee bill for regulating, by a fixed and positive provision of law, the costs of attorneys and other public officers is to be traced to Stuyvesant. On the 25th of January, 1658, he issued a proclamation with a preamble reciting the abuses that had arisen, by reason of the conduct of certain officers in demanding excessive fees, and fixing, with detail, the fees thereafter to be charged. "It is then provided that the officers enumerated shall serve the poor gratis for God's sake, but may take from the wealthy the fees specified."

Courts of a similar character were established in other parts of the province. From all these local courts an appeal lay to the appellate court, composed of the Governor and council at New Amsterdam. These constituted the judicial tribunals of New Netherland until the colony passed into the hands of the English, which event occurred on the 6th of September, 1664, N. S. Col. Richard Nicolls, the first English Governor, immediately changed the name of the colony and city to New York, but no change was made in the courts until a later period.

The "Duke's Laws," promulgated March 1, 1665, provided for arbitrators, a court to be held by the constable and overseers, justices of the peace, courts of sessions,

courts of oyer and terminer, and a court of assizes with appellate jurisdiction. Justices of the peace were commissioned for the various towns and were clothed with all the powers exercised by such officers in England. A local court was created in each town for the trial of actions of debt or trespass under £5. Six overseers, elected by the people, with a constable, or seven without him, constituted a quorum for the transaction of business; all questions were determined by a vote of the majority, and, if the overseers were evenly divided, the constable had the casting vote. In 1666 the number of overseers was reduced to four, and any two of them, with the constable, held the court; the town clerk was clerk of the court.

The province was divided into three ridings, known as the east, west, and north riding, and in each a court of sessions was established, which was held twice a year; that is, on the first, second, and third Wednesdays in March and the corresponding Wednesdays in June. The court of sessions was held by all the justices living in the riding. All actions at law, and all criminal cases, were tried before a jury. The jurors were drawn from the overseers, each town electing eight. "Seven jurors were impaneled for the trial of a cause, and the verdict of a majority was sufficient, except in capital cases, when the court might impanel twelve, which was uniformly done, and the twelve were required to be unanimous." This court had both civil and criminal jurisdiction. It was also a court of probate, and exercised the jurisdiction now intrusted to surrogates.

The highest tribunal in the province was the court of assize, or, as it was sometimes called, the general assizes. It was held once a year in the city of New York by the Governor and council and such of the justices of the peace as saw fit to attend it. This court had original ju-

risdiction, civil, criminal, and equitable, and was the appellate court from the inferior tribunals.

In June, 1665, the court of burgomasters and schepens was abolished in the city of New York and a new court organized called the mayor's court, a title by which it was known for one hundred and forty-six years. The members of the court were the mayor, alderman, and sheriff. The change was more formal than real; "it was merely altering the burgomaster into a mayor, the schepen into an alderman, and the schout into a sheriff." The records were directed to be kept in English and Dutch, and a jury of twelve was required to be impaneled for the trial of civil causes.

There was no court of chancery, but matters in equity were heard in any of the courts organized in conformity to the Duke's Laws. On the 9th of August, 1673, the city was retaken by the Dutch, who immediately undertook to re-establish the former judicial tribunals; but they held the city only a little more than a year, when the English reconquered it and terminated the Dutch dynasty. The English courts were reorganized in 1674, and continued from that time, with various modifications, until 1685, when a momentous change occurred in the system of government. Dongan was appointed Governor in 1682. Upon the advice of William Penn, James, then Duke of York, yielded to numerous requests made by men of every rank in the province, and in 1683, ordered Governor Dongan to call an assembly.

In tracing the institutions of our state, Robert Ludlow Fowler, to whom I am indebted for many facts relating to the early courts, remarks: "Our present law is the result, modified by certain acidents, of all that which has been happening among the European residents of this territory since their sojourn here. It is the result of natural development, and not the result of political miracles,

and, if it is looked on in any other light, it cannot be understood. . . . The acts of the first assembly are still discernible in the law of to-day, and some of the courts created then are still tribunals in the same jurisdiction, and precedents then are recognized still."

This assembly passed an act dividing the province into twelve counties. Its seventh act was entitled "An Act to Settle Courts of Justice." By this act four distinct tribunals were created,—"a petty court for the trial of small causes for every town; a court of sessions for each county; a court of oyer and terminer and general gaol delivery; and a court of chancery for the entire province." The court of assize was abolished. The fluctuation of the jurisdiction of courts in matters of equity cognizance will be observed when we recall the fact that the court of assize, which was the first English court of the province, possessed both law and equity jurisdiction like the present supreme court of the state. The court of oyer and terminer had both civil and criminal jurisdiction, and a term was required to be held in each county once every year.

I have already referred to the change in colonial affairs caused by the death of Charles II., the accession of the Duke of York to the throne in 1685 as James II., his abdication in 1688, and the accession of William and Mary in 1689. I have also referred to the appointment of Governor Sloughter, and the re-establishment of the Colonial Assembly, which began its first session April 9, 1691. The most important act of the assembly, for our present purpose, was the act reorganizing the judicial system of the colony. This was prepared by James Graham, the speaker of the assembly, and was introduced and passed on the 17th of April, 1691.

This act was regularly approved by the Governor and council, and became a law on the 6th of May, 1691. It

appears as chapter 4, Laws of 1691, and will be found in vol. 1 of the Colonial Laws of New York as published by the Statutory Revision Commission. The act provided for a court of chancery, a supreme court, a court of common pleas, courts of sessions, and justices' courts.

Immediately upon the passage of this act the supreme court was organized, and Joseph Dudley was appointed chief justice, Thomas Johnson, second judge, and William Smith, Stephen Van Cortlandt, and William Pinhorne, associate judges. The act was to be in force only ten years, but it was re-enacted from time to time and continued by proclamations, and was in force, with some modifications, at the time of the Revolution and the organization of the state government in 1777.

The supreme court was at first composed of five judges. From 1701 to 1758, the number was three,—a chief justice and two associate justices. In the latter year a fourth was added. It may, perhaps, indicate somewhat the growth of the state to note that there are now seventy-six justices of the supreme court, besides the court of appeals, the various city and county courts, and the inferior local tribunals in towns and villages. The judicial machinery of the state has assumed vast proportions. It is said that in 1741 the duty of revising the laws in force, with notes and references, was assigned to Daniel Horsemanden, a justice of the supreme court, but on account of his advanced age this task was not performed. This is said to have caused the adoption of the principle of limiting the office of the judges to sixty years of age to avoid the inconvenience that might result from the infirmities of advanced age. This limitation has since been extended to the last day of December next after a judge shall be seventy years of age.

The state of New York formerly had a court of exchequer, originally created by Governor Dongan in 1685,

discontinued in 1691, and reorganized as a branch of the supreme court in 1786, "for the better levying and accounting of fines, forfeitures, issues, amercements, and debts due to the people of the state." The court ceased to exist January 1, 1830. There was also a court of admiralty, which was discontinued upon the adoption of the Federal Constitution in 1789.

Growth of the Colony.

It is impracticable to present a table of the population of the colony at stated intervals. During the first half of the colonial period a census was not often taken; accurate statistics concerning this period are therefore not available, and, even when attempts were made to procure evidence of the number of inhabitants in the colony, the results were often quite imperfect, and do not afford a reliable basis for a computation of population. In its earlier years the colony had many fluctuations resulting from trouble with the natives, incompetent administration, and inadequate home support. Notwithstanding the irregular methods of obtaining this information, it is possible to give a quite reasonable estimate of the population of the colony at different times, and during the last half of the colonial period enumerations seem to have been conducted with considerable care. Sometimes a census was limited to particular localities, sometimes it included only men of military age, sometimes heads of families, and an occasional property census was taken. From various official sources, nearly all of which will be found in the colonial documents, I have prepared a statement showing the population at different times, either estimated or actually ascertained. The statement also shows some other facts bearing on the development of the colony.

1641. Manhattan had at this time about 400 inhabitants.

1643. The population was estimated at 3,000. The unhappy condition of the colony appears from a statement by the Eight Men to the Assembly of XIX., dated October 24, 1643, in which they say: "The population is composed mainly of women and children; the freemen (exclusive of the English) are about 200 strong, who must protect by force their families now skulking in straw huts outside the fort."

1646. The population at this time was estimated at 1,000. This decline is said to have been due to the maladministration of Governor Kieft.

1647. The condition of the colony at this time is described by Governor Peter Stuyvesant in a report dated October 19, 1665, on the causes which led to the surrender of the colony to the English. He says that at the time of his accession as Director General in 1647, "the flat land was stripped of inhabitants to such a degree that, with the exception of the three English villages at Heemstede, New Flushing, and Gravesend, there were not fifty bouweries or planatations on it, and the whole province would not muster 250, at most 300, men capable of bearing arms."

1653. The city of New York was incorporated this year, and it then had a population of about 800.

1656. A census of the city of New York was taken which showed that there were then 120 houses and 1,000 inhabitants.

1667. Certain Dutch merchants presented to the States General a remonstrance in relation to trade with New Netherland which had recently been conquered by the English. The remonstrance describes the colony as a "healthy and fertile country," and "therefore well adapted and prepared to the support and easy subsistence of a multitude of families and many thousand souls, whereby, if peopled, it could be maintained and defended with a

small force; having, already, two tolerably well-built enclosed towns, one open town, and fifteen villages, besides divers extensive colonies, bouweries, and planatations inhabited by more than 8,000 souls, consisting of about 1,500 families, all natives and subjects of this state, who went thither to gain a livelihood and to settle on the promise of being sustained and protected."

1673. The Dutch this year temporarily reconquered and reoccupied the colony, and during such reoccupation the authorities of New Orange, in a communication to the States General, estimated the good Dutch inhabitants with women and children at 6,000 or 7,000 souls. This, apparently, did not include the English.

1678. Governor Andros estimated the number of men capable of bearing arms at 2,000. According to the usual ratio adopted in the colony, this would indicate a population of about 10,000.

1688. Jacob Leisler and Abraham Gouverneir in a memorial relating to colonial affairs in 1688 estimated the population at 8,000 families, out of which there might be raised 12,000 fighting men. This estimate indicates a larger family ratio than is suggested in other estimates. The ordinary estimate of militia is one to five of the population. This would indicate a population of 60,000 in 1688, and, if accurate, shows a remarkable increase of population in ten years.

1689. September 16, 1696, Leisler and Gouverneir made another statement in which they estimated that in 1689 the militia amounted to 12,000 or 14,000 men, and that the colony then had 8,000 or 9,000 families.

1693. Governor Fletcher, speaking of the decline in the colony and the removal of many inhabitants to other provinces, says: "We do now muster 3,000 men in this province," making an estimated population of 15,000. This showed a wide variance between the estimates made

by Leisler and Gouverneir in 1688, and, if both estimates are correct, indicates a remarkable loss of population in five years. But the Governor's estimate may refer only to the organized militia and not to the whole number of men of military age. It seems from a remark in Governor Fletcher's report that there had been a large migration from the colony to escape taxation, and that the people moved to other colonies which offered better inducements to settlers. Mr. Gouverneir in his memorial of 1696 attributes the unfortunate condition of affairs in part to the "oppression of the Governor."

1695. In November of this year the local government of New York sent Chidley Brook and W. Nicoll to England with an address to the Crown relating to colonial affairs. On the voyage they were captured by enemies, and threw the papers overboard; afterwards arriving in England, they prepared a short memorial relating to the object of their visit, in which they estimated that the colony then had 3,000 families, which probably indicated a population of at least 15,000.

1698. Attorney General Graham in a communication to Governor Bellomont, dated June 30, 1698, estimated that the colony then had at least 5,000 families.

1703. A general census was ordered in 1702, and also a separate census of militia, including male persons from fifteen to sixty years of age. The census was reported in 1703, and I believe this was the first regular census of the entire colony. According to this census the colony then had a population of 20,748.

1712, Another census was ordered, but it was not completed that year. Governor Hunter in a report dated the 12th of June, 1712, said he had been unable to obtain a complete census, "the people being deterred by a simple superstition and observation that the sickness followed upon the last numbering of the people." The records

show, however, that the census was taken either that year or within the next two years in all the counties except Queens. Estimating Queens on the basis of population of 1703, a probable ratio of increase, the total population of the colony at this time was 28,395.

1723. The census showed a population of 34,393 whites and 6,171 negroes and slaves, making a total of 40,564.

1731. The census this year showed a population of 43,040 whites and 7,202 blacks, making a total of 50,242.

1737. Whites 51,496, blacks 8,941, total 60,437.

1746. In a census taken this year Albany county was omitted, the statement being made in the report that it could not be numbered on "account of the enemy." Applying to Albany county the ratio of increase shown in the remainder of the colony, the total population amounted to 62,823 whites and 11,095 blacks, making a total of 73,918.

1756. Whites 83,233, blacks 13,542, total 96,775.

1771. Whites 148,124, blacks 19,883, total 168,007.

1774. No census was taken this year. Governor Tryon in a report dated June 11, 1774, on the affairs of the colony, answered several questions propounded by the home government, in one of which he was asked to state the number of inhabitants. He replied by quoting the last census, taken in 1771; then on an assumed ratio of increase he estimated the number of whites in 1774 at 161,102, and blacks at 21,149, making a total population of 182,251. The Governor was also asked to give a reason for the increase of population. Replying to this question, he said: "The reasons commonly assigned for the rapid population of the colonies are doubtless the principal causes of the great increase in this province. The high price of labor and the plenty and cheapness of new land fit for cultivation, as they increase the means of subsistence, are strong additional incitements to mar-

riage, and the people entering into that state more generally and at an earlier period of life than in Europe; the proportion of marriages and births so far exceeds that of populous countries that it has been computed the colonies double their inhabitants, by natural increase only, in twenty years. The increase in this colony has been nearly in the same proportion; but it cannot be denied that the accession to our numbers by emigrations from the neighboring colonies and from Europe has been considerable, though comparatively small compared with the number thus acquired by some of the southern colonies."

Governor Tryon's statement shows a prosperous condition of the colony, and his report is specially significant because apparently the last official communication relating to this subject prior to the Revolution. The impending conflict was rapidly drawing near, and the inquiry embraced in twenty-one questions submitted to him by the home government was clearly for the purpose of ascertaining colonial conditions, and especially the strength and resources of the people, who were already threatening resistence to the authority of the Crown. Colonial committees had already been appointed for general consultation, and a Continental Congress was about to meet in Philadelphia. The rapid movement of events clearly appears when we remember that scarcely ten months after Governor Tryon made his report, the war began at Lexington. The Governor's report is useful to us in forming an estimate of the strength of the colony at the beginning of the Revolution. In the same report he estimates the number of available militia at 32,000. It is impossible to deduce from the Governor's figures a satisfactory estimate of the military strength of the colony which might be available for supporting the patriot cause, for the reason that the loyalists must be deducted, and they constituted an unknown quantity.

1790. The first Federal census was taken this year, and showed that New York had a population of 340,120. The last colonial census was in 1771, nineteen years before, and showed a population of 168,007. The Federal census showed an increase of 172,113, from which it appears that the population of the colony and state had more than doubled during the period including the Revolutionary War and the subsequent seven years of peace. The enumeration of electors under the first state Constitution will be found in the article on apportionment. During this period the Federal census furnished the only evidence relating to the population of the state. The first state census of inhabitants was taken in 1825.

Conclusion.

I have now traced our colonial history through its entire period, and have noted the principal incidents directly connected with the constitutional development of the colony. Much history and many interesting facts have necessarily been omitted here because not deemed pertinent at this time. In subsequent chapters I shall often have occasion to refer to colonial history for the purpose of showing the foundations of policies which have since been incorporated in the Constitution, and many topics which have been mentioned only briefly in this chapter will there be more fully elucidated. The history of this early time must ever attract the attention of the student who wishes to examine the political and social development of Dutch and English society during the last three centuries. The events of the colonial period, unfolding in sequences which seem to mark the regular evolution of society, inspired with new aspirations for popular liberty and representative government, must forever stand as high expressions of the faith, and courage, and mutual sympathy of the only nations which, at that time, had

been touched and awakened by the new spirit of freedom. The Dutch and English ships that sailed into New York harbor brought the traditions, customs, and aspirations of two liberty-loving nations, and the Dutch and English governments transferred to New York, sometimes unwillingly, the free institutions which the colonists had so deeply cherished in the Fatherland. It was eighty-two years after Hudson discovered New York before constitutional government was permanently established, and this government continued eighty-four years under colonial conditions; the first Sloughter assembly, therefore, stands almost midway between the beginning and the end of the colonial period. Reforms do not go backwards, and once established, representative government could not be abandoned in New York.

The departments into which a free government is deemed most wisely divided—namely, the executive, the legislature with two branches, and an independent judiciary—had already existed eighty-six years when the people of New York determined to transform the colony into a state. They were, therefore, not called on to invent any new scheme of government. They took a form of government already in good working order, gave it a new name, and made the state.

Many interesting events occurred during the closing years of the colonial period, but they are so intimately interwoven with the events preceding and accompanying the Revolution that I have deemed it proper to consider them in the chapter on the first Constitution.

CHAPTER II.

The First Constitution, 1777.

The first Constitution of any free people possesses a peculiar interest; especially is this true when, as in the case of New York, the Constitution is the outgrowth and culmination of more than a century of struggle for popular liberty.

Our first Constitution also excites additional interest from the circumstances surrounding its preparation; for it was not framed, as most of the later state Constitutions were framed, to accomplish a peaceful transition from a territorial condition to statehood, and where the authors, with research and deliberation, worked out a plan of government based on the best models. The framers of our first Constitution worked in the stress of war and revolution and without a model, except as they may possibly have derived assistance from Constitutions of other states, recently adopted, but under which there had been little, if any, actual experience. Neither was it framed by experienced men of mature years, but by young men reared in luxury, and who had not enjoyed the opportunities of public service and acquaintance with details of public affairs. John Jay, who is understood to have been the chief author of the Constitution, was only thirty years of age, Robert R. Livingston, one of his colleagues, was only twenty-nine, and Gouverneur Morris, the other, was only twenty-four, when they were appointed on the committee to frame a form of government; yet these wise young patriots exercised a controlling influence in preparing a

Constitution which was the fundamental law of the state for forty-five years, and many of whose provisions have been continued without change in all subsequent Constitutions.

The first Constitution was framed, adopted, and put in operation by a congress, or convention, chosen by the people of the colony, and which, after three intermediate congresses, was the successor of the colonial legislature. The last Colonial Assembly was chosen under writs of election issued January 14, 1769, and returnable February 14. The assembly met for its first session April 4, 1769. It continued in session at different times until April 3, 1775, when it was prorogued until May 3, 1775. It was prorogued at different times afterwards until March 11, 1776, and then again till April 17, 1776, but it did not meet at that time, and never met after April 3, 1775. Events developing the Revolution were crowding each other rapidly during this period, and, in the absence of an assembly authorized to exercise legislative powers and attend to the affairs of the colony, the people assumed control, and at first by committees, and later through elected congresses, gradually worked out a plan of local administration of the colony, culminating in constitutional government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On the 1st of May the Committee of Sixty was increased to one hundred, and reorganized as a Provisional War Committee. This committee requested the people of the several counties of the colony to elect delegates to a Provincial Congress, to meet in New York on the 22d of May, 1775, "to deliberate upon, and from time to time to direct, such measures as may be expedient for our common safety."

This congress met at the time appointed at the Exchange in the city of New York. It is known as the First Provincial Congress, and it became substantially the successor of the Colonial Assembly, which had met for the last time on the 3d of the preceding April.

This congress, on the 18th of October, ordered an election of delegates by ballot, to constitute a new Provincial Congress, to meet November 14, 1775. The first congress adjourned on the 4th of November.

The second congress was organized on the 6th of December, and continued its sessions at different times until its final adjournment May 13, 1776.

In April, 1776, an election was held for delegates to constitute a new Provincial Congress, to meet on the 14th of May.

The Third Provincial Congress, owing to the failure of a sufficient number of members to attend, was not actually organized until May 22, 1776. It continued in session until June 30, 1776.

These congresses had no constitutional sanction, but were expedients resorted to by the people in a great emergency. The Colonial Assembly, which had existed as a component and essential part of colonial government for nearly a century, had been dissolved. Government by the people, in the manner so positively asserted in the Charter of Liberties, had apparently ceased, and the rights of the people had reverted to the people themselves. It should be noted as a significant fact, evincing the deepest patriotism and the most conservative self-poise, that in all this trying period, from the failure of real representative government in the old assembly to the institution of a regular form of government under the new state, there was no attempt by any committee or body of patriots to usurp the recognized rights of the people; but in all cases each delegation to the Continental

Congress, and each Provincial Congress, was composed of men chosen, either directly by the people, or by representatives of the people elected for that specific purpose; and the government and administration of colonial affairs exercised by the several Provincial Congresses were strictly representative, and recognized to the fullest extent the right of popular self-government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"AND WHEREAS, Doubts have arisen whether this Congress are invested with sufficient power and authority to deliberate and determine on so important a subject as the necessity of erecting and constituting a new form of government and internal police, to the exclusion of all foreign jurisdiction, dominion, and control whatever:

"AND WHEREAS, It appertains, of right, solely to the people of this colony to determine the said doubt: Therefore

"*Resolved*, That it be recommended to the electors of the several counties in this colony, by election in the

manner and form prescribed for the election of the present congress, either to authorize (in addition to the powers vested in this congress) their present deputies, or others in the stead of their present deputies, or either of them, to take into consideration the necessity and propriety of instituting such new government as in and by the said resolution of the Continental Congress is described and recommended. And if the majority of the counties by their deputies in Provincial Congress shall be of the opinion that such new government ought to be instituted and established, then to institute and establish such a government as they shall deem best calculated to secure the rights, liberties, and happiness of the good people of this colony, and to continue in force till a future peace with Great Britain shall render the same unnecessary. And

"*Resolved,* That the said elections in the several counties ought to be on such a day, and at such place or places, as by the committee of each county respectively shall be determined. And it is recommended to the said committees to fix such early days for the elections as that all the deputies to be elected have sufficient time to repair to the city of New York by the second Monday in July next, on which day all the said deputies ought punctually to give their attendance.

"AND WHEREAS, The object of the foregoing resolutions is of the utmost importance to the good people of this colony:

"*Resolved,* That it be, and it is, hereby earnestly recommended to the committees, freeholders, and other electors in the different counties of this colony, diligently to carry the same into execution.

"*Ordered,* That the foregoing resolutions be published in all public newspapers in this colony, and in handbills to be distributed in the counties."

This action shows a clear purpose to form a government by a representative body of undoubted authority, and is a high illustration of wise and conservative statesmanship. It is quite probable that, if this third congress had itself acted on the recommendation of the Continental Congress, and had erected a state government, such a government would have been accepted and recognized by the people; but the delegates to this congress had not been commissioned for such a purpose and had no express authority to institute a permanent government. They therefore wisely determined to go back to the people and obtain full and specific authority for themselves, or other representatives, to organize a government with the very clearest title, because coming directly from the people. The people did not reserve the right to ratify the action of their representatives, but clothed them with full authority to frame, erect, and put in operation such a government as they might deem best suited to the interests of the colony. The congress thus chosen combined in itself and exercised the double function of a constitutional convention and a legislature. It administered the affairs of the colony, and at the same time instituted a new government with a written constitution.

A constitutional convention is the highest representative body known to a free people, and may create or alter the legislative department of the government. This congress exercised legislative powers, and at the same time instituted a new government, providing a new legislature to succeed itself, thereby surrendering at the earliest opportunity the authority which had been committed to it by the election held in June, 1776.

On the 30th of June, 1776, the third congress, apprehending an attack on New York by the British, adjourned to White Plains, to meet there on the 2d of July, and

also directed that the fourth congress meet at the same place on Monday, the 8th of July. The third congress did not meet again after the 30th of June.

The Fourth Provincial Congress, which became the First Constitutional Convention, met at the court house in White Plains on the 9th of July, 1776. General Nathaniel Woodhull was chosen president, and John McKesson and Robert Benson secretaries. This was one of the most important bodies that ever assembled in this state. It had received a high commission from the people, namely, to institute an independent government in such form and with such component parts as might be best suited to the genius, the spirit, and the traditions of the colony.

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

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

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

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

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

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

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

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

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

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

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

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

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

Richmond.—Not represented.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Making a Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

concerning the proper scope and form of a written constitution.

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

Not adopted.

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

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

Adopted without change.

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

The words in brackets were erased in the original

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adopted without amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Gilbert Livingston offered the following substitute for this section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This provision appears as § 22.

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

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

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

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

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

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

"The General Assembly shall once in every year openly nominate and appoint one of the senators from each of the great districts which senators shall form a council for the appointment of the said officers, of which the governor for the time being or the lieutenant governor or president of the senate when they shall respectively administer the government shall be president and have a casting voice, but no other vote; and with the advice and consent of the said council shall appoint all the said officers, and that a majority of the said council be a quorum. And further that the same senators shall not be eligible to the same council for two years successively."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Ministers Disqualified from Holding Office.) A & B. And whereas the Ministers of the Gospel are by their Pro-

fession dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their Function. Therefore this Convention doth ordain and determine that no Minister of the Gospel or Priest of any denomination whatever shall at any Time hereafter under any pretense or description whatever be eligible to or capable of holding any civil or military office within this State [of any kind whatever.]

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

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

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

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

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

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

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

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

Draft A contained no provision on this subject.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Constitution Adopted.

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

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

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

Charlotte.—John Williams, Alexander Webster.

Cumberland.—Simon Stephens.

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

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

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

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

Tryon.—William Harper.

Ulster.—Christopher Tappen.

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

The Constitution was not submitted to the people, but took effect immediately, and, according to *Jackson ex dem. Russell* v. *White,* 20 Johns. 313, above cited, its adoption was deemed the origin of the state government. This day must therefore stand in history as

THE BIRTHDAY OF THE STATE OF NEW YORK,

SUNDAY, APRIL 20, 1777.

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

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

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

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

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

Government Established.

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

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

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

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

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

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

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

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

On the 8th of May the Convention adopted the following

ORDINANCE.

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

"*Therefore resolved,* That John Morin Scott, Robert

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"By Order of Convention.

"Abraham Ten Broeck, President.

"Attest. John McKesson, Sec'ry."

Convention Adjourns; Council of Safety.

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

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

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

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

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

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

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

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

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

Legislature Organized.

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

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

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

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

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

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

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

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

A quorum of members of assembly did not appear until

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

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

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

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

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

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

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

From Richmond county.—Joshua Mercereau; Abraham Jones.

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

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

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

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

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

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

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

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

The Hadden Case.

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

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

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

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

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

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

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

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

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

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

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

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

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

New Council of Safety.

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

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

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

Kingston, October 7, 1777.

Sir:—

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

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

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

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

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

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

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

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

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

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

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

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

Council's Proceedings Validated.

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

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

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

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

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

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

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

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

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

Another Council Recommended; Bill Vetoed.

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

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

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

Synopsis of Constitution.

The first Constitution was a brief instrument, and was limited to very few subjects. Some important provisions, notably those relating to the Council of Revision and the Council of Appointment, were added while the Constitution was under consideration by the Convention, and we learn from Mr. Jay's correspondence that he intended to suggest other additions, which he thought it

would be better to submit in convention than in the first draft, but he was called away by the death of his mother, and during his absence the Constitution was unexpectedly, and, as he thought, somewhat hastily, adopted. He afterwards expressed great regret that some other subjects had not been included. Omitting the preliminary part, consisting of the resolutions adopted by the Third Provincial Congress, providing for the election of the Convention, and the Declaration of Independence, which is quoted in full, the Constitution proper consists of forty-five short sections, or "articles," as they were then termed. The range of subjects treated is limited, and the powers conferred on the new government are quite meagerly expressed. The framers of the instrument seem to have taken the colonial government as they found it, and continued its principal features, while eliminating its royal characteristics. The judicial system of the colony, and also the county and town governments, were continued substantially as they then existed. It became necessary to construct a new legislature and provide a new executive. The skeleton of the new government was then complete, and the remainder of the Constitution either asserts abstract rights, or confers or limits power in matters of administrative detail.

The abstract rights asserted are few and briefly stated. In substance they are:

1. All power is derived from the people. This is fundamental in any system of representative popular government.

2. Each citizen is entitled to full protection in his individual rights; stating, in substance, the 39th article of Magna Charta.

3. Each citizen is entitled to the enjoyment of complete religious liberty.

4. The right of trial by jury shall remain inviolate forever.

5. General, but not universal, suffrage was established, and the legislature was authorized to provide for the use of ballots at elections, instead of voting *viva voce*, which was then the practice.

Three general departments of government were established, namely, the legislative, executive, and judicial. These three divisions were already familiar, both from English precedents, and from colonial experience for nearly a century. The influence of tradition and custom is shown by the unwillingness of the Constitution makers to vest in these departments the distinct and independent powers naturally belonging to them. They did not seem to appreciate fully the importance of a clear separation of the powers of the three great departments into which the government was divided. Subsequent experience and development have marked these lines of distinction with much more clearness than was apprehended by the framers of the first Constitution. There seems to have been an unwillingness to trust either the legislative or the executive department with its appropriate powers under a proper distribution of constitutional authority. The Constitution shows a manifest intention to reserve to and vest in each department some authority over the others. In a representative constitutional government, as now understood, the legislature is the supreme law-making power, subject to the possible check of an executive veto, which may sometimes prevent hasty, ill-considered, and unwise legislation; but even this check may be overcome by the legislature, if a given number of its members, arbitrarily fixed at two thirds, shall be in favor of enacting the statute, notwithstanding executive objections. The executive is charged with the duty of executing the laws, with only the limited veto check on legis-

lation. But both the legislative and executive branches are subject to indirect control or restraint, and may be kept in the path of constitutional duty, by the judiciary; for this branch of the government has the exalted function of determining whether a given statute violates the fundamental law as expressed in the Constitution, thus testing every statute by the principles established by the people for their government.

So clearly have these principles, specially applicable to each department, been enunciated in recent years, that it is now almost axiomatic that the supreme legislative power is vested in the senate and assembly, and that this legislative power cannot be delegated, except as authorized by the Constitution itself; that the functions of the governor are executive, and not legislative, except to the extent of the veto power, and not judicial, except generally in determining questions affecting removals from office, and in the exercise of the pardoning power; and that the functions of the courts are judicial only, and not administrative. The framers of the first Constitution, perhaps from a lack of an apprehension of these principles, now so familiar, and possibly, also, from a lack of experience necessarily incident to pioneer conditions, combined these functions in the several departments in a manner which would not now be tolerated in framing a well-ordered scheme of representative government. They not only made the legislature the lawmaking power, but they vested it with executive functions through the Council of Appointment, composed of four senators chosen annually by the assembly. They gave the higher courts, not only judicial powers, but also authority over legislation through the Council of Revision, composed of the governor, the chancellor, and the judges of the supreme court. By these two contrivances the power of the governor was limited in two very im-

portant particulars; namely: He was deprived of the full veto power, for he might be overruled by the judges in the Council of Revision; and he was deprived of the responsibility for official appointments, by being made subject to the control of the Council of Appointment.

The Constitution contains a few details concerning the separate powers of the senate and assembly, including the power of the assembly to select the members of the Council of Appointment, and to present articles of impeachment. The legislature was to elect the state treasurer; it was also given control over contracts with Indians; and might naturalize aliens; but this right of naturalization was soon superseded by the Federal Constitution. The legislature was prohibited from passing acts of attainder, and from instituting any courts, except those which proceeded according to the common law. Terms of judicial officers were established, and provision was made for the choice of state, county, and town officers. The English common law was continued, and English grants were confirmed. Provision was also made for a state militia; and a curious provision was inserted, by which clergymen were excluded from the right to hold office.

It will be observed that the first Constitution was quite limited in its scope, and many subjects now deemed important were omitted. It was, however, sufficiently elastic to permit the expansion and growth of a great state, and it is a high tribute to the patience, good sense, and patriotism of the men who framed it, and of the men who administered the government under it through a third of the history of the state, that the only amendment in forty-five years was for the purpose of reducing and limiting the number of members of the senate and assembly.

The Jays, the Livingstons, the Morrises, the Clintons,

the Gansevoorts, the Schuylers, the Van Cortlandts, the Van Rensselaers, the Roosevelts, the Spencers, the Lansings, the Lewises, the Ten Broecks, Duane, Scott, Kent, Hamilton, Tompkins, Burr, and others who constructed, set in motion, and maintained this simple machinery of government, did not need elaborate descriptions or limitations of power. They had a Constitution which gave them the right of self-government, and they knew how to use that right judiciously. There was placed in their hands a state to govern and improve, and they appreciated its possibilities and the importance of the trust reposed in them. The Constitution was sufficient for their needs. They were almost wholly unrestrained, for it will be noted that the restrictions in the first Constitution related chiefly to immaterial subjects which soon became obsolete. They did not need to tie their own hands, for they could trust themselves. The simple brevity, the "unsuspecting simplicity," of the first Constitution is in striking contrast to the prolixity of some modern Constitutions, which evince a misapprehension of the real purpose of a written constitution, namely, to state principles of government in general terms, and not with the fluctuating detail necessarily incident to statutes intended to meet shifting conditions of society or administration. Under this Constitution, despite its limitations, the state had a remarkable development. It witnessed the growth and enlargement of our unsurpassed system of jurisprudence, molded by the genius of Kent, with the aid of his distinguished associates in the judiciary. Under it were established the university and the common school; and colleges, academies, and libraries were nourished and encouraged. The care of the poor and other unfortunates was provided for by a system of administration which in its essential features has continued to this day. A system of taxation was estab-

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