THE JUDICIAL DEPARTMENT OF GOVERNMENT AS PROVIDED BY THE CONSTITUTION OF IOWA

Most State Constitutions provide that the powers of government shall be divided into three separate and distinct branches, namely, the legislative, the executive, and the judicial, and that the persons exercising the powers of the one shall not exercise any of the powers belonging to either of the others unless this is expressly provided for in the Constitution. The judicial, the last of these branches, has to do with the interpretation of the law. The creation of a department of government which is neither concerned with the making nor the enforcement of the law has been regarded as an essential safeguard to both the personal and property rights of the citizen.

Although most Constitutions provide that the three branches of government shall be separate and distinct, and that no one branch shall exercise the powers of the others, they are, however, to a more or less degree dependent upon one another. The judicial department is ultimately dependent upon the executive department for the enforcement of its decisions. Likewise it must depend upon the legislative department to raise the funds necessary for its maintenance and to enable it to discharge the functions for which it was created.

The functions of the judicial department of the government are discharged through a system of courts. In the United States, each State has its own judicial system framed according to its own local needs. Ordinarily this would tend to create a wide diversity in the organization

and operation of the judiciary in the various States, but owing to the fact that the judicial systems of these States have the Common Law as their basis, there is a close similarity among them. In general the courts in the different States are arranged by rank or grade according to the importance of the cases to be handled by each; cases of the highest importance being delegated to the courts of highest rank. In Iowa, as will be seen, the judicial system is very similar to those systems which have been established in the other States.

THE JUDICIARY OF IOWA AS PROVIDED IN THE ORGANIC ACT OF 1838

The Organic Act of June 12, 1838, under which Iowa was established as an independent Territory, vested the judicial power of the Territorial government in a Supreme Court, district courts, probate courts, and justice of the peace courts. By and with the advice and consent of the Council the Governor of the Territory was empowered to appoint all judicial officers (except justices of the Supreme Court, attorney, and marshal), justices of the peace, sheriffs, and militia officers. All vacancies occurring in these offices during the recess of the Council were to be filled by the Governor, and all persons appointed to fill such vacancies continued in office until the next session of the Legislative Assembly. Under the provisions of the Organic Act both the appellate and original jurisdiction of the courts was to be defined by legislative enactment. The Supreme Court and district courts were given a chancery (equity) as well as a Common Law jurisdiction. Justice of the peace courts were denied original jurisdiction in all controversies where titles or boundaries were in dispute, or in which the amount in question exceeded the sum of fifty dollars.[1]

The Organic Act also provided for the appointment of an

[1] *Laws of the Territory of Iowa,* 1838-1839, pp. 34–36.

Attorney and a Marshal by the President of the United States with the consent of the United States Senate. The term of office for these officials was four years unless sooner removed by the President. These officials appointed for the Territory of Iowa were to perform the same duties, be subject to the same restrictions and penalties, and to receive fees on the same basis as were then received by corresponding officials of the Territory of Wisconsin. It was further provided that all justices of the peace, sheriffs, constables, and other judicial officers who were in office in the Territory of Wisconsin west of the Mississippi River at the time the new Territorial government went into operation, were to continue in office until they were reappointed or others selected to take their places. No such officer, however, was to continue in office longer than twelve months without reappointment to office. The Governor of Iowa Territory was given power to define temporarily the judicial districts of the Territory and to assign the judges who were appointed to the several districts, as well as to set the time for holding court in the various counties in each judicial district. After temporary organization was effected the power to reorganize, alter, or modify judicial districts; to assign judges, and to change the time for holding courts was vested in the Legislative Assembly. Such action could be taken at its first session or at any subsequent session. Under the Territorial government all judicial officers were required to take an oath of office to support the Constitution of the United States and to discharge faithfully the duties of their respective offices.[2]

The District Court.— The Organic Act of June 12, 1838, divided the Territory of Iowa into three judicial districts, and provided that a district court should be held in each.

[2] *Laws of the Territory of Iowa*, 1838-1839, pp. 36, 37, 38, 39, 40.

The number of districts corresponded with the number of judges of the Supreme Court, and each judge was to preside over the district court to be held in the district to which he was assigned. The judge assigned to one of these three districts, the Organic Act prescribed, must reside in the district to which he was appointed. Each district court was authorized to appoint a clerk who was to keep his office at the place where the court held its sessions. The clerks of the district court were also to be the registers in chancery. In case of vacancy in the office of clerk during the vacation of the court the judge of the district court was authorized to fill such vacancy, and the appointment so made was to continue until the next term of the court. The district courts of the Territory of Iowa were to have and to exercise the same jurisdiction as the circuit and district courts of the United States in all cases arising under the Constitution and laws of the Federal government. The first six days of the district court or as much of that time as was necessary was set aside for the trial of cases arising under the Constitution and laws of the United States. Writs of error and appeals from the decisions of the district court in these cases had to be made to the Supreme Court of the Territory.[3]

All suits, process, and proceedings, and all indictments and informations filed with the district courts of Wisconsin Territory west of the Mississippi River and still undetermined at the time that the new Territory was organized, were transferred to the district courts of Iowa Territory to be tried, prosecuted, and determined. In all cases where the demand was made the Organic Act provided that writs of error, bills of exception, and appeals in chancery were to be allowed from the decisions of the district courts to the Supreme Court of the Territory in the manner to be pre-

[3] *Laws of the Territory of Iowa,* 1838-1839, pp. 35, 36, 37, 38, 39, 40.

scribed by law, but in no case was trial by jury to be allowed in the Supreme Court.[4]

The Supreme Court.— The Organic Act of Iowa also provided for a Supreme Court to consist of three judges — one chief justice and two associate judges. These judges were appointed for a term of four years by the President with the consent of the Senate. Each judge before entering upon his duties had to take an oath of office to support the Constitution of the United States and to discharge faithfully the duties of his office. Any two of the judges constituted a quorum for the transaction of the business of the court. One term of the court was required to be held annually at the seat of government.[5]

The annual salary of the chief justice of the Supreme Court and of the associate judges was fifteen hundred dollars to be paid quarterly out of the treasury of the United States. The court was authorized to appoint its own clerk who was to hold office at the pleasure of the court. All cases from the counties of the Territory of Wisconsin lying west of the Mississippi River which were brought before the Supreme Court of that Territory and remained undetermined on July 3, 1838, were removed to the Supreme Court of the Territory of Iowa, and there determined upon in the same manner as they would have been proceeded upon in the former court. Writs of error and appeals from the final decisions of the Territorial Supreme Court in cases where the amount in controversy exceeded one thousand dollars could be carried to the Supreme Court of the United States in the same manner as prescribed for appeals from the Circuit Court of the United States.[6]

[4] *Laws of the Territory of Iowa,* 1838-1839, pp. 34–36, 38.

[5] *Laws of the Territory of Iowa,* 1838-1839, pp. 34–36.

[6] *Laws of the Territory of Iowa,* 1838-1839, pp. 34–36, 38, 39.

The judicial system as thus prescribed for the Territory of Iowa was very similar to those which had been set up for Territories organized prior to this time. They were the creation of Congress and were arranged in a graded series, consisting of the Supreme Court, the highest in rank, the district courts, the probate courts, and the justice of the peace courts.

THE JUDICIARY OF IOWA AS PROVIDED BY THE CONSTITUTION OF 1844

Soon after the formation of Iowa as a separate Territory agitation was started for State organization. It was not, however, until April, 1844, that the people of the Territory voted in favor of a Constitutional Convention for the purpose of drawing up a Constitution preparatory to admission to the Union. Under the Act of February 12, 1844, and the amendment thereto of June 19, 1844, seventy-three delegates were elected to a Constitutional Convention to assemble at Iowa City, the seat of the government, on October 7, 1844.[7] Most of the delegates assembled at the Capitol building on the date set. The Convention was called to order at two o'clock in the afternoon and temporary organization effected. On the following day permanent organization took place and the work of the Convention was soon under way. One of its important problems was to provide a satisfactory judicial system for the proposed Commonwealth.[8]

Prominent among the standing committees provided for in the rules adopted by the Convention was that on the judiciary department. As members of this committee President Shepherd Leffler appointed Jonathan C. Hall,

[7] Shambaugh's *Documentary Material Relating to the History of Iowa,* Vol. I, pp. 133–149.

[8] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846,* pp. 7, 8.

James Grant, James Clarke, Stephen Hempstead, Stephen B. Shelledy, Jonathan E. Fletcher, and Andrew W. Campbell.[9] On the day following the appointment of this committee a resolution was referred to them for consideration, which read as follows:

> *Resolved,* That there be established in each organized county in the state, a county court, to be composed of the justices of the peace of the several townships, to whom shall be assigned by law, the county and probate business, for the purposes aforesaid, meeting at stated periods without any additional compensation.
>
> That all roads laid out under a special act of the Legislature, shall be at the expense of the state.

The committee in reporting upon this resolution expressed the opinion that it should more properly be referred to the Committee on County Organization and they were relieved from further consideration of it.[10] Later, a resolution was introduced but not referred, which asked that the "Judicial committee be instructed to inquire into the expediency of inserting an article in the Constitution authorizing the Legislature, so to provide, that all crimes of a less degree than felony shall be triable upon information of the District Attorney, of the proper county, without the intervention of a Grand Jury."[11] As this resolution was not referred, it was not necessary for the Judicial Committee to give it consideration.

On Saturday morning, October 12th, or three days following the appointment of the Committee on the Judiciary,[12] it was ready with its report on this important phase of the

[9] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, p. 14.

[10] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 17, 30.

[11] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, p. 33.

[12] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 14, 35.

Constitution. The report as presented consisted of eighteen sections and read as follows:

ON THE JUDICIARY

1. The Judicial power of this State both as to matter of law and Equity, shall be vested in a Supreme and District Courts, and such other inferior courts as the Legislature may from time to time establish.

2. The Supreme Court shall consist of a Chief Justice and three Associate Justices, any two of whom shall be a quorum to hold court, except as hereinafter provided. The Supreme Court shall have appellate jurisdiction in all cases in Chancery and constitute a Supreme Court, for the correction of errors in all cases at law, under such restrictions as the Legislature may from time to time prescribe.

3. The Supreme Court shall have power to issue all writs and process that may be necessary to do justice to parties having the rights of citizens, and exercise a complete supervisory power over all inferior Judicial tribunals.

4. The Supreme Court shall hold at least one term of said court in each year, at the seat of government, at such time as may be fixed by law. *Provided,* The Legislature may provide for two terms in each year.

5. The Judges of the Supreme Court shall be conservators of the peace throughout the State.

6. The District Court shall consist of a President Judge, who shall reside in the district that shall be assigned to him by law, the District Court shall have common law and chancery jurisdiction in all civil and criminal matters arising in the respective counties in their district, as shall be prescribed by law. The Judges shall be conservators of the peace in their respective districts — shall have power to issue writs of injunction, ne exeat republico, habeas corpus, mandamus, procedendo and certiorari, and such other common law writs as may be necessary to do justice to parties.

7. The Judges of the Supreme Court and District Courts, shall be elected by the joint vote of the Senate and House of Representatives, and hold their office for the term of six years. Which vote shall be viva voce, and entered on the Journal of the House of Representatives: *Provided,* That the Legislature may, at their dis-

cretion, pass a law authorizing the election of district judges, by the people of the district within which said judges are to preside.

8. There shall be elected in each county of this State, one Probate Judge, who shall have jurisdiction over Wills and Administration, shall hold his office for the term of four years, and until his successor shall be elected and qualified.

9. The Judge of Probate in the absence of the Judge of the District Court, may allow writs of injunction, ne exeat republico, habeas corpus, and do such other acts as may be prescribed by law.

10. There shall be elected in each county one Clerk of the District Court, who shall hold his office for the term of four years and until his successor is elected and qualified.

11. There shall be a Prosecuting Attorney elected by the people for each county, who shall hold his office for four years.

12. The State shall be divided into four Judicial Districts, and the Judges of the Supreme Court shall be assigned by law to respective districts, and shall perform the duties of district judges in such district for the term of six years from the time of the first election of judges under this constitution, after which the Legislature may at their discretion, elect district judges for such district: *Provided,* That the Legislature shall have power to make such other and additional districts as they may deem necessary, and elect judges of the District Court for such new district. The Judge of the Supreme Court, who tried the cause in the district court, shall not set upon the trial of the same case in the Supreme Court.

13. When any vacancy shall happen in the office of Clerk of the district court, such vacancy shall be filled by a pro tem. appointment of the Judge of said court, the Clerk so appointed shall exercise the duties of the office until a Clerk shall be duly elected and qualified.

14. When any vacancy shall happen in any of the courts by the death, resignation or removal from office of any judge, the Governor shall fill such vacancy by appointing some person to fill said office. The Judge so appointed shall hold the office until a successor shall be duly elected and qualified.

15. The compensation of Judges of the Supreme Court and District Court, shall be one thousand dollars per annum, to be paid quarterly: *Provided,* That the Legislature may levy a tax upon all causes that may be brought into the Supreme or District Courts,

not exceeding two dollars on each case, to be paid by the loosing parties or by the plaintiff in the suit, and from said fund increase the salaries of the judges to any sum not exceeding one thousand five hundred dollars.

16. The Judges of the Supreme Court shall appoint a Clerk who shall reside at the seat of government, and hold his office during the pleasure of the Court.

17. The style of all process shall be "The State of Iowa," and all prosecutions shall be carried on in the name and by the authority of the State of Iowa.

18. The Judges of the several courts and clerks shall be removable by impeachment, by the Legislature, or such tribunal as the Legislature may establish, and during the pendency of any impeachment the accused shall be suspended from discharging the duties of the office.[13]

Four days following the presentation of this report a minority report of the Committee on the Judiciary was presented by Jonathan E. Fletcher. The minority report consisted of but thirteen sections and read as follows:

MINORITY REPORT OF THE COMMITTEE ON THE JUDICIARY

1. The Judicial power of this State shall be vested in a Supreme Court and courts of Common Pleas, and in such inferior courts as the Legislature may, from time to time, ordain and establish.

2. The Supreme Court shall consist of a Chief Justice, and two associate justices, any two of whom shall constitute a quorum and shall have jurisdiction, co-extensive with the limits of the State, under such restrictions and regulations as may, from time to time, be prescribed by law.

3. The courts of Common Pleas shall consist of a President Judge, and two associate judges; the President Judge alone, in the absence of the associate judges, or the President Judge and one of the associate judges, in the absence of the other, shall be competent to hold a court, and the two associate judges, in the absence of the President, shall be competent to hold a court, except in capital cases and cases in chancery.

4. The President and associate judges, of the courts of Common

[13] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 35–37.

Pleas, in their respective counties, shall have civil law and chancery jurisdiction, and also criminal jurisdiction in all such cases, and in such manner as may be prescribed by law.

5. The Judges of the Supreme Court shall, by virtue of their offices, be conservators of the peace throughout the State, as also the President Judges in their respective districts, and the associate judges in their respective counties.

6. The Judges of the Supreme Court shall be elected by the qualified voters of the State, and shall hold their office during the term of seven years.

7. The State shall be divided into three convenient judicial districts, and there shall be elected by the qualified electors, one judge in each district, who shall preside over the courts of Common Pleas in the several counties in the district, to hold his office during the term of five years; *Provided,* That nothing in this article shall be construed as to prohibit the legislature from increasing the number of districts hereafter.

8. The Associate Judges, of the courts of Common Pleas shall be elected by the qualified electors of the respective counties, and shall hold their office for the term of two years.

9. There shall be elected in each county, by the qualified electors therein, a clerk of the court of Common Pleas, to hold his office for the term of five years.

10. The Judges of the Supreme Court shall appoint a clerk, who shall hold his office during their pleasure.

11. The Judges of the Supreme Court shall receive, as a compensation for their services, the sum of ———— dollars per annum. The President Judges of the Court of Common Pleas shall receive the sum of ———— dollars per annum, and the associate judges of the Courts of Common Pleas, shall receive the sum of ———— dollars per day, while engaged in the duties of their respective offices.

12. There shall be no election of the Judges of the Supreme Court until after the first session of the Legislature of this State, and until the Legislature shall otherwise prescribe by law, the powers of the Supreme Court shall be vested in, and its duties shall be performed by the President Judges of the several judicial districts, and they, or the majority of them, shall hold such sessions of the Supreme Court as may be prescribed by law.

13. The style of all process shall be "the State of Iowa." All prosecutions shall be carried on in the name and by the authority of "the people of the State of Iowa," and conclude "against the peace and dignity of the same."[14]

The chief points of difference between the two reports was that the first provided for a Chief Justice and three associate justices of the Supreme Court, whereas the minority report provided for a Chief Justice and two associate justices. Under the provisions of the former the Supreme Court judges were to be elected by a joint vote of the House of Representatives subject, however, to change by legislative action so as to make them elective by popular vote, whereas the latter made all judges elective by the people. The term of office for judges in the different courts did not correspond in the two reports. Moreover, the majority report provided for the division of the State into four judicial districts while the minority report provided for only three. A further difference between the two reports was that the majority report provided for the election of a Prosecuting Attorney, the impeachment of judges, and the filling of vacancies by the Governor while the minority report made no such provisions whatever.

Before any action was taken upon either of the reports James Grant, member of the Committee on the Judiciary, offered the following resolutions:

1. *Resolved,* That the Judiciary Department of the Government, shall consist of a Supreme Court, District Courts, and such inferior courts as the Legislature shall, from time to time, establish.

2. The Supreme Court shall consist of three judges who shall be elected by joint ballot of the legislature, and shall be a court of errors to settle questions of law and equity. Their sessions shall be at the seat of Government; and they shall appoint their own clerk.

3. The District Court shall consist of one judge, who shall be

[14] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 65–67.

elected by joint ballot as aforesaid; the jurisdiction of said court shall be limited by law; the clerks of said court shall be elected by the people.

4. The term of office of said judges, of Supreme and District courts shall be for six years.

5. The Judges of the Supreme Court shall not perform the duties of judges of the District Court.[15]

Finally when the Convention came to a consideration of the Article on the Judiciary, section one relating to the distribution of the judicial power was adopted in essentially the same form as it appeared in the majority report. A few verbal changes of no importance were made. Section two, relating to the composition of the Supreme Court, was amended so as to reduce the number of associate judges from three to two, and to cause the sessions of the court to be held at the seat of government at such time as the Legislative Assembly should prescribe. It was further provided in this section that the Judges of the Supreme Court should appoint a clerk who would hold office during their pleasure. The section as revised was really a combination of sections two, four, and sixteen of the report of the majority of the Committee. Section three of the Article on the Judiciary which deals with the jurisdiction of the Supreme Court was a combination of sections three and five of the majority report. So far as is shown by the records of the debates these sections of the report created no discussion in the Convention.[16]

When sections six and seven of the majority report, which provided for the election of judges and the organization and jurisdiction of the district courts, were taken up,

[15] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 86, 87.

[16] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 35–37, 197, 198; Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846,* p. 103.

Stephen Hempstead proposed a substitute in which he would make the judges elective by the people. He believed that in a republican or democratic government all power resided in the people who were the real sovereigns. He could not see why, if the people were capable of electing their legislators, they would not be capable of choosing their judges. Besides, election by joint ballot of the legislature was one of the most corrupt methods of selecting public officials ever devised. He then pointed out a number of instances where such elections had been conducive to corruption.

Gideon S. Bailey did not doubt the capacity of the people to elect their own judges, but he feared the influence of politics and he did not think that the people cared for this privilege. Consequently he did not believe in giving them something for which they did not ask.

Richard Quinton believed that the ends of justice would be better served through the election of judges by the people than by the legislature.

Ex-Governor Lucas did not accept the opinion that the people were not capable of electing their judicial officers, but he thought that it was the intention of the Convention to establish an independent Supreme Court; and to accomplish this end he believed it would be better to have the judges elected by a joint ballot of the legislature.

J. S. Kirkpatrick opposed the selection of judges by the legislature because he believed that it was "wrong both in principle and in policy, as it had a tendency to tramel, and change the nature of our elections, and tinge in some degree the most brilliant feature of a representative government." He declared himself against the "mode of voting by proxy." One of the finest features of the government, he said, was the fact that the electorate could select men according to their liking, who were qualified to fill the respective offices.

On the other hand if the representatives and judges were to be bound together in their election, the people might vote for a certain representative "who was unfit to make laws, simply because he pledged himself to vote for a favorite candidate for judge". Mr. Kirkpatrick further believed that the election of judges by the people was the greatest and surest protection against corruption that could be offered. "The people were more immediately interested with this department of government; here we applied to have our wrongs redressed, and our rights defended; here character and life and death were put at stake. We should choose our judges ourselves and bring them often to the ballot box."

Thos. J. McKean favored the election by the legislature of judges of both the Supreme and district courts. The only argument in his estimation in favor of the popular election of judges was that the people were the possessors of sovereign power, and should therefore logically elect all of their officers. But, he pointed out, the fact that the people possessed sovereign power did not necessarily mean that they should exercise this power directly in every instance. To do so "would lead to results, fatal alike to the stability of the government and to the rights and liberties of the individual citizen."

Although the qualified electors were regarded as being the people, in point of fact they were only a portion of the people: under the Territorial government only about one-eighth of the population constituted the electorate. Fully eighty-seven per cent of the people would have nothing to do with the selection of judges, yet they would be as much affected by its decisions as the qualified voters would be. If the judges were to be popularly elected, every resident of the State should have an opportunity to participate in their election. This would not be feasible, of course. This

objection, Mr. McKean explained, could not be raised against the election of members of the General Assembly because the object of this department of government was to ferret out public opinion and to formulate it into law. "Its action is upon general subjects, affecting whole classes of people, while the judiciary decides individual cases, affecting individuals directly. The Legislature, though chosen only by the voters, represents the people who could make themselves heard by petition and remonstrance, or direct by instructions; the business of the Judiciary was to decide between the people and the individual. In order to make the Legislature better acquainted with the interests and wishes of the people, the power of choosing Representatives was delegated to small districts. But judicial decisions should never be influenced by local interests. There was no analogy between the objects or duties of the two departments, and there could be no reason why they should be elected in the same manner."

After continued discussion upon this subject a compromise was finally reached in which it was decided that the judges of the district courts should be elected by the qualified voters of the districts over which they were to preside, and that judges of the Supreme Court should be elected by a joint ballot of the legislature. Owing to the fact that section five of the majority report was combined with section three, sections six and seven now became sections four and five of the Article on the Judiciary.[17]

When section eight of the majority report, which provided for the election of a probate judge in each county, was being considered, it was enlarged by being combined with sections ten, eleven, thirteen, and fourteen dealing

[17] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 104–122; Shambaugh's *History of the Constitutions of Iowa*, pp. 208–212; *Journal of the Convention for the Formation of a Constitution for the State of Iowa*, 1844, pp. 35, 36, 108, 113–118.

respectively with the election of a clerk of the district court, the prosecuting attorney, vacancies in the office of clerk of the district court, and vacancies in the office of judge in the courts. The section as finally agreed upon by the Convention read:

> There shall be elected in each county, one Judge of Probate, one Prosecuting Attorney, and one Clerk of the District Court, who shall continue in office for two years, and until their successors are elected and qualified. Vacancies in the office of Clerk shall be filled by appointment by the Judge of the District Court, and such appointments shall continue, until a successor is elected and qualified.

The terms of these officers were by these provisions reduced from four to two years.[18] This section appears as section six of the Article on the Judiciary.

One other provision of the majority report on the judiciary was retained by the Convention in its consideration of this important Article. Section seventeen, which read: "The style of all process shall be 'The State of Iowa', and all prosecutions shall be carried on in the name and by the authority of the State of Iowa", was adopted by the Convention in substantially this form as section seven, the final section of the Article on the Judiciary in the Constitution of 1844.[19] The Convention completed its labors on the last day of October after a session of twenty-five days. The Article on the Judiciary as it appeared in the new Constitution read:

JUDICIAL DEPARTMENT

1. The Judicial power shall be vested in a Supreme Court, District Courts, and such other inferior courts, as the Legislature may from time to time establish.

2. The Supreme Court shall consist of a Chief Justice and two Associates, two of whom shall be a quorum to hold court.

[18] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 36, 37, 114, 115, 198.

[19] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 37, 115, 198.

The Supreme Court shall have appellate jurisdiction only, in all cases in chancery, and constitute a court for the correction of errors at law, under such restrictions as the General Assembly may by law prescribe.

The sessions of the court shall be at the Seat of Government, at such times as may be fixed by law; and the Judges thereof shall appoint a Clerk, who shall hold his office during their pleasure.

3. The Supreme Court shall have power to issue all writs and process necessary to do justice to parties, and exercise a supervisory control over all inferior judicial tribunals. The Judges of the Supreme Court shall be conservators of the peace throughout the State.

4. The District Court shall consist of a Judge, who shall reside in the district assigned him by law, be elected by the qualified voters thereof, and hold his office for the term of four years, until his successor is elected and qualified.

The District Court shall be a court of law and equity, and have jurisdiction in all civil and criminal matters arising in the respective counties in the district, in such manner as shall be prescribed by law. The Judges of the District Court shall be conservators of the peace in their respective districts.

The first session of the General Assembly shall divide the State into three districts, which shall be increased as the exigencies of the State may require.

5. The Judges of the Supreme Court shall be elected by joint vote of the General Assembly, and shall hold their offices for the term of four years, and until their successors are elected and qualified.

6. There shall be elected in each county, one Judge of Probate, one Prosecuting Attorney, and one Clerk of the District Court, who shall continue in office for two years, and until their successors are elected and qualified. Vacancies in the office of Clerk shall be filled by appointment by the Judge of the District Court, and such appointments shall continue, until a successor is elected and qualified.

7. The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.[20]

[20] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1844, pp. 197, 198.

As will be seen by an examination of this article, its provisions would have entirely reorganized the judicial system as it existed under the Territorial government. In the Territory the judges of the district court were members of the Supreme Court while under the new Constitution separate judges were provided for each court. This was done to prevent a judge from passing upon a decision which he had rendered in a lower court. The manner of selecting judges was also changed, district judges being made elective by popular vote. This was a question which not only created discussion in the Convention but also in the press.

The Iowa Capitol Reporter in commenting upon the constitutional provisions for a judiciary declared that "the organization of the Courts meets our entire approbation." This paper was in favor of the provision which made district judges elective by the people and concluded by saying: "we are determined to give it [the new Constitution] our decided support, and wish to see its unanimous adoption by the people." In another issue of the same paper the following comments were made:

> We publish in this number that part of the Constitution of Iowa which related to the judiciary department.
>
> In relation to making the Supreme court independent of the District court organization, we think that the people will generally approve of this provision. It would seem to be proper in case of writs of error from inferior jurisdiction, that the same judge sitting in a Supreme Court should not have an interest to sustain a decision, made by himself, while sitting in an inferior jurisdiction.
>
> In regard to making the Supreme judges' election by the legislature and the inferior judges by the people, although it is a departure from the ancient practice, it may meet the approbation of the public.
>
> The limitation to a term of office in the judicial department we think a decided improvement upon ancient usages.[21]

[21] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 210, 211, 221.

The *Dubuque Transcript*, on the contrary, objected to the election of judges by the people, regarding this provision as sufficiently obnoxious to warrant the rejection of the entire Constitution. The *Burlington Hawk-Eye* set itself "uncompromisingly against the whole construction of the Judiciary", as well as the provision making judges subject to popular election.[22]

Both by the public and by the press many similar criticisms were made of this portion of the new Constitution. Many regarded the office of judge as being too sacred to be mixed with partisan politics. Judges should not be made directly responsible to the electorate for their actions. While there were other objections to the proposed Constitution, it must be conceded that the proposed reorganization of the judicial department contributed toward the defeat of the new instrument of government. Although the Constitution of 1844 was submitted to the people at two different times for their approval, it was rejected each time, and as a consequence never functioned.[23]

THE JUDICIAL DEPARTMENT AS PROVIDED BY THE CONSTITUTION OF 1846

Although the Constitution of 1844 had been twice rejected by the people this fact did not operate as a check to the movement toward State organization. The advocates of statehood were persistent in their efforts and on January 17, 1846, an act passed by the Territorial legislature was approved which provided for the election of thirty-two delegates at the township elections in April. Those so chosen were to assemble at Iowa City on May 4th of that year for the purpose of drafting a new Constitution for the proposed

[22] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 211, 212, 213.

[23] Swisher's *The Judiciary of the Territory of Iowa* in THE IOWA JOURNAL OF HISTORY AND POLITICS, Vol. XX, p. 273; Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, p. 376.

State. The delegates chosen at this election, in accordance with the provisions of the act of January 17, 1846, assembled at the Territorial Capitol on the 4th day of May.[24]

Permanent organization was soon effected, and to prevent delays the rules of the Convention of 1844 were adopted. Six standing committees were determined upon, among which was the Committee on the Judicial Department. The members appointed to this committee by President Enos Lowe were: Henry P. Haun, David Galland, Erastus Hoskins, Sanford Harned, and Francis K. O'Ferrall.[25] Of these members three were Democrats and two were Whigs. This is in keeping with the fact that the majority of delegates to the Convention were Democrats. Only two of the five members were lawyers; one being a physician, another a merchant, and the other a farmer.[26] The report of this select group of individuals was prepared promptly, and on the day following their appointment Mr. Haun, chairman of the committee, made the following report to the Convention concerning the Article on the Judiciary:

> 1st. The Judicial power shall be vested in a Supreme Court, District Courts, and such other inferior courts, as the Legislature may from time to time establish.

[24] Shambaugh's *Documentary Material Relating to the History of Iowa,* Vol. I, pp. 185–190.

[25] Erbe's *Constitutional Provisions for the Suffrage in Iowa* in THE IOWA JOURNAL OF HISTORY AND POLITICS, Vol. XXII, p. 177; *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1846, pp. xx, 30.

[26] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846,* pp. 413–415; *The Iowa State Almanac and Statistical Register* for 1860, p. 19. The latter reference lists Erastus Hoskins as a Democrat whereas the former regards him as a Whig. In the election of a President for the Convention, Mr. Hoskins voted for the Democratic candidate. He is therefore regarded as a Democrat in this monograph. If perchance he was a Whig then the majority of the Committee on the Judiciary were Whigs which is not likely to be true in a Democratic convention.

2nd. The Supreme Court shall consist of a Chief Justice and two Associates, two of whom shall be a quorum to hold court.

3rd. The Judges of the Supreme Court to be elected by the qualified voters of the State, at a general election for State officers, to hold their courts within each Judicial district of the State, at such place as the Judges may choose, to hold their offices for five years, and until their successors are elected and qualified, and each to receive a salary of twelve hundred dollars per year, for the first five years, after which time, the General Assembly to fix their salaries. The Supreme Court shall have appellate jurisdiction only, in all cases in Chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the General Assembly may by law prescribe. The Supreme Court shall have power to issue all writs and process necessary to do justice to parties, and exercise a supervisory control over all inferior judicial tribunals, and the Judges of the Supreme Court shall be conservators of the peace throughout the State.

4th. The District Court shall consist of a Judge who shall be elected by the qualified voters of the district in which he resides, and hold his office for the term of five years, and until his successor is duly elected and qualified. The District court shall be a court of law and equity, and have jurisdiction in all civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law. The Judges of the District Courts shall be conservators of the peace in their respective districts. The first session of the General Assembly shall divide the State into four districts, which may be increased as the exigencies require.

5th. The qualified voters of each county shall elect one Judge of Probate at a general election, who shall hold his office for the term of three years, and until his successor is duly elected and qualified.

6th. The qualified voters of each county shall elect one Prosecuting Attorney, at a general election, who shall hold his office for three years.

7th. The qualified voters of each judicial district shall elect, at a general election, one Clerk of the Supreme Court, who is a resident thereof, and who shall hold his office for five years.

8th. The qualified voters of each county, at a general election, shall elect a Clerk of the District Court, who shall hold his office for five years, and until his successor is duly elected and qualified.

9th. The style of all process shall be, "The State of Iowa;" and all prosecutions shall be conducted in the name and by the authority of the same.[27]

This report consisted of nine sections and was in content very similar to that outlined in the Constitution of 1844. The chief points of difference between the committee's report and the Article on the Judiciary of the previous Convention was that it made the judges of the Supreme Court elective by the people, and increased the term of judges of the Supreme and district courts from four to five years. It likewise provided that the General Assembly at its first session should divide the State into four districts for judicial purposes instead of three districts as provided in the former Constitution.

When the report of the Judiciary Committee was taken up for consideration section one providing for the location of the judicial power in the courts received a minor amendment by having the word "other" stricken out of the phrase, "and such other inferior courts". The amendment in no wise affected the intent of this provision.[28] Section two which provided for the number of judges for the Supreme Court was adopted without change.

Sections three and four providing for the election of judges to the Supreme and district courts were, in this as well as in the previous Convention, the chief point of contention. The question was again debated in much the same manner as in the Convention of 1844, as to whether the judges should be subject to popular election, or to election by a joint ballot of the General Assembly. The report of the Committee on the Judiciary made both the Supreme Court judges and the district judges elective by the people

[27] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1846, pp. 32–34.

[28] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1846, pp. xiii, 33, 41.

which was a departure from the previous Constitution, which made only the district judges elective by the people, and the Supreme Court judges elective by a joint ballot of the General Assembly. George W. Bowie now proposed a different method of selection, one that had not been even considered in the previous Convention. He proposed to amend sections three and four so as to make the judges of the Supreme Court and the district courts appointive by the Governor by and with the advice and consent of two-thirds of the Senate. J. Scott Richman then offered an amendment to make judges of the Supreme Court appointive for life or during good behavior.[29]

In defense of his proposal Mr. Bowie said that he did not wish to deny that the people were competent to select good judges; in fact he had the utmost confidence in the ability of the people to select these officers, but he objected to their doing so because men who would be qualified in learning and integrity for the position of judge would hesitate to run the gauntlet of public scrutiny and would, as a consequence, be eliminated from the holding of this important office.[30]

Mr. Hoskins stated that he had conversed with many of the people of his county and he was positive that a large majority of them were in favor of electing all judicial officers and would be reluctant to consent to the selection of these officers by any other power, because this was a prerogative which they felt fully competent to exercise.[31]

Following Mr. Hoskins's statement of the will of the people of his county, Samuel A. Bissell addressed the Con-

[29] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, p. 321.

[30] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 321, 322.

[31] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, p. 323.

vention in opposition to the amendment which proposed to take the privilege of selecting judges away from the people. Public opinion, he said, "is the only test of the character of a public man — and no where can public opinion be so independently and directly expressed as at the ballot box. If our Judges are to be appointed by the Governor and Senate, they will be very likely to be influenced by the representations of men whose only wish will be, to secure the office for their favorite."[32]

Section three dealing with the election of judges of the Supreme Court was finally amended after having been twice referred to a special committee. The amendments added thereto made the Supreme Court judges elective by a joint vote of the General Assembly, and increased their term from five to six years. They were also declared to be ineligible for any other office during the term for which they were elected. Section four, relating to judges of the district courts, was amended so as to make the judges of these courts ineligible to any other office during the term for which they were elected. The selection of district judges was, however, left to the people.[33]

Sections five, six, and eight of the original report on the judiciary dealing with the election of a probate judge, prosecuting attorney, and clerk of the district court were dropped and a substitute combining all of these provisions in a single section was proposed. This substitute section read as follows:

> The qualified voters of each county, shall, at the general election, elect one Judge of Probate, one Prosecuting Attorney, and one

[32] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 325, 326.

[33] *Journal of the Convention for the Formation of a Constitution for the State of Iowa*, 1846, pp. 33, 41, 64, 65, 66, 67, 68, 74, 95; Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 321–328.

Clerk of the District Court, who shall be residents thereof, and who shall hold their several offices for the term of two years, and until their successors are elected and qualified.[34]

This proposed substitute was agreed to upon a division of the question. The section which became section five of the Article on the Judiciary in the Constitution differed, however, from the substitute in that it did not provide for the election of a judge of probate. This change must have been made in the Committee on Revision for no record of the change is made in the journal of the Convention.

The election of a clerk of the Supreme Court by popular vote in each judicial district, as provided in the seventh section of the original report on the judiciary, was dropped by the Convention. This no doubt followed from the fact that the election of judges of the Supreme Court was transferred from the electorate to the General Assembly.[35]

Only one other section of the original report remains for consideration. This section which appeared as section nine in the report related to the style of all process. It was agreed to without change, and owing to other changes made in the original report it became section six of the Article on the Judiciary in the Constitution of 1846.[36] This article as finally agreed upon by the Convention was expressed in the following language:

JUDICIAL DEPARTMENT

1. The Judicial power shall be vested in a Supreme Court, District Courts, and such inferior courts, as the General Assembly may from time to time establish.

2. The Supreme Court shall consist of a Chief Justice and two Associates, two of whom shall be a quorum to hold court.

[34] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1846, pp. 68, 69.

[35] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1846, p. 69.

[36] *Journal of the Convention for the Formation of a Constitution for the State of Iowa,* 1846, pp. xiv, 33, 34.

3. The Judges of the Supreme Court shall be elected by a joint vote of both branches of the General Assembly, and shall hold their courts at such time and place as the General Assembly may direct, and hold their offices for six years, and until their successors are elected and qualified, and shall be ineligible to any other office during the term for which they may be elected. The Supreme Court shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the General Assembly may by law prescribe. The Supreme Court shall have power to issue all writs and process necessary to do justice to parties, and exercise a supervisory control over all inferior judicial tribunals, and the Judges of the Supreme Court shall be conservators of the peace throughout the State.

4. The District Court shall consist of a Judge who shall be elected by the qualified voters of the district in which he resides, at the township election, and hold his office for the term of five years, and until his successor is duly elected and qualified, and shall be ineligible to any other office during the term for which he may be elected. The District Court shall be a court of law and equity, and have jurisdiction in all civil and criminal matters arising in their respective districts, in such a manner as shall be prescribed by law. The Judges of the District Courts shall be conservators of the peace in their respective districts. The first session of the General Assembly shall divide the State into four districts, which may be increased as the exigencies require.

5. The qualified voters of each county, shall at the general election, elect one Prosecuting Attorney, and one Clerk of the District Court, who shall be residents therein, and who shall hold their several offices for the term of two years and until their successors are elected and qualified.

6. The style of all process shall be "the State of Iowa" and all prosecutions shall be conducted in the name and by the authority of the same.[37]

The organization of the judiciary as provided in the new Constitution was the same as that in the old Constitution, the only difference being that under the old the judges of

[37] *Journal of the Convention for the Formation of a Constitution for the State of Iowa*, 1846, pp. xiii, xiv.

the Supreme Court and of the district courts were elected for a term of four years whereas under the new Constitution the term of Supreme Court judges was extended to six years, and that of the district court judges to five years. Judges were also made ineligible for any other office during the term for which they were elected. The old Constitution provided for the office of judge of probate, an office not included under the judicial organization provided for in the Constitution of 1846. On the whole there is a close similarity in the judicial organization as provided by the Constitutions of 1844 and 1846.

The labors of the Constitutional Convention of 1846 were completed on Tuesday morning, May 19th, after a session of sixteen days. When the new Constitution was received by the public the debates and newspaper comments upon this phase of the Constitution relating to the judiciary were very similar to those which had been evoked by this same article in the Constitution of 1844.[38]

The Iowa Capitol Reporter in commenting upon the method of selecting judges stated:

> The article upon the judiciary is a compromise with reference to the manner of selecting the judges. We would have preferred that the Supreme, as well as the District judges, should have been made elective by the people; but many of the Delegates who were in favor of that policy, believed that public opinion was not yet fully prepared for it, and conceded their views accordingly.[39]

The objections of the Whig party to this portion of the new Constitution are well expressed in a speech of Wm. Penn Clarke to the electorate of Muscatine, Johnson, and Iowa counties. In this speech he said that he opposed the Constitution because it proposed "an experiment with our

[38] *Journal of the Convention for the Formation of a Constitution for the State of Iowa*, 1846, p. 107.

[39] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, p. 339.

judiciary system.— An *elective* judiciary is one of the vagaries which has grown up out of the party strife of the country, and is calculated to disrobe our Courts of Justice of their sacred character and impair the confidence the people ought to, and do entertain in the integrity of our judges.'' Such an experiment had been tried in but a single State — Mississippi — and there it had worked corruption and increased crime. The effect of a constitutional provision making judges elective by the people would be to place political partisans upon the bench. Mr. Clarke further declared:

> In a whig district we shall have a *whig* judge; in a democratic district, a *democratic* judge. If the position is correct when applied to the judge of the *law,* it is equally applicable to judges of the *fact*; yet were the Constitution to provide that in democratic counties, there should be none other than democratic jurors, and in whig counties, none but whig jurors, the proposition would be greeted with an universal burst of indignation. The second effect will be, to elevate to the judiciary second or third rate men in point of talents and legal acquirements. Partisan Conventions will be followed round by men of this class — most of them *party hacks* — claiming a nomination to the judgeship, as the reward of political services. Lawyers of talents and character, whose conduct and integrity secure them an ample practice, will not degrade themselves by coming into competition with such men. Thus it is reduced to probability that our courts will be filled by judges, whom, as *lawyers,* the people would hardly trust with a three-shilling case. Are the people prepared to confide the judiciary — that department of the government which is to decide upon their dearest rights — to such hands? To show that these will be the inevitable results of the proposed experiment, I need only to delineate the manner in which party nominations are made — the maneuvering of aspirants to pass the ordeal of a party convention, and the character of the class of men which constitutes these self-created assemblages. Still another effect follows, equally detrimental to the public interest. Political judges never can command the entire confidence of the great mass of the community. Those who have been arrayed

against them in the canvass — with whom they have been engaged in party conflict — will watch their conduct with the strictest vigilance, ready to denounce on the slightest suspicion of partiality to a political favorite, and liable to misrepresent their decisions to the public; whilst the judges themselves, just out of the excitement of a violent contest, with the worst passions of their nature aroused, will be incapable of deciding causes in which their opponents may be parties or engaged, free from those prejudices, and with that calm deliberation, which should mark judicial decisions. So long as human nature is what it is, this effect will be produced, and the lightest suspicions of wrong, will be "confirmation strong as holy writ."

The natural result of this stage of things must be to drag the decisions of the judges from the sacred temples of Justice, into the political arena, there to become themes for popular discussion, and newspaper animadversion. Here, again, will partisan strife be renewed. The minority will labor to make capital against the judge, in view of the next election, whilst his political friends will be equally zealous in sustaining his conduct. The judge himself, it may be, will descend from his tribunal, throw aside his robe of office, and enter the ring, desirous of breaking a lance in his own defense. But the numbers which made the judge possess the numerical strength to sustain him, and however wrong may have been his conduct, or illegal his decisions, an excited party will be loath to condemn their representative and put another in his place. Thus the laws may be disregarded — injustice perpetrated by those whose duty it is made to prevent it — individual rights impaired — and the nearest interests of the citizen blasted — and all without a remedy! Is not this a beautiful system? Yet such, I entertain no doubt, will be its natural and inevitable results. Those, then, who vote for the ratification of the Constitution, vote for a judiciary system, radically defective, and which is liable to great abuse.[40]

Although a strong endeavor was made to defeat the new Constitution both by the Whigs and by those who were entirely opposed to State organization, sentiment in its favor was sufficiently strong to secure its ratification at the polls

[40] Shambaugh's *Fragments of the Debates of the Constitutional Conventions of 1844 and 1846*, pp. 355, 356.

on August 3, 1846, by the small majority of four hundred and fifty-six votes. The act of Congress defining the boundaries of the new Commonwealth was approved by President James K. Polk on August 4th, and finally, on December 28th, Iowa was admitted into the Union as one of the United States.[41] From this time on the judicial system set up by the Organic Act of June 12, 1838, ceased to operate and a system of State courts as provided in the new charter of government took its place.

THE JUDICIARY AS PROVIDED BY THE CONSTITUTION OF 1857

The Constitution of 1846 contained a provision which prohibited the establishment of corporations for the purpose of banking, or the making of paper to circulate as money throughout the State. The object of this provision was to protect the people of Iowa against the evils that were at that time prevalent among banking institutions. Far from securing the desired end, however, the constitutional provision above referred to merely denied the people the benefits of banking institutions and failed to protect them against its evils and abuses, for Iowa was flooded with bank notes and shinplasters from the other Commonwealths.[42] To remove this restriction in regard to banking corporations was one of the chief factors which led to the calling of a Constitutional Convention in 1857. One other factor that is also frequently referred to as contributing to the demand for constitutional revision was the method of selecting Supreme Court judges under the Constitution of 1846.[43]

[41] Shambaugh's *Documentary Material Relating to the History of Iowa*, Vol. I, pp. 185, 186.

[42] Shambaugh's *Documentary Material Relating to the History of Iowa*, Vol. I, pp. 217, 218.

[43] Erbe's *Constitutional Provisions for the Suffrage in Iowa* in THE IOWA JOURNAL OF HISTORY AND POLITICS, Vol. XXII, p. 185.

The only way in which the Constitution of 1846 could be revised or amended was through the calling of a Constitutional Convention. This was not an easy matter, and so it was that those who favored constitutional revision labored with untiring efforts to secure the passage of an act by the General Assembly to have the question of calling a Constitutional Convention submitted to the people. It was not, however, until 1855 that these efforts were rewarded.[44]

According to the provisions of the act of January 24, 1855, the question of calling a Constitutional Convention to revise or amend the Constitution was submitted to the people at the August election in 1856 for approval or rejection. The proclamation issued by Governor James W. Grimes following this election showed that there were 32,790 votes polled in favor of a convention and 14,162 against it.[45] The Convention Act having been approved by the people, the next step was the election of delegates to a Convention to revise the Constitution. Sections four and five of the act for the Convention provided for the election of as many delegates as there were Senators in the General Assembly — thirty-six — at an election to be held on the first Tuesday after the first Monday in November. The delegates chosen at this election assembled at Iowa City on January 19, 1857, in accordance with the provisions of the act under which they were elected.[46]

The first meeting of the Convention was called to order by Hosea M. Gray of Linn County. Three delegates had failed to put in their appearance at the time the first roll was taken. Little business was transacted on the first day

[44] Erbe's *Constitutional Limitations on Indebtedness in Iowa* in THE IOWA JOURNAL OF HISTORY AND POLITICS, Vol. XXII, p. 379.

[45] Shambaugh's *Documentary Material Relating to the History of Iowa*, Vol. I, pp. 221, 222.

[46] Shambaugh's *Documentary Material Relating to the History of Iowa*, Vol. I, pp. 217, 218, 219.

and permanent organization was not attempted until the day following when Francis Springer was chosen President of the Convention. On the third day the rules which were to govern the procedure of the Convention were adopted, and the membership of the various standing committees announced. To the Committee on the Judicial Department the president appointed Wm. Penn Clarke, Daniel H. Solomon, James F. Wilson, Jonathan C. Hall, and Rufus L. B. Clarke.[47] The members of this committee all belonged to the legal profession and all were very prominent members in the Convention. All were Republicans except Mr. Hall and Mr. Solomon. No standing committee in the whole Convention was better qualified or more capable of performing its special task than was the Committee on the Judiciary.[48] The report of this select committee was made on the tenth day following its appointment. As presented by the chairman, Wm. Penn Clarke, this report read:

Section 1. The Judicial power of this State shall be vested in a Supreme Court, Superior Courts, District Courts, and such inferior Courts as the General Assembly may, from time to time, establish.

Sec. 2. The State shall be divided into four judicial districts, to be bounded by county lines, and as compact and equal in population and territory as nearly as may be; in each of which districts, at the first general election under the Constitution, one Supreme Judge and three District Judges, who shall be residents of their respective districts, shall be elected by the people. The Supreme and District Judges so elected, shall be classified so that one Judge of the Supreme Court, and one of the District Judges in each district, shall go out of office every two years. The judge of the Supreme Court holding the shortest term of office under such classification, shall be Chief Justice of the Court during his term, and so on in rotation. After the expiration of their terms of office under such classification, the term of each Judge of the Supreme Court

[47] *Journal of the Constitutional Convention of the State of Iowa,* 1857, pp. 4, 5, 10, 23–25, 26, 27.

[48] Eriksson's *The Framers of the Constitution of 1857* in THE IOWA JOURNAL OF HISTORY AND POLITICS, Vol. XXII, pp. 58, 59, 78–81.

shall be eight years, and the term of office of each District Judge six years, and until their successors are elected and qualified.

Sec. 3. The Supreme Court shall consist of the four Judges elected as required by the foregoing section, three of whom shall constitute a quorum. They shall hold their Court at such time and place as the General Assembly may prescribe, and shall be ineligible to any other office in the State during the term for which they were elected.

Sec. 4. The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, in all cases that may be appealed from the Superior Court, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the State.

Sec. 5. The Superior Courts shall be held in each district at such time and place as the General Assembly may prescribe; shall consist of the Judges of the District Courts of that district, two of whom shall constitute a quorum; and the Judge holding the shortest term of office shall be the Chief Justice of the Court of his district, and so on in rotation.

Sec. 6. The Superior Courts shall have appellate jurisdiction only in all cases in chancery, and constitute a Court for the correction of errors at law within their respective districts, under such restrictions as the General Assembly may prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals within their respective districts.

Sec. 7. The District Court shall consist of a single Judge, and the District Judges of each district shall hold Court in each county, alternately, at such time and place as the General Assembly may prescribe.

Sec. 8. The District Court shall be a Court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in all civil and criminal matters arising in their respective districts, under such restrictions as may be prescribed by law.

Sec. 9. The salary of each Judge of the Supreme Court shall not be less than two thousand five hundred dollars, nor more than five thousand dollars per annum. The salary of each Judge of the District Court shall not be less than two thousand, nor more than four

thousand dollars per annum; and the salary of no judge of either Court shall be increased or diminished during his term of office.

Sec. 10. The Judges of the Supreme and District Courts shall be conservators of the peace throughout the State.

Sec. 11. After the year 1860, the General Assembly may re-organize the judicial districts, and increase or diminish the number of districts, or the number of Judges of the Supreme or District Courts; but such increase or diminution shall not be more than one district, or one Judge of either Court at a time; and no re-organization of the districts, or diminution of the Judges shall have the effect of removing a Judge from office. Such re-organization of the districts, or increase or diminution of the Judges shall take place every five years thereafter, if necessary, and at no other time.

Sec. 12. The Supreme and Superior Courts shall have the power to appoint the necessary Clerk for each Court, and a Reporter of their decisions. The other officers of the Courts shall be provided for by law.

Sec. 13. The Judges of the Supreme and District Courts shall be chosen at the general election, and the term of office of each Judge shall commence on the first day of January next after their election.

Sec. 14. The General Assembly shall provide by law for the election of an Attorney General by the people, whose office shall be kept at the seat of government.

Sec. 15. The qualified electors of each county shall elect, at such times as may be prescribed by law, one Prosecuting Attorney, and one Clerk of the District Court, who shall be residents therein, and hold their several offices for the term of two years, and until their successors are elected and qualified.

Sec. 16. When any vacancy shall occur in the office of any Judge of the Supreme or District Courts, before the expiration of the regular term for which he was elected, the same shall be filled by appointment by the Governor, until it shall be supplied at the next general election, when it shall be filled by election for the residue of the unexpired term.

Sec. 17. The General Assembly may provide by law for the creation of a temporary Court for the trial of any Judge of either the Supreme or District Court, or any other State officer, who may be charged with incompetency or misconduct. If a Judge of the Supreme Court is a subject of the charge, four of the Judges of the District Court, selected from the respective districts, shall consti-

tute a Court to investigate the charge. If the complaint is made against a Judge of the District Court, or any other officer of State, the Supreme Court shall have original jurisdiction of, and constitute a Court to investigate the same. The charge shall be made by petition, under oath, and the cause shall be tried by the Court.

Sec. 18. The style of all process shall be: "The State of Iowa"; and all prosecutions shall be conducted in the name and by the authority of the same.[49]

Rufus L. B. Clarke, a member of the committee making this report, stated to the Convention that he concurred with the majority report with but a few exceptions. In the first place he objected to the election of judges of the Supreme Court by districts. He thought that they should be elected at large by the people of the State. Mr. Clarke favored the subdivision of each district into four circuits and would have one judge elected from each circuit. He also favored the election of a prosecuting attorney in each circuit. In his opinion no judge should be tried for incompetency, unless the charge were presented by a majority of the General Assembly.[50]

A minority report was also presented at this time which was signed by Wm. Penn Clarke. The judicial organization provided by this report was very similar to that provided in the Constitution of 1846, the chief point of difference being the manner of electing judges. The Supreme Court judges were made elective by the people and one judge was to be elected from each circuit.[51]

The radical point of difference between the majority and minority reports of the Committee on the Judiciary is that the majority report provided for the creation of three

[49] *Journal of the Constitutional Convention of the State of Iowa,* 1857, pp. 97–99.

[50] *Journal of the Constitutional Convention of the State of Iowa,* 1857, p. 99.

[51] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 116–118, 227; *Journal of the Constitutional Convention of the State of Iowa,* 1857, pp. 100–102.

courts: a district court; a superior court which was to be the supreme court of the district and was to consist of the district judges of the district in which the court was located; and, lastly, a Supreme Court, which was to be similar to the Court of Appeals in the State of New York.[52] The question then upon which the Judiciary Committee could not agree was whether there should be a supreme court for each district or whether the system should remain as it then operated. Should there be two courts or three courts?

Harvey J. Skiff favored the majority report because it would cheapen litigation and bring the courts nearer to the people. The two court system was feasible for those who lived near the place for holding sessions of the Supreme Court, for they could carry their cases to this court with little expense. On the other hand if superior courts were established as provided in the majority report, for the purpose of correcting errors in cases that arose in the district courts, many of the cases that then went to the Supreme Court for determination would be corrected in the superior courts. This would reduce the number of Supreme Court cases and make their reports less voluminous. As a consequence the reports would be of greater value in that the decisions contained therein would be of the more important cases.[53]

J. C. Hall favored the three court system because he was positive that a two court system could not long serve the needs of such a rapidly developing Commonwealth as Iowa. In fact he was fully persuaded that the legislature, even under a three court system as proposed in the majority report, would in a very short time be called upon to establish superior courts in the cities in order to handle the

[52] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 227.

[53] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 229.

increasing judicial business that would increase with the rapid development of the State.[54]

Rufus L. B. Clarke could see no grounds for objection to the majority report, for it was "no innovation, no new and untried system". It was one that had been practically treated in other States, and was therefore the embodiment of actual practice. It was said that this system would be too complex. Mr. Clarke answered this objection by asking, "Why is your State divided into counties, townships, and again subdivided into school districts?" His answer was: "It is done, in order that you may more conveniently carry on the whole machinery of the government. As well might gentleman complain of the complexity of this political machinery, as of that of the judicial system which we propose here, and which divides and simplifies our proceedings, instead of making them more complex. The system which we propose, is modelled upon that of the United States, and comprises a supreme court, district court, and a circuit court, and it is under this form, and upon these principles that I wish to have it presented before this body."

On the other hand, Mr. Clarke objected to the then existing system because under it a majority of the cases coming before the Supreme Court were brought there upon some simple question that could well be decided by an intermediate court without the expense and delay involved in carrying it to the highest tribunal in the State.[55]

James F. Wilson declared himself in favor of a system as nearly like that provided by the Constitution of 1846 as possible since the people of the Commonwealth had demanded no change. One of the objections to the present judiciary system was that the same question arising in

[54] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 231.

[55] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 234–236.

different district courts would frequently be decided differently in the different courts, and there might be as many decisions as there were districts in the State. The same difficulty would arise under a system having intermediate courts. The decision of one court would be no authority in another and in order to obtain an authoritative decision which would be recognized by the legal profession it would be necessary to carry the litigation to the Supreme Court or highest tribunal in the State. For this reason Mr. Wilson believed that litigation would not be cheapened under the judicial system proposed by the majority of the Committee on the Judiciary. Since the new Constitution would contain a provision whereby it could be amended, Mr. Wilson felt that the old judicial system should be retained with as little change as possible.[56]

The majority report was supported by John T. Clark because he had practiced some four or five years in New York State under a system very similar to that proposed by the majority of the Judiciary Committee. He asserted that the people of New York were not tired of that system and that no inducement could be held out to them that would cause them to go back to their old system. Mr. Clark was decidedly in favor of a change in the judicial system like the one proposed in the majority report. It was his understanding that the revision of the article providing for the judiciary was one of the reasons why the Convention was called. But, he said, "if there had been no such demand, if we, sitting here, could conceive of the necessity of such a change, even prospectively, it is our duty to make it. And so far from being a drawback, a deadweight upon the constitution, when submitted to the people for their approval, I am satisfied that it will be

[56] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 236–238.

the means of adding a large amount of votes to it, at least in the portion of the State from which I come. It is true, perhaps, that the banking question absorbs more of the attention of the people than any other question that led to the calling of this convention; but, second to that, I place the desire for a change in our judicial system.''[57]

A statement made by Mr. Wilson that there was no demand on the part of the people for a revision of the judicial system of the State was challenged by John H. Peters, who said: ''For one, I would say that in the country where I reside, there was no one subject which assisted more in bringing about a revision of the constitution than a change in the judicial system; and I think there is no one question — not even excepting the banking question — in which the people feel a deeper interest, than in this change now proposed by the majority of the committee on the judciary.''[58]

Robert Gower on the other hand said that to his knowledge his constituents did not demand much of a change in the judiciary of the State. Other than suggestions that Supreme Court judges be elected by the people at the end of their present term of office, nothing had been said in this regard. George Gillaspy voiced the same opinion in regard to his constituents. ''The universal expression among them is that the present judiciary system is well enough as it is at present, and the only change needed is that the supreme court judges should be elected by the people.''[59]

All of Wednesday afternoon, February 4th, Thursday

[57] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 238–240.

[58] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 241.

[59] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 254, 257.

forenoon, February 5th, and a part of Thursday afternoon was spent in discussing the reports of the Committee on the Judiciary. During the progress of the discussion many arguments similar to those already referred to were advanced either in favor of a three court system or a two court system. The debate was no doubt prolonged by the fact that there was a great deal of disagreement among the members of the committee on both reports. In fact those who favored the majority report claimed that they were unaware that minority report was to be rendered. Mr. Hall and Mr. Solomon favored the majority report, and Rufus L. B. Clarke concurred in most of its provisions. He strongly favored a three court system. Wm. Penn Clarke without question was the author of the minority report. James F. Wilson favored the latter report in that it provided for a two court system. In fact he was convinced that there was no demand for a change in this article of the Constitution.[60] Owing to the fact that there was no concurrence of opinion among the committee themselves, those of the committee who favored a three court system finally succeded in having both reports referred back to the Committee on the Judiciary. Thereupon Rufus L. B. Clarke submitted the following majority report:

Section 1. The judicial power shall be vested in a Supreme Court, District Courts, Circuit Courts, and such other inferior Courts as the General Assembly may establish.

Sec. 2. The Supreme Court shall consist of a Chief Justice and two Associate Justices, two of whom shall be a quorum to hold Court. They shall be elected by the people of the State at large, and shall hold their office six years (except as herein provided), and until their successors shall be elected and qualified. The salary of each shall not be less than two thousand dollars nor more than five thousand dollars per annum, to be fixed by law, and not changeable during their term of office.

[60] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 254–257.

Sec. 3. The State shall be divided into three judicial districts, to be bounded by county lines, and as nearly equal in population and territory as may be, and each of said districts shall be subdivided in the same manner, into four divisions called circuits.

Sec. 4. There shall be twelve District Judges, who shall also be Circuit Judges, one of whom shall preside, after his election, in each of the said circuits; shall be elected by the people of the districts at large, and to hold office for four years, (except as herein provided,) and until their successors are elected and qualified; and shall have each a salary of not less than one thousand dollars, nor over three thousand dollars, and not changeable during their term of office.

Sec. 5. At the first election of judicial officers under this Constitution — which shall be at the first general election after its adoption — they shall be so classified, under provisions of law, that one of the Supreme Court Judges shall go out of office every two years, and one of the District Judges in each district shall go out of office every year, and their successors shall be elected for the fall terms. The Justice of the Supreme Court having the longest term at the first election, shall be Chief Justice; and after the expiration of his term, the Justice longest presiding shall be Chief Justice. And in each district the Judge elected for the longest term shall be Presiding Judge, and after the expiration of his term, the Judge longest presiding shall be Chief Justice. And in each district the Judge elected for the longest term shall be Presiding Judge, and after the expiration of his term, the Judge longest presiding shall be thus designated.

Sec. 6. The resident Judge in each circuit shall hold the courts therein, except when otherwise provided by law, and the Circuit Court shall be courts of law and equity, having jurisdiction in each, over all matters, civil or criminal, arising in their respective circuits, under such regulations as the law may provide.

Sec. 7. The District Courts shall be composed by the meeting of the Circuit Judges in each district in bank, at such times and places as shall be provided by law; any three of whom shall constitute a quorum to hold a court; but no Judge shall vote, or join in an opinion, in a case which was tried before him in the Circuit Court; nor in which he may be or may have been interested; nor in which he may be, or may have been connected as attorney or counselor at law. The General Assembly may make provisions for justices of

the Supreme Court, and Judges from another district, to sit upon the bench of the District Courts in cases where it may be necessary, or for the good of the public.

Sec. 8. The District Courts shall have exclusive jurisdiction in all matters arising in the Circuit Courts of their respective districts, and brought up on appeal or writ of error, in such manner as shall be provided by law, except in cases where the law may provide for their going directly to the Supreme Court.

Sec. 9. The Supreme Court shall have appellate jurisdiction in chancery, and constitute a court for the correction of errors at law, in all cases coming from the District Courts; and in such cases from the Circuit Courts as the law may provide; — and shall have the right to appoint its own clerk and reporter.

Sec. 10. There shall be a clerk of the Circuit Court elected in each county where a term of such court shall be appointed by law to be held, who shall also be clerk of the District Court in those counties where said District Courts shall be appointed by law to be held.

Sec. 11. Each of said courts shall exercise a supervisory control over all inferior courts within the limits of their respective jurisdictions and be conservators of the peace therein; they shall have power to issue all usual writs and process and to enforce the same.

Sec. 12. No judicial officer, provided for herein, shall be eligible to any other office during the term for which he shall be elected; except that district judges shall be eligible to the office of Justice of the Supreme Court; and their terms of office shall commence the 1st of January next after their election, but in cases of a vacancy the same may be filled by appointment by the Governor, until it shall be supplied at the next general election, when it shall be filled by election for the residue of the unexpired term.

Sec. 13. It shall be the duty of the General Assembly to make such provisions by law as shall be necessary for the carrying into effect of this article and to provide for a regular system of practice in all the courts of the State. To provide for the election of an Attorney General to reside at the Capital and for the election of Prosecuting Attorneys in each circuit, in lieu of the Prosecuting Attorneys in the several counties, and to prescribe their powers, duties, terms of office and salary.

Sec. 14. The style of all process shall be, "The State of Iowa;"

and all prosecutions shall be conducted in the name and by authority of the same.

Sec. 15. After the year 1860, the General Assembly may re-organize the judicial districts, and increase or diminish the number of districts, or the number of Judges of the Supreme or District Courts; but such increase or diminution shall not be more than one district, or one Judge of either Court at a time; and no re-organization of the districts, or diminution of the Judges shall have the effect of removing a Judge from office. Such re-organization of the districts, or increase or diminution of the Judges shall take place every five years thereafter, if necessary, and at no other time.

Sec. 16. The Supreme Court, with one District Judge from each district, to be selected as shall be provided by law, shall form a Court for the trial of all impeachments, except in cases where a Justice of the Supreme Court is upon trial, when the Court shall be composed of the District Judges, a majority of whom shall constitute a quorum. Incompetency shall be a ground for impeachment, in a judicial officer; and all impeachments must be found by the General Assembly.[61]

Following the submission of this report Wm. Penn Clarke inquired as to what had become of the minority report, and upon being informed that it had been referred to the the Judiciary Committee along with the former majority report, he immediately, upon his own responsibility, submitted the same minority report to the Convention. At this time the new majority report was laid upon the table until copies of it could be had for use by the members of the Convention.[62]

The judicial organization as provided in the new majority report still retained the three court idea. It would divide the State into three districts with four district judges elected by the people of the district at large. Each of the three districts was to be sub-divided into four

[61] *Journal of the Constitutional Convention of the State of Iowa,* 1857, pp. 124–127.

[62] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 259, 260.

circuits, and each of the four judges elected in each district was to be judge of one of the circuits and to reside after his election in the circuit over which he was to preside. The circuit courts were to be courts of law and equity with jurisdiction in all civil or criminal matters arising within their respective circuits, under such regulations as might be provided by law. The district courts under the proposed scheme were to be composed of the circuit judges of each district, who were to meet in bank at such times and places as the law might prescribe. Each district court was to have exclusive jurisdiction over all matters arising in the circuit courts and brought up on appeal or writ of error from their respective districts. The Supreme Court was to consist of a chief justice and two associate justices to be elected by the people of the State at large for a term of six years. This court was given appellate jurisdiction in chancery, and was to stand as a court for the correction of errors at law in all cases appealed to it from the district courts, and in cases legally brought to it by the circuit courts.

When the new majority report was taken up for consideration in Committee of the Whole, objection was immediately raised against the three court system. An amendment was proposed to the first section eliminating the intermediate courts and making the judicial organization consist of a two court system. Vigorous debates favoring both schemes were continued for some time, and no division was made on party lines. Both Democrats and Republicans were divided in their opinions upon this important question which proved difficult of solution. Finally, however, the committee succeded in getting a vote upon the proposed amendment to decide whether the majority of the Convention favored a two or three court system. When the question was put, the amendment carried, fifteen mem-

bers voting for it and ten against it.[63] By this vote the Convention declared itself in favor of a two court system. Many, however, who opposed the three court system, opposed it on the grounds that it was too complex for such a sparse population as Iowa then had. They believed that five or ten years hence such a system as certain members advocated would be conducive to efficient judicial administration in the State. Thus, it will be noted that the Constitution framers, while they voted in favor of a two court system, were careful not to make it too difficult to introduce a three court system whenever the people desired it.[64]

Scarcely had the vote been taken favoring the two court system when Rufus L. B. Clarke presented the majority report with the provisions relating to the circuit court stricken out as a substitute for the report as presented. This in his opinion would obviate the objections which many of the delegates entertained toward the majority report. Wm. Penn Clarke, however, moved to lay the substitute upon the table and to take up a consideration of the minority report. His motion was concurred in and the Committee of the Whole proceeded to consider the minority report.[65]

Immediately following the reading of this report, Mr. Wilson, a member of the Judiciary Committee and champion of a two court system, proposed a substitute for the minority report. In substance the proposed substitute closely resembled the Article on the Judiciary in the Constitution of 1846, the chief difference being that he would

[63] *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. I, pp. 430–438. See remarks of John T. Clark, p. 443.

[64] *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. I, pp. 228, 243, 443.

[65] *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. I, pp. 438, 439.

have the Supreme Court judges elected by the people instead of by a joint ballot of the General Assembly. The proposal of Mr. Wilson was laid upon the table. Soon afterwards Rufus L. B. Clarke moved to substitute the article in the old Constitution for the minority report. After a few brief remarks it was agreed that the Article on the Judiciary in the old Constitution should be substituted for the minority report,[66] and as the minority report was under consideration by the Committee of the Whole the discussions of the Convention in regard to the judiciary centered around this article as it appeared in the Constitution of 1846.[67]

A proposal by Wm. Penn Clarke to strike out the word "inferior" and to insert the word "other" in section one which read: "The judicial power shall be vested in a Supreme Court, District Courts, and such inferior courts as the General Assembly shall from time to time establish", created lively discussion.

J. A. Parvin opposed this amendment because he said the Convention had already declared themselves opposed to a three court system, and if this word "inferior" should be stricken from this section the very next legislature would be besieged by every person in the State who favored a three court system.

To this Mr. Clarke, the author of the amendment, replied:

> It seems to me that it is reasonable that we should leave to the legislature to increase the courts as the business and necessities of the state may require. A system that may answer our wants at this time, would not probably meet the necessities of the state in ten years from now; the commercial, manufacturing and other business facilities of the state will be increased by the construction of rail-

[66] *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. I, pp. 440, 441, 442.

[67] For an extract of the Article on the Judiciary in the Constitution of 1846, see pages 431, 432 above.

roads, and litigation will increase proportionately, so that the present system will be totally inadequate to the wants of the people. Is it not wise and prudent to so place power in the hands of the law-making branch of the government, in the hands of the agents of the people, that they may be able to increase these courts as the interests of the state may require? I think such power is conferred upon the legislature of almost every state.

I am opposed to this three court system, now, because I do not think it is demanded by the necessities and wants of the people. But it may be demanded five years hence, and I want the legislature to have the power to create these courts without imposing the necessity upon the people to call another convention to revise the constitution in that respect. I trust and believe that the legislature, as the representatives and agents of the people, will exercise this power carefully and properly.

John T. Clark speaking in regard to this amendment said:

I was in favor of the three court system, and I shall go in favor of striking out this word "inferior". If I cannot get what I want I will go for the next best thing I can get. I will not refuse half a loaf because I cannot get a whole one. I certainly think we should leave the constitution in such a shape that the legislature can create a third court if the people require it, and it will be beneficial to the State. What may be the best interests of the people of the State to-day, may not be in two years from now. And for the purpose of meeting the changes which must inevitably take place in the wants and conditions of the people of this State. I am in favor of leaving this constitution in such a shape that the legislature may be able to provide all that may be necessary.[68]

Little opposition was offered to this amendment in Committee of the Whole and when the vote was taken it was agreed that the word "inferior" should be stricken out of section one.[69] Thus, the way was prepared whereby a

[68] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 443–445.

[69] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 445.

three court system could be established by legislative action at any time the General Assembly was disposed to do so. In 1868 the legislature of Iowa did create such a system by the establishment of circuit and general term courts.[70] Later in the discussion of section one in the Convention attempts were made to restore to it the same intent as it contained in the Constitution of 1846. These attempts were, however, without success. The word "inferior" although stricken from this section in some manner or other crept back in, but in a place where it emphasized rather than detracted from the amendment made in Committee of the Whole. The section as finally adopted, read:

> The judicial power shall be vested in a Supreme Court, District Court, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish.

The next provision to create discussion was section two providing for the number of Supreme Court judges. The question was shall there be three judges or four judges. Mr. Hall believed that four was the proper number for a court of last resort. His reason for believing this was that where the court consisted of three judges, the absence of one judge would have the effect of destroying the bench, whereas the addition of another judge would greatly lessen the labors of the court. He said further:

> Gentlemen may perhaps wonder, why I consider a Supreme Court of four to be better than a court of three or five. It is because of the certainty and confidence in the decisions of a court, that it commands respect for its decrees and becomes worth something. In a division of the court, where the number of judges is three, and they stand two against one, or four judges, and two to two, you would have no decision at all, and there would be no governing principle, either for that court or any other court. But when you go a step farther and say, there shall be four judges, then you have three against one, and you add considerable strength and

[70] *Laws of Iowa*, 1868, pp. 113–120.

authority to their decisions. There is no number, in my opinion, equal to "four," and this should be the number of judges of a court of last resort, whose decisions become law for other courts to follow. It should be one of the cardinal objects of this Convention to establish such a system as shall secure the respect and confidence of the people for the decisions of the Supreme Court.[71]

Wm. Penn Clarke concurred with the view of Mr. Hall for still another reason. With three judges, cases might be decided by two judges with a dissenting opinion. Such a decision would stand as an authority and yet it might represent an instance where two judges stood against two other judges, if the judge who held the dissenting opinion sided with the district judge or judge of the court below. Such authority Mr. Clarke regarded as unreliable.

Mr. Wilson objected to such views. In the first volume of Clarke's Reports he could find but six dissenting opinions in ninety-nine cases.

Rufus L. B. Clarke objected to paying a salary for a judge for just six cases. Besides, he said, if there were four judges the decision might be two to two, and consequently no decision would be rendered.

It was finally decided in Committee of the Whole that there should be but three judges, and that the section should remain as it stood in the old Constitution. In the Convention the language in section two was changed but the number of judges was left the same. The section as revised read: "The Supreme Court shall consist of three Judges, two of whom shall constitute a quorum to hold Court."[72]

Section three providing for the election of judges of

[71] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 447, Vol. II, p. 1018.

[72] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 446–449, 462–467, Vol. II, p. 1018; *Journal of the Constitutional Convention of the State of Iowa,* 1857, Appendix, p. 14.

the Supreme Bench by joint vote of the General Assembly was next taken up for discussion. Mr. Wilson proposed to amend this section so as to make Supreme Court judges subject to election by the people of the State. Wm. Penn Clarke offered a substitute for the amendment of Mr. Wilson in which he proposed to divide the State into four judicial districts. One Supreme judge should be elected from each of the four districts. The object of this substitute was to remove the judges as far as possible from practical politics and still retain their selection by the people. It was argued that the people of a district would be acquainted with the person whom they selected for judge whereas if candidates were selected from the State at large this was not possible. Thus, the people in the district would vote for the man best qualified regardless of his politics, whereas in an election at large the selection of judges was bound to be partisan. Mr. Clarke in referring to the influence of politics upon the selection of judges said: "I want to have one department of our State government in regard to which we can say, there is no political taint or bias, there is no partizan complexion to it; it is of such a character that when we go before it to have our dearest rights decided, we may rest assured that they will be decided upon principles of law and equity, and not upon political or party principles."[73]

Mr. Hall favored the idea of district selection of judges of the Supreme Bench rather than selection at large. In voting, he said, it is difficult to separate from that act the idea of representation. In other words it must be considered that the person elected and the people retain the relationship of representative and constituents. This to his mind was the only objection to the election of judges

[73] *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. I, pp. 449, 450, 453.

by the people for the idea is bound to persist that the judge must represent the persons who elected him, and consequently there will be a representative court. On the other hand if judges are elected by districts, it can scarcely fail to happen that there will be a court composed of judges elected from more than one party. The bench would be mixed and more confidence would be attached to such a court than if its judges had all been elected from a single party.[74]

In supporting his amendment Mr. Wilson said that under his scheme the people would have an opportunity of voting for all of the judges as they had a right to do, whereas under the district system they would be confined to the selection of a single judge. "The people of the State have demanded that they shall be allowed to select all the judges of the Supreme Court, not one judge only. Yet by this district system you propose to give each voter but a part of the right which the people demand." Mr. Wilson favored a general ticket for the selection of Supreme Court judges.[75]

George W. Ells opposed the district system because he believed that party complexion and party bias would operate as freely in a district as it would in the State at large. Men who wished to control a party could control a district even when they might not succeed in controlling the State. Party influence was bound to make itself felt regardless of whether judges were elected by districts or by the State at large. For this reason he favored retaining the old system of selection by joint vote of the General Assembly.[76]

When the question was finally voted upon the district

[74] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 450, 451.

[75] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 451, 452.

[76] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 454, 455.

system was rejected and election of judges upon a general ticket by the State at large was agreed to.[77]

In Convention it was agreed that the following should be added to section three:

> After the first election of Supreme Judges under this Constitution, they shall be so classified, under provisions of law, that one of the Supreme Judges shall go out of office every two years. The justice of the Supreme Court having the shortest term at the first election, shall be chief justice; and at the expiration of his term, the justice holding the shortest term shall be chief justice.[78]

The Article on the Judiciary was later referred to the Committee on the Judiciary at which time the amendment to section three above referred to was somewhat revised. Under the revised section judges were classified so that the judge holding the shortest term, that is who still had the fewest number of years in office before the expiration of his term, should be chief justice. It was also provided that judges of the Supreme Bench should be ineligible to any other office in the State during the term for which they were elected.[79]

A great deal of time was spent in the consideration of section four which provided for the composition of the district court and the division of the State into judicial districts. As the section then read the General Assembly was authorized at its first session to divide the State into four districts which could be increased at any time as the exigencies might require. After brief discussion the word "four" was stricken out and "ten" inserted in its place, thus requiring the General Assembly at its first session to

[77] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 455.

[78] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 471, 472.

[79] *Journal of the Constitutional Convention of the State of Iowa,* 1857, pp. 224, 225.

divide the State into ten judicial districts. Some delegates wished to limit the legislature so that the number of districts could never be increased beyond ten. This attempt was unsuccessful. Later it was proposed to insert "thirteen" in place of "ten". This motion was ruled out of order by the President, and so after some deliberation the Article on the Judiciary with the amendments that had been proposed thereto was referred to the Judiciary Committee for revision.[80]

Four days later, February 20th, the Committee on Judiciary reported the article back in revised form with the recommendation that the number of judicial districts be increased from ten to eleven. The Committee also recommended that the General Assembly be given power to reorganize the judicial districts, and to increase or diminish the number of judges of the district court, and likewise to increase but not decrease the number of Supreme Court judges every four years. The article as submitted left these portions blank so that the Convention might take any action upon the matter that it saw fit to take. As submitted to the Convention the revised article consisted of fourteen sections and read as follows:

Section 1. The judicial power shall be vested in a Supreme Court, District Courts, and such other Courts inferior to the Supreme Court, as the General Assembly may, from time to time, establish.

Sec. 2. The Supreme Court shall consist of three Judges, two of whom shall constitute a quorum to hold Court.

Sec. 3. The Judges of the Supreme Court shall be elected by the qualified voters of the State, and shall hold their Court at such time and place as the General Assembly may prescribe. The Supreme Judges so elected, shall be classified so that one Judge shall go out of office every two years; and the Judge holding the shortest

[80] *Journal of the Constitutional Convention of the State of Iowa*, 1857, p. 190; *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. I, pp. 456, 508, 509.

term of office under such classification, shall be Chief Justice of the Court during his term, and so on in rotation. After the expiration of their terms of office under such classification, the term of each Judge of the Supreme Court, shall be six years, and until his successor is elected and qualified. The Judges of the Supreme Court shall be ineligible to any other office in the State, during the term for which they are elected.

Sec. 4. The Supreme Court shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the State.

Sec. 5. The District Court shall consist of a single Judge, who shall be elected by the qualified voters of the District in which he resides. The Judge of the District Court shall hold his office for the term of four years, and until his successor is elected and qualified; and shall be ineligible to any other office, except that of Supreme Judge, during the term for which he was elected.

Sec. 6. The District Court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts in such manner as shall be prescribed by law.

Sec. 7. The Judges of the Supreme and District Courts shall be conservators of peace throughout the State.

Sec. 8. The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

Sec. 9. The salary of each Judge of the Supreme Court, shall be two thousand dollars per annum, and that of each District Judge sixteen hundred dollars per annum, until the year 1860; after which time, they shall severally receive such compensation as the General Assembly may, by law, prescribe, which compensation shall not be increased or diminished during the term for which they were elected.

Sec. 10. The State shall be divided into ———— District Court districts; and after the year 1860, the General Assembly may reorganize the judicial districts, and increase or diminish the number

of districts or the number of Judges of the said court, and may increase the number of Judges of the Supreme Court, but such increase or diminution shall not be more than one district, or one Judge of either court, at a time, and no re-organization of the districts, or diminution of the Judges shall have effect of removing a Judge from office. Such re-organization of the districts or increase or diminution of the Judges, shall take place every ——— years thereafter, if necessary, and at no other time.

Sec. 11. The Judges of the Supreme and District Courts shall be chosen at the general election; and the term of office of each Judge shall commence on the first day of January next after his election.

Sec. 12. The General Assembly shall provide by law, for the election of an Attorney General by the people, whose term of office shall be two years, and until his successor is elected and qualified.

Sec. 13. The qualified electors of each judicial district shall, at the time of the election of District Judge, elect a District Attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor is elected and qualified.

Sec. 14. It shall be the duty of the General Assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this State.[81]

The recommendations of the Judicial Committee in regard to dividing the State into eleven judicial districts and giving the General Assembly power to increase or decrease the number of judges every four years were accepted by the Convention and the proposed changes adopted. The Judiciary Committee recommended eleven districts because the districts in the western part of the State were so large that it took a great deal of the judges' time in traveling from one place of holding court to another. To make an additional district would reduce the size of some of these larger districts and thus facilitate the business of the courts. Delegates representing the western counties fought hard to secure even a larger number than eleven judicial districts,

[81] *Journal of the Constitutional Convention of the State of Iowa*, 1857, pp. 224–226.

but were unsuccessful in accomplishing their object and no increase was made at this time.[82]

Section ten in the final report on the judiciary received two slight amendments by the Convention other than the filling in of the blank left by the Judiciary Committee. In the phrase which reads: "but such increase or diminution shall not be more than one district, or one Judge of either court, at a time," the words "at a time" were changed to "at any one session". Also in the final sentence which read: "Such reorganization of the districts, or increase or diminution of the judges of either court shall take place every four years thereafter, if necessary, and at no other time", the words "or any change in the boundaries thereof," were added following the word "districts". Following the adoption of these amendments the amended Article on the Judiciary was ordered to be engrossed preparatory to a third reading.[83]

It will be noted that by section nine of this article the salary of Supreme Court judges was set at two thousand dollars per annum, and that of district judges at sixteen hundred dollars per annum. Prior to the submission of the final report of the Judiciary Committee considerable time was spent in Committee of the Whole discussing the proposition as to what should constitute an adequate and sufficient salary for the different judges. At that time it was advocated by some of the most prominent men in the Convention that the minimum salary of Supreme Court judges should be three thousand dollars and that of district judges two thousand five hundred dollars. Some members favored leaving the question of salaries for legislative action while

[82] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 628–635.

[83] *The Journal of the Constitutional Convention of the State of Iowa,* 1857, pp. 226–229; *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, p. 508.

others thought that it properly belonged to the Committee on Schedule. It was argued by those who favored higher salaries for judges that the existing salaries were insufficient for a judge to maintain a respectable livelihood for himself and his family, and that as a consequence some good judges had been forced to resign their positions. In order that the judicial branch of the government might be maintained on a par with the other branches of government, it would be necessary to attract the best and most capable lawyers to the Supreme and district benches, and in order to do this it would be necessary to give them at least such compensation as would afford them a comfortable living. Further arguments similar to these were advanced by those favoring higher salaries for judges. The majority of the delegates were, however, opposed to high salaries because it meant higher taxes and more complaint on the part of their constituents.[84] Thus, it happened that the maximum salary for Supreme and district court judges in Iowa was set at two thousand dollars and sixteen hundred dollars respectively.

After the Article on the Judiciary had been ordered engrossed, a resolution was offered by John Edwards which read as follows:

Resolved, That the Committee on Judicial Department be instructed to provide in that Article of the Constitution, for the creation of a Court of Common Pleas, and to report by Monday next.

Immediately thereupon George Gillaspy moved to amend the resolution by adding the following:

And to provide that no person shall be elected District Judge who has not attained the age of fifty years, nor Supreme Judge who has not attained the age of seventy-five years.

[84] *The Debates of the Constitutional Convention of the State of Iowa,* 1857, Vol. I, pp. 479–494, 504–510.

Both the amendment to the resolution and the resolution were defeated.[85]

The Article on the Judiciary was read a third time on Wednesday evening, March 4th, and passed in substantially the form last reported by the Judiciary Committee.[86] A few changes in phraseology were made by the Committee on Revision but these were of a minor character.

The Article on the Judiciary as finally adopted by the Constitutional Convention of 1857 differed greatly from that which appeared in the Constitution of 1846. Some of the changes made in the judicial system came as a result of the experiences of the State with its judicial system up to that time. Under the Territorial government the judicial system consisted of a Supreme Court and district courts. The Supreme Court could entertain appeals from the district courts. All sessions of the Supreme Court were held at the seat of the government. The Constitutions of 1844 and 1846 retained in general the same system. Under both of these Constitutions the Supreme Court consisted of a chief justice and two associate justices, all of whom were elected by joint vote of the General Assembly. Each district court consisted of one judge elected by the qualified voters of the district. Provision was also made for the division of the State into three districts under the Constitution of 1844, and four districts under the Constitution of 1846, with the additional provision in both Constitutions that the number of districts might be increased by the General Assembly as the exigencies of the State might require. At a special session of the first State legislature in 1848 it was enacted that "the Supreme Court shall be holden once

[85] *The Journal of the Constitutional Convention of the State of Iowa*, 1857, p. 233.

[86] *The Journal of the Constitutional Convention of the State of Iowa*, 1857, p. 369.

a year in each of the judicial districts of the State".[87] Thus, as was said by a member of the Convention the court was put on wheels and moved about from place to place. In 1853 this plan was completely changed by an act which provided that "the terms of the Supreme Court of this State shall be held at the capitol of the State, and at no other place."[88]

Such was the law when the Constitutional Convention assembled at Iowa City on January 19, 1857. During the intervening period the General Assembly had, however, increased the number of judicial districts with great rapidity. An act approved on January 22, 1857,[89] created the fourteenth judicial district.

Section ten of the Article on the Judiciary in the new Constitution provided that the State should be divided into eleven judicial districts, but that after 1860 the legislature might reorganize these districts and increase or diminish the number of districts, but not more than one district could be created at any one session of the General Assembly. This section further provided that such reorganization of districts or change in the boundaries thereof, should take place not oftener than once in four years. The object which the Constitution framers had in mind was to diminish the number of districts and to prevent their subsequent increase. A number of delegates favored the establishment of as many as thirteen districts, but these delegates came largely from the western part of the State where large districts existed. It was expected that the evils attending the organization of large districts would be remedied by redistricting the State and increasing the size of the eastern districts.

[87] *Laws of Iowa,* 1848 (Extra Session), p. 15.

[88] *Laws of Iowa,* 1852-1853, pp. 139–141.

[89] *Laws of Iowa,* 1856-1857, pp. 86, 87.

The Constitution of 1846 provided for the election of one prosecuting attorney in each county by the qualified electors, whereas the Constitution of 1857 provided for the election of a district attorney instead of a county attorney. The former was no doubt the best and most satisfactory means of efficiently administering the judicial business of the various counties in the district. This statement is substantiated by the fact that in 1884 an amendment was added to the Constitution striking out the provisions regarding the election of a district attorney, and substituting a provision providing for the election of county attorneys instead.[90] The Constitution of 1857 also provided for the popular election of an Attorney General, who was to hold his office for a term of two years. No provision had been made for this officer in the Constitution of 1846.

Although the Article on the Judiciary of the Constitution of 1846 was almost entirely rewritten by the Constitutional Convention of 1857, the same general organization was retained throughout. The chief points of difference were that the Constitution of 1857 made Supreme Court judges elective by the people, and provided for the election of an Attorney General by popular vote.

OTHER PROVISIONS OF THE CONSTITUTION OF 1857 RELATING TO THE JUDICIARY

Besides the regular Article on the Judiciary there are a few other provisions in the Constitution of 1857 that are more or less directly connected with the judiciary of the State. In fact one or two of these provisions might well have been included under that portion of the Constitution that provides for the judicial system. For example, turning to section one of the Article on Miscellaneous Provisions, the following statement is found:

[90] Ramsay's *The Constitution of the State of Iowa and Amendments from 1857 to 1919*, pp. 65, 66.

The jurisdiction of Justices of the Peace shall extend to all civil cases, (except cases in chancery, and cases where the question of title to real estate may arise,) where the amount in controversy does not exceed one hundred dollars and by the consent of parties may be extended to any amount not exceeding three hundred dollars.

While justice of the peace courts were not directly provided for in the Constitution, the power to establish them was given to the General Assembly.[91] The Constitution framers no doubt were confident that the justice of the peace court would be continued, and, although they left it to the General Assembly to establish such inferior courts from time to time as might be necessary, they did not wish to leave it to this body to define the jurisdiction of this particular court. During the consideration of this subject by the Convention, some members wished to extend the civil jurisdiction of the justice courts to cases where the amount in controversy was five hundred dollars. John T. Clark strongly opposed such attempts for to him it was clear that a justice court was not created to decide questions of such great importance. Such an amount in controversy would warrant the parties to subject themselves to the expense of carrying their case to courts better qualified to settle questions of legal importance. He added:

Even if justices of the peace were qualified, and had the requisite learning and ability, they live, as a general thing, in a neighborhood where the disputes, which they are called upon to adjust, originate. The plaintiff in a suit generally goes to a justice of the peace, states his case, not unfrequently takes the advice of the justice in the matter, and enlists his feelings in his behalf before the process is issued. Then, again, the officer who summons the jury in a jury trial, also lives in the neighborhood. He is generally appealed to, and his sympathies are excited, and thus there is a feeling enlisted on his side on the part of the court and jury that are to dispose of the matter.

[91] Constitution of Iowa, Article V, Sec. 1.

H. D. Gibson, who proposed the extension of the civil jurisdiction of the justice of the peace courts, said that the principle implied by Mr. Clark in regard to bribing the jury in a justice court would carry over to the district court as well. It was not his intention to do away with the district court but merely to extend the jurisdiction of the justice court in civil cases and matters of debt. This would make it possible to take a plain note before a justice court, which otherwise might have to be held up until the district court was in session. Then, too, it would be much cheaper to carry a case to a justice court than to the district court.

David Bunker explained that the jurisdiction of the justice court had been limited by the committee because there was not one case in ten decided in a justice court where the amount in controversy exceeded fifty dollars that an appeal was not taken to the district court. This involved the expense of trial before two courts. Thus, after some little discussion the limit of jurisdiction of the justice courts in civil matters was set at one hundred dollars; and in cases where both parties agreed, at three hundred dollars.[92]

The jurisdiction of justice courts in criminal cases was also defined by the Convention in section eleven of the Article on the Bill of Rights. This section reads:

> All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, or information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.

[92] *The Debates of the Constitutional Convention of the State of Iowa*, 1857, Vol. II, pp. 795–798, 810, 811.

It was adopted by the Convention of 1857 as a substitute for section eleven of the Bill of Rights in the Constitution of 1846. "No person shall be held to answer for a criminal offence, unless on presentment, or indictment by a grand jury, except in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia when in actual service in time of war or public danger." The object of the substitute was to relieve the district court of a great many cases which could well be taken care of and tried before local magistrates. As a result of this provision many cases have been decided in the local courts which otherwise would have been thrust upon the district court.[93]

There are a number of other provisions in the Article on the Bill of Rights which might be considered here as being related to the judicial department. The provisions of the Bill of Rights are, however, generally regarded as being limitations upon the power of the General Assembly, although they may be regarded as limitations upon all departments of government.

Section five of the Article on Miscellaneous Provisions provides that "Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of this State, and also an oath of office." This provision while general in its application, bears as strongly upon persons elected to judicial offices, as upon those elected to any office of any other department of the government.

By section twenty of the Article on the Legislative Department of the Constitution, judges of the Supreme and district courts are made responsible for their acts and conduct in office. This section reads:

> The Governor, Judges of the Supreme and District Courts, and other State officers, shall be liable to impeachment for any mis-

[93] Erbe's *The Bill of Rights in the Iowa Constitution* (A Thesis), pp. 55–58.

demeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under this State; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the General Assembly may provide.

Under the Article on Schedule, which contains only such provisions as are necessary to complete the organization of government under a new Constitution and which is then no longer in force, there are three sections whose purpose it was to complete the judicial organization under the Constitution of 1857. The first, section three, read as follows: "All indictments, prosecutions, suits, pleas, plaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgment and execution; and all appeals, writs of error, certiorari, and injunctions, shall be carried on in the several courts, in the same manner as now provided by law; and all offenses, misdemeanors, and crimes that may have been committed before the taking effect of this Constitution, shall be subject to indictment, trial and punishment, in the same manner as they have been, had not this Constitution been made."

Sections seven and eight of this same article related to the first election of the Attorney General, district judges, district attorneys, judges of the Supreme Court, and other State officers. These provisions from the Article on Schedule, having accomplished the purpose for which they were incorporated in the Constitution of 1857, are no longer operative, although they still appear as a part of that Constitution.

The Constitutional Convention which assembled at Iowa City on January 19, 1857, completed its work on Thursday evening, March 5th. It was not, however, until August 3rd that the Constitution which they had framed was submitted

to the electorate for ratification. It was quite generally believed that the new Constitution would be adopted because of the serious objections to the restrictions placed upon corporations in the old Constitution. The early returns of the election sometimes predicted the adoption of the new Constitution and then its defeat. The final official count, however, showed that the Constitution had been adopted by the small majority of 1460 votes.[94] On September 3rd of that year, Governor James W. Grimes issued a proclamation declaring that the new Constitution was adopted and that it was the supreme law of the Commonwealth of Iowa.[95] By this proclamation the judicial system as provided in the Constitution of 1857 supplanted that under which Iowa had been admitted as a member of the Union.

AMENDMENTS TO THE JUDICIAL DEPARTMENT OF GOVERNMENT SINCE 1857

During the early part of the regular session of the Nineteenth General Assembly which met in January, 1882, Warren S. Dungan introduced a series of amendments to the Constitution, three of which related to the judiciary department.[96] The second amendment in this series was a proposition to amend section ten of the Article on the Judiciary. This read as follows:

> The State shall be divided into eleven Judicial Districts; and after the year eighteen hundred and sixty, the General Assembly may reorganize the Judicial Districts and increase or diminish the number of Districts, or the number of Judges of the said Court, and may increase the number of Judges of the Supreme Court; but such increase or diminution shall not be more than one District, or

[94] Erbe's *Constitutional Provisions for the Suffrage in Iowa* in THE IOWA JOURNAL OF HISTORY AND POLITICS, Vol. XXII, p. 206.

[95] Shambaugh's *Documentary Material Relating to the History of Iowa*, Vol. I, pp. 256, 257.

[96] *Journal of the House of Representatives*, 1882, pp. 54, 55.

one Judge of either Court, at any one session; and no re-organization of the districts, or diminution of the number of Judges, shall have the effect of removing a Judge from office. Such re-organization of the districts, or any change in the boundaries thereof, or increase or diminution of the number of Judges, shall take place every four years thereafter, if necessary, and at no other time.[97]

The amendment proposed to this section by the Nineteenth General Assembly read:

At any regular session of the General Assembly the State may be divided into the necessary judicial districts for district court purposes, or the said districts may be reorganized and the number of the districts and the judges of the said courts increased or diminished; but no organization of the districts or diminution of the judges shall have the effect of removing a judge from office.[98]

The third proposed amendment in the series was an enlargement of the power vested in the General Assembly by section fourteen of the Article on the Judiciary. This section made it the duty of the General Assembly to provide a general system of practice to be followed by the courts of the State. The amendment here under consideration proposed to enlarge the powers of the General Assembly in this respect by providing that "The grand jury may consist of any number of members not less than five nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of a grand jury."[99]

The fourth proposal in the series was a substitute for section thirteen of the Article on the Judiciary. Section thirteen as incorporated in the Constitution read:

The qualified electors of each judicial district shall, at the time of

[97] Ramsay's *The Constitution of the State of Iowa and Amendments from 1857 to 1919*, p. 37.

[98] *Laws of Iowa*, 1882, pp. 180, 181.

[99] *Laws of Iowa*, 1882, pp. 180, 181.

the election of District Judge, elect a District Attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor shall have been elected and qualified.

The proposed substitute provided for the election of a county attorney instead of a district attorney, and as adopted by the Nineteenth General Assembly read:

The qualified electors of each county shall, at the general election in the year 1886, and every two years thereafter, elect a county attorney, who shall be a resident of the county for which he is elected, and who shall hold his office for two years, and until his successor shall have been elected and qualified.[100]

These proposed amendments were passed by both houses of the Nineteenth General Assembly and approved by the Governor on March 17, 1882.[101] According to the constitutional provision for amendment of the Constitution they were properly published and referred to the Twentieth General Assembly which convened in January, 1884. Here again the amendments received the approval of both houses of the General Assembly and were sanctioned by the chief magistrate on March 29, 1884.[102]

During the period which elapsed between the adoption of the amendments by the Twentieth General Assembly and their submission to the electorate in November, 1884, there was some press comment in regard to their merits, although they did not arouse a great deal of enthusiasm. The *Iowa City Daily Republican* of October 20th, in commenting upon the grand jury amendment prior to the election, said:

If the amendment is adopted, it seems evident that the drift of public sentiment will be towards legislation abolishing the system altogether, and leave it in the hands of committing magistrates and county attorneys to take cognizance of criminal offenses and file

[100] *Laws of Iowa,* 1882, pp. 180, 181.

[101] *Laws of Iowa,* 1882, pp. 180, 181.

[102] *Laws of Iowa,* 1884, pp. 234, 235.

informations against offenders. It could certainly be done as well and with far less expense as well as more certainty of meeting the ends of justice than under the present system. The grand jury as now constituted of fifteen men, can find a bill only on the concurrence of twelve of them, so that it often happens that where criminals have money or friends or influence, prosecutions are prevented. The object of law is to do justice and whenever a needless and cumbersome body of men are called to pass upon the innocence or guilt of a supposed criminal you give the person sought to be convicted another opportunity of escaping a deserved punishment. We think the grand jury amendment may be voted for in the interest of justice and good order.

Later in its issue of November 3, 1884, the same paper made the following comment:

> If you want to lessen court expenses and make the punishment of crime surer, cheaper, and more expeditious, vote for the amendment allowing a change in the law in regard to grand juries. It simply leaves the whole matter in the discretion of the legislature . . .
>
> If you want to see the State more equally divided into judicial districts, so that the district courts, especially in the western part of the State, shall not be swamped with business, and the trial of cases may be more speedy, vote for the amendment allowing the legislature to re-district the State.

At the general election held on the following day, November 4th, the amendment in regard to re-districting the State carried by a vote of 64,960 for the amendment and 33,868 votes against it. The grand jury amendment was ratified by a vote of 72,591 for it, and 30,343 against it; and the amendment providing for the election of county attorneys instead of district attorneys carried by a vote of 67,621 for it and 32,902 against it.[103]

Carl H. Erbe

The Iowa State Teachers College
Cedar Falls Iowa

[103] Shambaugh's *Documentary Material Relating to the History of Iowa*, Vol. I, pp. 280, 281.