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A HISTORY OF JUDICIAL TENURE IN PENNSYLVANIA

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An independent judiciary is one of the most important features of our government. Without it, no matter how liberal the constitution may be, the people have no assurance that their rights will be protected or their liberties safeguarded against the usurpation of power by other branches of the government.

Judicial independence involves two fundamental factors: tenure of office and salary. That judges should have a "fixed" salary—that is, one beyond the reach of recurring legislatures to change at will and thus jeopardize the position of the judge—has generally been conceded in our political theory and practice. Over tenure of office, however, much controversy has arisen. Judicial tenure throughout the history of Pennsylvania has varied greatly and has given rise to many sharp political encounters.

As a result of a revolution in 1688 judicial tenure during good behavior was established in England. At first, however, this was dependent upon the will of King William, whose commissions ran *quamdiu se bene gesserint*.¹ A little later, by the *Act of Settlement* of 1701, Parliament decreed that judges' commissions should be during good behavior, with the possibility of removal upon the address of both houses.²

By the terms of the Charter granted William Penn by King Charles II, the power to erect courts and appoint judicial officers was conferred upon the Proprietary.³ But Penn was willing to forego to some degree the exercise of

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¹Henry Hallam, *The Constitutional History of England* (from the Fifth London Edition, New York, 1851), p. 597. In 1692 William refused his assent to a bill which had passed both Houses of Parliament for establishing the independence of judges by law and fixing their salaries.

²*ibid.*, p. 591. This is said to have been the ancient course until the advent of James I in 1601.

³For the *Charter* and the various *Frames of Government* see *Colonial Records of Pennsylvania*, vol. I.

this right,⁴ and by Article 17 of the *Frame of Government of the Province of Pennsylvania* (1682) the judges were to be nominated by the Provincial Council and commissioned by the Governor or his Deputy, to serve for one year. In the very next section, however, Penn stated that since "the present conditions of the province" would not admit "of so quick a revolution of officers," he would nominate and appoint judges and other officers "for so long time as every such person shall well behave himself in the office . . ."⁵ This provision was formally incorporated in the *Frame of Government* of 1683, for the Council was to "elect and present to the Governor or his Deputy, a double number of persons to serve for Judges, . . . to continue so long as they shall well behave themselves, . . ."⁶

In the early days there was no supreme court as such, the same court often sitting in different capacities. From this practice some curious situations resulted. For instance, in the case of *Hasting v. Yarnall*, in 1686, the court sitting as a court of equity reversed its own judgment previously entered while sitting as a court of law.⁷

The first man really to discharge the highest judicial office in Pennsylvania was Nicholas Moore, appointed Chief Justice—then called "prior judge"—in August, 1684.⁸ His career as such was short, for the next year the Assembly charged him with committing "high crimes and misdemeanours."⁹ It does not appear that he ever came to trial before the Council, probably because of alleged ill-health,¹⁰ but other judges were appointed and Moore was at length deprived of his office and dignities.¹¹

In Markham's *Frame of Government* of 1696 nothing is said about the term of office of judges. The same is true of the *Charter of Privileges* of 1701, the last charter or frame of government granted by William Penn, which served the province until 1776.¹² During this period it is obvious that judicial tenure depended upon the pleasure of the governor. After a supreme

⁴Lawrence Lewis, Jr., "The Courts of Pennsylvania in the Seventeenth Century," *Pennsylvania Magazine of History and Biography*, V, p. 143.

⁵1 Col. Rec., pp. 35-6.

⁶Art. xvi. Although this provision seems to establish explicitly tenure during good behavior, yet we are told that judges were commissioned by William Penn in 1684 for two years only. See Robert Proud, *The History of Pennsylvania* (2 vol., Philadelphia, 1797), vol. I, pp. 286-7.

⁷*Records Chester Co. Ct.*, 3d. lwk. 10mo. 1686. 5d. lwk. 10mo. 1686. For material on the judicial system of Pennsylvania in the 17th century, see Lewis, *op. cit.*; William H. Loyd, *The Early Courts of Pennsylvania* (Boston, 1910); H. Frank Eshleman, "The Constructive Genius of David Lloyd," *Pa. Bar Assn. Reports*, 1910.

⁸"Minutes of the Provincial Council," 1 Col. Rec., p. 121.

⁹*ibid*, p. 135.

¹⁰*ibid*, p. 153.

¹¹*ibid*, p. 190.

¹²By this Charter the governor resumed the power of direct appointment. See William R. Shepherd, "A History of Proprietary Government in Pennsylvania," *Columbia University Studies in History, Economics and Public Law*, vol. VI, p. 373.

court was finally established its judges were recommissioned from time to time by the governor and it appears that they generally held their offices until death or resignation.¹³

The attempts of the province to establish a genuine supreme court were generally frustrated by the Crown. It was alleged that the highest authority resided in England, and that there was no need for such a court. The act of 1684 established what might be called a supreme court, but it was annulled by William and Mary in 1693.¹⁴ In 1701 a new judicial act was adopted, but again it was annulled by the Crown.¹⁵ The Act of February 28, 1710-11, creating a supreme court and designating one member as the chief justice, was also repealed by the Queen in Council.¹⁶ The same thing happened to the *Act for Erecting a Supreme or Provincial Court of Law and Equity*, passed on May 28, 1715.¹⁷

By this time the colonists were determined to establish a system of courts as they saw fit, so they resorted to strategy. The Charter stated that all laws had to be submitted to the Crown for approval, and if not declared void within five years, became law by lapse of time. Thus laws were often put into operation immediately upon their adoption, but were not sent to England until the time limit had almost expired. If rejected, they were passed again in a slightly amended form, and again held here for a long period.

In 1722 an *Act for Establishing Courts of Judicature* was passed, stating that "there shall be three persons of known integrity and ability, commissioned by the governor . . . to be judges of the "supreme court", one of whom shall be distinguished in his commission by the name of chief-justice."¹⁸ This act was put into operation, but for some unknown reason was never considered by the Crown.¹⁹ Five years later a new act was passed, almost identical with the previous one. This was repealed by the King in Council on August 12, 1731,²⁰ so the Act of 1722 remained in force in accordance with the Charter. This remained the basis of the judicial system of Pennsylvania until after the Revolution.²¹

The judges of the supreme court, while virtually serving during good behavior, nevertheless held their commissions at the pleasure of the Governor or Proprietary. As time went on a bitter battle arose between the Assembly and the Governor and Council which represented the Proprietary interests.

¹³Loyd, *op. cit.*, p. 104. Shepherd, *op. cit.*, p. 370: "The tenure of office was during the good behavior of the incumbent."

¹⁴Eshleman, *op. cit.*, p. 418.

¹⁵*Statutes at Large*, II, pp. 148-159.

¹⁶*ibid.*, pp. 301-331. Repealed Feb. 30, 1713-4.

¹⁷Repealed by the Lords Justices in Council, July 21, 1719. *Statutes at Large*, III.

¹⁸section vi. Passed May 22, 1722. *ibid.*

¹⁹*ibid.*, III, p. 308.

²⁰*ibid.*, IV, p. 95.

²¹*Pa. Bar Assn. Reports*, 1910, pp. 435-6. It was amended in 1731, and again in 1759 and 1767. See *Statutes at Large* for amendments.

One result of this was the attempt of the Assembly to establish by law tenure during good behavior. On September 29, 1759, a law was passed stating that the judges of the Court of Common Pleas, as well as the justices of the Supreme Court, should hold their commissions *quamdiu se bene gesserint*, and be removable only on the address of the Assembly. The reason given was that the independence of the judiciary would thereby be more firmly established.²² But such a move would have been a limitation upon the Charter rights of the Proprietors, and also, as the Lords of the Committee of the Council said, would "excite a just jealousy in the other colonies by seeming to extend advantages to this proprietary government, which have been denied to those under his majesty's immediate care."²³ The act was accordingly disapproved on September 2, 1760. Such an act would have created a dangerous precedent for British colonial control and never could have been allowed by the Crown.

When the first constitution of Pennsylvania was framed in 1776, there was much agitation for a judiciary holding office during good behavior. It was recognized by many that independence and efficiency would be endangered by a limited term of office. But the opposition was too great! It will be remembered that this constitution was the result of a political revolution—a great democratic upheaval against the rule of the oligarchy of wealthy Philadelphia Quakers. Consequently, there was a determined opposition to "life offices," as tenure during good behavior was called, so the best that could be secured was a term of seven years, with the possibility of reappointment.²⁴ Section 20 of the new constitution provided that "The president, and in his absence the vice-president, with the council, . . . shall have the power to appoint and commissionate judges."

Despite the democratic circumstances under which this constitution was framed, it is interesting to note that one of the principles of independence was established, for the judges were not to be dependent upon recurring elections for their tenure of office, but derived their power from the executive branch of the government—the principle followed later by the framers of the Federal Constitution.

Concerning the question of salaries the Colonists had long ago learned that by controlling the stipend of the Royal Judge (or in Pennsylvania, the appointee of the Proprietor) he could be compelled to do their bidding.

²²*Statutes at Large*, V, p. 463.

²³*ibid*, V, p. 724.

²⁴Section 23. Limited tenure was found in only three other constitutions framed during this period—those of Georgia, New Jersey and Vermont.

With such a precedent before them the framers wisely provided that judges should have "fixed salaries."²⁵

In spite of this clear provision trouble soon arose, for the Council of Censors, that unique body provided to see that the Constitution be faithfully executed, declared: "This most important injunction of the Convention has not been complied with, as it ought. Permanent salaries, should without delay be established by Act of Assembly for the justices of the supreme court, for and during their respective continuance in office. Judges should have nothing to hope or fear from any one."²⁶

The Constitution of 1776 immediately aroused a storm of opposition and the battle for revision began as soon as it was proclaimed. The Council of Censors appointed a committee to consider what alterations were necessary. It reported on January 17, 1784, proposing life tenure for the judges of the Supreme Court.²⁷ The report was adopted on every point, but the movement for amendment failed. By a vote of 14 to 10 it was "Resolved, That there does not appear to this council an absolute necessity to call a convention to alter, explain, or amend the constitution."²⁸

The movement for revision continued, however, without interruption. On March 4, 1789, the Republican assemblymen²⁹ were busy preparing petitions to be circulated in the various counties, urging the Assembly to call a convention to meet in October. On March 24th the project was, by a vote of 41 to 17, formally submitted to the people.³⁰ Four days later the Assembly adjourned for the summer recess, thus giving the members an opportunity to ascertain the wishes of their constituents.³¹

When the Assembly met after the recess, being "satisfied" from the petitions returned to it, and from personal inquiries made by members during the summer,³² that a convention was the will of the people, a formal call was voted

²⁵Section 23. "The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehavior at any time by the general assembly;"

²⁶*Report of the Council of Censors*, printed by Francis Bailey, Philadelphia, 1784.

²⁷*ibid.* It is interesting to note that this proposal was adopted by the Convention of 1790.

²⁸*ibid.*

²⁹Those opposed to the Constitution were called anti-constitutionalists and later *Republicans*, while its supporters were known as the Constitutionalists. The term *Democrat* was not yet in wide use. *Vide* Graydon, Alexander, *Memoirs of His Own Time* (ed. by J. S. Littell, Philadelphia, 1846), p. 331.

³⁰*Minutes of the Third Session of the 12th General Assembly of the Commonwealth of Pennsylvania*, pp. 177-8.

³¹Part of the resolution read: "That this House, on the pleasure of the people in the premises being signified to them at their next sitting, will provide by law for the expenses and place of meeting." *ibid.*

³²*ibid.*, September 14, 1789.

on September 15, 1789.³³

An active campaign to try to influence the members of the convention now began. Benjamin Franklin, then on the verge of the grave, opposed the movement for a judiciary during good behavior, stating that it aimed "at establishing a monarchy at least for life, . . ." ³⁴ The *Carlisle Gazette* of October 21, 1789, said: "Most men of any knowledge or reflection admit" that judicial independence ought to be established. "This admitted, it necessarily follows that their provision should be permanent, and that the tenure on which they hold their appointments should be that of good behavior."

The convention met on November 24, 1789, at Philadelphia.³⁵ No record of its debates was printed, so we know little about the discussions which took place. Much time, however, was spent in the *Committee of the Whole* discussing the provisions of the section relating to the judiciary. The framers completed their work on February 26, 1790, and adjourned to enable the people to inspect the result of their labors. The Convention re-convened on August 9, and on September 2, 1790, formally proclaimed the constitution by a vote of 61 to 1.³⁶

This Constitution, following the newly framed Federal Constitution, distinguished and defined the legislative, executive and judicial powers according to the now classic American method. It declared that the judges of the supreme court should hold their offices during good behavior, but "for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature."³⁷ The judges were to receive "for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office."³⁸ The long struggle for an independent

³³*ibid.* The vote was 39 to 17. 7000 English and 3000 German copies of the resolution for calling the Convention were ordered to be printed and distributed among the people. A movement to postpone the consideration of this question was defeated by a vote of 37 to 19. *ibid.*, September 15.

³⁴"Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania," printed in Franklin's *Works* (Bigelow ed., New York and London, 1885), vol. X, p. 185.

³⁵*Minutes of the Convention of the Commonwealth of Pennsylvania*, etc. (Philadelphia, 1789).

³⁶George Roberts, from the city of Philadelphia, cast the lone negative vote. *ibid.* On August 14 and 16 discussion on the judiciary section took place, but no change was made regarding judicial tenure.

³⁷Article 5, section 2.

³⁸*ibid.*

judiciary, serving during good behavior, was at last successful.³⁹

But the democratic spirit which had won such a triumphant victory in 1776 was not dead. The life tenure became the subject of vitriolic attacks, culminating in a series of impeachment proceedings against the judges. It was declared that such an institution as life tenure was aristocratic and had no place in our government. The *Whiskey Rebellion* of 1794 in western Pennsylvania was one manifestation of the opposition of these people, mainly Scotch-Irish, to the stern rule of the Federalist party. The *House-Tax* or *Fries' Rebellion* in 1799 was an indication of the same spirit among the Germans in the eastern counties of Bucks, Montgomery and Northampton.

The Anti-Federalist party of Thomas Jefferson naturally found many supporters in Pennsylvania, and in the presidential election of 1796 the Federalists were able to carry the state only by a very narrow margin. Four years later the Governor and House of Representatives were strongly Democratic-Republican (the old anti-constitutional party), while the Senate was still Federalist. In 1804 the Jeffersonians secured complete control of the legislative and executive branches of the government, but the life-judiciary was filled with their opponents. The outcry against them was tremendous, but it must be admitted that some of the opposition came from political leaders who were looking at the offices with covetous eyes and plotting to divert the salaries to partisan purposes.⁴⁰

After 1805 many petitions were received by the Legislature against life tenure, and insistent demands were made for the revision or amendment of the constitution. They usually ran like this: "It is believed that the Constitution of Pennsylvania might be improved by being so amended as to diminish the patronage of the Governor, abolish all offices for life, secure a more equal

³⁹The first indication of how the question would be decided came on December 10, 1789. On a preliminary question embracing the judges of the Supreme Court only, it was decided by a vote of 56 to 8 that the "Judges of the Supreme Court should hold their commissions during good behavior. . . ." *Minutes*, pp. 34-5. The opponents of life tenure did not give up the battle, for they immediately turned their attention to the question of removal. On Feb. 13, 1790, it was moved that the word *may* after governor be struck out, and in lieu thereof the word *shall* inserted, thus making it mandatory for the governor to remove the judge on the address of two-thirds of the legislature. But before a vote could be taken the session adjourned. Two days later the amendment was withdrawn, but another one was introduced to pass an *address* to the governor simply by a majority vote, instead of two-thirds. This also met with defeat. Quite a few of the same men were involved in both attempts.

⁴⁰This is shown by the fact that many of the judges proceeded against were Federalists. Loyd, *op. cit.*, p. 149. The citation of English decisions in the opinions of the court greatly exasperated the radical element, so an act was passed on March 19, 1810 (*P.L.*, p. 136), which provided that it should be unlawful "to read or quote in any court in this Commonwealth, any British precedent or adjudication which may have been given or made subsequent to the fourth day of July, . . . (1776)." This act was repealed on March 29, 1836. *ibid.*, pp. 224-5.

enjoyment of the right of suffrage, and have the magistrates and other officers elected directly by the people."⁴¹

A *Society of Friends of the People*, organized in 1805, claimed that the Constitution had produced in officials a sense of irresponsibility to the people, and advocated the reform of the whole judicial system. The friends of Governor McKean meanwhile organized a society called the *Constitutional Republicans*, and petitioned against a convention. The whole issue was fought out in the gubernatorial campaign of 1805, when McKean was re-elected and the constitution vindicated by a narrow majority of about 5,000 votes in a total of 82,500.⁴² In an address to the Legislature, Governor McKean said: "The organization of the judicial powers of Pennsylvania has been long and fairly condemned. But there is not a defect suggested, from any quarter which the legislature is not competent to remedy."⁴³

But this statement did not satisfy the opponents of life tenure, which the legislature had no power to change. The agitation continued, and in 1825 the question of calling a convention was submitted to the people and decided in the negative by a vote of 44,488 to 59,892.⁴⁴ By 1831, however, it was generally conceded that many evils existed in the administration of justice.⁴⁵ The courts were simply overwhelmed with work, the judges themselves complaining.⁴⁶ One authority states that in proportion to the population, the number of suits was greater in the last quarter of the 18th century and the first half of the 19th than during any equal period subsequently.⁴⁷

In the meantime great social and industrial changes had taken place and the Assembly once more was petitioned to revise the constitution. Early in 1833 the Senate appointed a Committee to consider these petitions. On February 20 the Committee reported favorably on submitting a call for a convention to the people.⁴⁸ The report proposed, however, to limit the action of the convention to ten amendments named in the sundry petitions, the second of which stated that judges should be appointed for a term of years, rather than "the present tenure . . . which, in reality, amounts to holding the office for life; because it is evident from what has transpired within the last ten years, that it is next to an impossibility to remove a judge by impeachment, or address to the Governor . . . indeed, from past occur-

⁴¹*Debates in the Constitutional Convention of 1837*, vol. IV, pp. 396-7.

⁴²Franklin S. Edmonds, "Development of Constitutional Limitations in Pennsylvania," *Pa. Bar Assn. Reports*, 1915, (vol. 21), pp. 261-2.

⁴³Howard M. Jenkins, ed., *Pennsylvania-Colonial and Federal* (Philadelphia, 1903), II, p. 181.

⁴⁴Edmonds, *op. cit.*, p. 262.

⁴⁵See Hazard, *Register of Pennsylvania*, IX, p. 36.

⁴⁶*Ibid.*, p. 361; vol. XIII, pp. 94-6.

⁴⁷F. N. Thorpe, *Constitutional History of the American People* (2 vol., New York, 1898), II, p. 45.

⁴⁸See *Report of the Committee*, read in the Senate on Feb. 20, 1833. Printed by Henry Welsh, Harrisburg, 1833.

rences, it would seem that, unless in a time of extreme political excitement, judges may bid defiance to addresses and impeachments. . . . It is thought that the tenure of a judgeship, for a term of years not unreasonably short or long, would on the one hand, preserve as far as necessary, the independence of the judge, and on the other, prevent many of the evils now complained of, and which, for many years, have caused much dissatisfaction among the people in some parts of the state. . . .⁴⁹

This report boded ill for the life tenure of the judiciary, but the Senate rejected the bill embodying these proposals, so the matter of revision dragged on for a few more years.⁵⁰ In 1834 a meeting was held in Harrisburg for the purpose of drafting a memorial praying the legislature to pass a law providing for the election of delegates to compose a "Convention for the purpose of submitting an amended Constitution to the citizens of this Commonwealth for their adoption or rejection." A committee, appointed to report what amendments ought to be agreed upon by this convention, proposed the abolition of all offices for life.⁵¹

Thus it is evident that there was a persistent and constantly growing sentiment for revision, though it is undoubtedly true that much of it was for political reasons. The matter came to a head when the Commonwealth, on account of the tremendous expenditure of borrowed money for public works, temporarily defaulted on the interest payments on the state debt.⁵² In no state was the effect of the panic of 1837 so overwhelming as in Pennsylvania.⁵³ The forces of discontent were thus consolidated and the call for a convention to amend the constitution was finally adopted by a majority of 13,404.⁵⁴

The convention met in the Hall of the House of Representatives at Harrisburg on Tuesday, May 2, 1837. Committees were appointed to study the proposed amendments. Perhaps the most important and profound debate took place on the question of the courts and the judiciary. The majority report of the Judiciary Committee recommended "that it is inexpedient to make any

⁴⁹There was no direct provision for amendments in the constitution of 1790, and the committee stated that "this circumstance has given rise to" difficulties.

⁵⁰*Pa. Bar Assn. Reports*, 1915, pp. 263-4.

⁵¹Hazard, *op. cit.*, XIII, p. 56. A term of five or seven years was proposed.

⁵²See *Report of Legislative Committee on Finances of Pennsylvania, 1838-1843* (Harrisburg, 1878). Printed in *Pa. Bar Assn. 2nd Annual Report*, 1896.

⁵³*Pa. Bar Assn. Reports*, 1896, pp. 16-18.

⁵⁴*Debates of the Constitutional Convention of 1837* (13 volumes, Harrisburg, 1838-9), vol. i, p. iv. The vote was 86,570 to 73,166. The legislature had decided on April 14, 1835, that "the sense of the people of Pennsylvania should be taken on the subject of holding a Convention."

amendment in" the section dealing with the judiciary. In other words, it advocated tenure during good behavior.⁵⁵

The minority report advocated the substitution of a term of years. This was the signal for a bitter and protracted debate. Involved in the question of tenure, unfortunately, was also the matter of justices of the peace. The latter had been appointed by the governor and it was admitted that much abuse had occurred. Hundreds of commissions had been issued in a few weeks by governors just going out of office—"midnight justices."⁵⁶ Under such circumstances, compromise was possible. It was understood that the election of the justices was most especially the wish of the people, so the advocates of life tenure hoped that by yielding on that point no change would be made in the term of judges.

But the Democrats regarded tenure during good behavior as an aristocratic institution. They maintained it was tenure for "life" and were determined that it should be abolished. Particular attention was centered upon the apparent impossibility of removing judges. Mr. Sturdevant remarked: "To attempt to impeach a judge in Pennsylvania was a folly. It could not be done. The people were in consequence, compelled to submit to injustice, to have their rights trodden under foot, and the only hope which they had of obtaining redress was the death of the judge. . . ." ⁵⁷

Mr. Woodward continued the argument by stating that tenure during good behavior was "life tenure." "As to the power of removal," he said, "it is seldom successful when resorted to. If the attempt be made to remove a judge, all the means which he can employ, himself a powerful man perhaps, and all that his powerful friends can bring to his aid, are put in requisition to avert the shaft of justice." It has "settled into an axiom that you can not remove a judge for matter which is cause for impeachment," and this "is even more difficult."⁵⁸

Mr. Brown said that if "you want to make a judge industrious, honest and faithful, and to keep him within the line of his duty, never let the public gaze be withdrawn from him. Let him know that the public are scrutinizing his acts, and will visit them with their condemnation, if they be arbitrary or corrupt. This responsibility had a salutary effect on all your other departments, and so it will have with the judiciary."⁵⁹

Mr. Ingersoll viewed with alarm the party results of the present judiciary system, stating that the "judges are not to be called to account, at any time for any misdeeds. They were secure under the protection of their commis-

⁵⁵With the exception of one member the committee was composed entirely of members of the legal profession. *ibid*, IV, p. 279.

⁵⁶*ibid*, p. 281.

⁵⁷*ibid*, p. 534. "Once a judge, always a judge!" was a common slogan in Pennsylvania at this time.

⁵⁸*ibid*, p. 319.

⁵⁹*ibid*, p. 410.

sions, which, however, cannot change the nature of the men, but leaves them just where they find them, subject to the inseparable infirmities of their kind—ambition, avarice, love of ease, . . . "60 It was also stated that if the "tenure were limited, a judge would not drink to excess; but that, when the tenure is good behavior, the judges have been often intoxicated with the flowing bowl."⁶¹

Tenure during good behavior had many able advocates. Mr. Hopkinson, of Philadelphia, declared that these so-called "life offices" had originated in England with the people, and were not "an aristocratical invention as has been asserted."⁶² He stated that "not a petition has been laid on our table; in no audible, distinct manner have the people spoken to us about it; but we are left to the vague conjectures . . . of gentlemen, drawn from sources and founded on evidence they can neither produce nor explain."⁶³ Hopkinson said that the "objections we have heard on this floor against the tenure of good behavior, have generally been found to consist of some local or temporary evil, of personal defects in some existing judge," but that no argument or evidence against the principle had been heard.⁶⁴

Mr. Porter, a lawyer from Northampton, said: ". . . one of the greatest evils I have had to encounter is the changes of judges. It is far better that the judicial decisions should be uniform, and in accordance with each other, than that they should be correct or incorrect." He asserted that he had "seen every new judge desirous to establish some new and favorable opinion, instead of affirming and continuing those which have been declared by his predecessors."⁶⁵

This argument was continued by Mr. Merrill, of Union, who stated that new judges give undue weight to different maxims, and also declared that when a judge is nearing the end of his term people may become suspicious of some of his decisions and would impute to him sinister motives, which otherwise would not be thought of. "Time and experience," he said, "are necessary to develop an able judge. Lawyers may take either side, while the judge must come to a fair decision on the whole." The course of practice of lawyers "has warped their judgment," and almost every man, when he comes to take his seat on the bench for the first time, thinks that some things either are, or ought to be law, which have not been so decided.⁶⁶

In the midst of this important debate a clever piece of strategy occurred. The minority report recommended a ten year term for the supreme court judges. Many, however, considered five years as the limit. Suddenly Mr.

⁶⁰*ibid.*, p. 447.

⁶¹*ibid.*, p. 511.

⁶²*ibid.*, pp. 286-7.

⁶³*ibid.*, p. 307.

⁶⁴*ibid.*, p. 309.

⁶⁵*ibid.*, p. 347.

⁶⁶*ibid.*, p. 361.

Dickey, of Beaver, threw consternation into both camps by moving that the tenure of the supreme court judges should be fifteen years.⁶⁷ The resultant situation is clearly shown in the speech of one of the delegates: "The gentleman from Beaver proposed a term of fifteen years, while my proposition was a term of five years. But I am willing, rather than to lose all—and rather than to forego the opportunity now afforded for the establishing of the principle of limited tenures, to take the term of fifteen years. . . . The question presented is a plain and practical one. Shall we take this or get nothing?"⁶⁸

On the other hand, what were the advocates of tenure for good behavior to do? The parties were closely divided; a five or ten year term was odious to them; fifteen years, while far short of their desire, was better than the former. They, too, had to answer the question: "Shall we take this" or get something worse? Thus we see the anomaly of many men voting for the motion but speaking against it. The final vote was taken on February 16, 1838, the motion being adopted by 85 to 32.⁶⁹ Thus, after a valiant struggle, tenure during good behavior was abolished.

The Constitution of 1838 was amended in 1850, 1857 and 1864. The amendment of 1850 is the only one pertaining to the judiciary. By it the judges of the supreme court were to be chosen by the qualified electors of the state at large, but no change was made in the tenure of office. The importance of this amendment is evident, for it was the first time in the entire history of Pennsylvania that the highest judicial officers were chosen by the electors. It was undoubtedly the result of the "Democratic Era" inaugurated by the election of Andrew Jackson. A fundamental tenet of his followers was that all officers be elected by the people. Apparently there was much demagoguery connected with the movement, for one well-known lawyer asserted that this amendment "was never called for by the people, was not debated or considered as so grave a matter should have been; . . ." ⁷⁰ One supporter of an elected judiciary in 1850 said he "would rather have demagogues than demijohns" as judges.⁷¹

Another important change made by the above amendment pertained to

⁶⁷*ibid.*, p. 383.

⁶⁸*ibid.*, p. 392.

⁶⁹*ibid.*, XIII, p. 49. The constitution as amended was submitted to the people, and was adopted by the small majority of 1,212. The vote was 113,971 to 112,759. *Constitutions of Pennsylvania* (Legislative Reference Bureau, prepared by Fertig and Hunter), p. 3.

⁷⁰Mr. Woodward, who served in both the conventions of 1837-8 and 1872-3. *Debates of the Constitutional Convention of 1872-3*, III, p. 744. The amendment passed both Houses in one year, again passed the next year, and was then submitted to the people and adopted. *ibid.*, p. 751.

⁷¹*ibid.*, p. 777.

the question of removal. For any reasonable cause which should not be sufficient ground for impeachment, the governor had the power to remove the judges upon the address of two-thirds of each branch of the legislature. This provision was also found in the Constitutions of 1790 and 1838, but was not imperative. It authorized the removal upon address, but was not categorical, simply stating that the governor may do so. By the amendment of 1850 removal was made obligatory by substituting the word *shall* for *may*.⁷²

One more change in the history of judicial tenure should be noted. During the years immediately following the Civil War until about 1875 Pennsylvania was governed worse than at any other time. A political ring was in almost complete control and special and local legislation was passed in their interests. In 1872, for example, the legislature passed 1113 bills, of which it is estimated that only 43 were general laws.⁷³ One contemporary asserted that it "had come to be generally believed that the lobby had as much to do with legislation as the members of the Senate and House, and charges of fraud were frequently circulated."⁷⁴ So widespread was the dissatisfaction that the legislature decided on April 11, 1872, to call a convention to amend the constitution.⁷⁵ The Convention met on November 12, 1872, at Harrisburg, but adjourned on the 27th to meet in Philadelphia on January 7, 1873.⁷⁶

Judicial tenure became one of the subjects for discussion, giving rise to a long debate. On November 21, 1872, a resolution was introduced stating: "That the Committee on Judiciary be instructed to inquire into the expediency of providing that all judges who are required to be learned in the law shall be appointed by the Governor, by and with the advice and consent of the Senate, and that they shall hold their offices during good behavior, . . ." ⁷⁷ Immediately other resolutions were presented advocating election by the people and a limited term, varying from fifteen to twenty years.

It is evident that many divergent views regarding judicial tenure existed. On March 26 it was stated in the convention that the report of the judiciary committee would not be unanimous, and it was predicted that there would be

⁷²In a legislative address Governor McKean frankly declared: "I will let the Legislature know, that *may* means I won't." C. R. Buckalew, *Examination of the Constitution exhibiting the derivation and history of its provisions* (Philadelphia, 1883), p. 126. See the attempt made in 1789 to do the same thing. *supra*, p. 14, note 39.

⁷³Franklin S. Edmonds, "Development of Constitutional Limitations in Pennsylvania," *Pa. Bar Assn. Reports*, 1915, pp. 266-7. See also statement of Mr. Justice Mitchell in *Commonwealth v. Gilligan*, 195 *Pa.* 504 (1900).

⁷⁴Samuel Dickson, "The Development in Pennsylvania of Constitutional Restraints upon the Power and Procedure of the Legislature," *Pa. Bar Assn. Reports*, 1896, p. 28.

⁷⁵*P. L.*, pp. 53-7.

⁷⁶*Debates*, 1872-3, *op. cit.*, vol. I.

⁷⁷*ibid.*, p. 89.

several minority reports.⁷⁸ One member said he understood that the report was "very revolutionary in character, and, in fact, changes the entire system of our judiciary."⁷⁹

The next day the committee reported. Section two of the report stated that the supreme court was to consist of seven judges, nominated by the Governor, and by and with the advice and consent of two-thirds of the Senate, appointed and commissioned by him. They were to hold office for twenty-one years, but were not eligible for re-appointment. The judges were to receive "an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office."⁸⁰

The reports of the dissenting members differed widely. In general they favored an elective judiciary and opposed the attempt to restore the old system.⁸¹ Mr. Bromall, in a dissenting report, said he seemed to stand "alone in his desire to leave the judiciary system substantially as it is."⁸² Tenure during good behavior was linked with the appointment of the judges by the governor and senate. If that could not be obtained, then, as one member said, "it is quite as well that they would feel dependent upon the good opinion of the people of the district, as upon that of a political Governor and Senate."⁸³

Aside from a long debate on the question whether the judges would be elected by districts or by the electors of the state at large,^{83a} the discussion centered on an elective or appointive judiciary. The strongest supporter of the latter was Mr. Woodward. He stated that practically everyone with whom he talked was in favor of abolishing the elective judiciary, and asserted that when the convention was in Harrisburg the sentiment was "as nearly unanimous on this point as it was possible for public sentiment to be on any subject." He got the impression that "this great reform" was going to be "accomplished in the easiest possible manner," but soon found how "young and green" he was, for in the judiciary committee "nobody, or scarcely anybody, was in favor of appointing the judges."

Mr. Woodward's main contention was that "the mass of voters are incompetent to judge of judges; they cannot select intelligently. It is an utter absurdity," he said, "to submit a comparison of judicial attainments and quali-

⁷⁸*ibid.*, III, p. 154. The chairman asked leave to have 1500 copies of the report printed. Objection was raised to the large number, but the chairman said he desired to have it "circulated freely among the lawyers and judges."

⁷⁹*ibid.*, p. 155.

⁸⁰*ibid.*, p. 182.

⁸¹*ibid.*, pp. 188, 191, 200. The following dissented from the report of the committee: Kaine, Purviance, Dallas, Bromall, Reynolds and Woodward.

⁸²*ibid.*, p. 201.

⁸³*ibid.*, p. 201.

^{83a}The debate dragged on so long that one member said that limitations must be made "if we intend to get away from here at any time before 1876, unless we intend to sit here as a monument to be looked at by the people coming to the centennial exhibition." *ibid.*, p. 741.

fications to masses of men who know not the candidates, who know not the duties to be performed, nor the training and education essential to a right discharge of those duties."⁸⁴

Mr. Temple, Philadelphia, declared that "the judges of the city and county of Philadelphia are primarily elected by about a score of politicians in this county."⁸⁵ In fact, it was asserted that candidates for judgeships were "found around the town trading and bartering with other persons who are candidates for other positions in the campaign."⁸⁶ On the other hand, it was contended that judges would be appointed for partisan reasons, and corruption could also creep in.⁸⁷

The first vote on any judicial question was taken on the motion that the judges of the supreme court be elected by the legal voters of the state at large. It was carried by 67 to 23.⁸⁸ It was now evident that tenure for good behavior was doomed, and, as Mr. Curtin said, "in the presence of so large a vote . . . we must abandon all hope of reaching an independent tenure to the judiciary by appointment." and get as long a term as possible.⁸⁹ On May 1 an entirely new section was proposed, with a term of fifteen years.⁹⁰ The next day a motion was carried by a vote of 57 to 25 to extend this to twenty-one years.⁹¹ The final decision was: "The Supreme Court shall consist of seven judges, who shall be elected by the qualified electors of the State at large. They shall hold their offices for the term of twenty-one years, if they so long behave themselves well, but shall not be again eligible. The judge whose commission shall first expire shall be chief justice, and thereafter each judge whose commission shall first expire shall in turn be chief justice."⁹² The constitution was ratified by the qualified electors on December 16, 1873, and went into effect on January 1, 1874.⁹³

The constitution of 1873 is very vague concerning the question of removal. The clarity of the earlier constitutions and amendments in this respect is replaced by a clause which is extremely ambiguous. Instead of the *shall* in the amendment of 1850 we again have *may*. But whether this applies to the justices of the Supreme Court is uncertain. Article 5, section 15, states that "All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period

⁸⁴*ibid.*, pp. 734-7; 741-3.

⁸⁵*ibid.*, p. 757.

⁸⁶*ibid.*, p. 757.

⁸⁷*ibid.*, pp. 747-9.

⁸⁸*ibid.*, IV, p. 41.

⁸⁹*ibid.*, pp. 58-9.

⁹⁰*ibid.*, p. 47.

⁹¹*ibid.*, p. 69. There was little debate on the tenure. Most of the discussion centered on the question of dividing the state into districts and having the judges elected therein.

⁹²Article V, section 2.

⁹³*Constitutions of Pennsylvania*, Fertig and Moore, p. 9.

of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each House of the General Assembly."⁹⁴

Does "any of them" refer to both Supreme Court and Common Pleas judges? If the above clause does not apply to Supreme Court justices, which appears to be a reasonable interpretation,⁹⁵ then they can be removed only by impeachment,⁹⁶ for Article VI, section 4, distinctly exempts "judges of the courts of record learned in the law" from removal by the Governor on address of two-thirds of the Senate.⁹⁷ The removal of Supreme Court justices upon address, therefore, depends entirely upon the interpretation given to Article V, section 15. Under this article a judge could be removed for physical disability, but only on the address of two-thirds of each House.⁹⁸ The whole matter, however, has never been judicially determined.

The history of judicial tenure in Pennsylvania shows very clearly that every phase of the subject was debated at some time or other, and that every type of tenure, from one year in the early period to good behavior from 1790 to 1838, was tried. The appointive method was in operation from the very foundation of the colony in 1682 until 1850, when it was superseded by popular election. Each change was the result of some broad movement in American life and politics which swept Pennsylvania along with it.

⁹⁴Italics my own.

⁹⁵One authority says, however, that the clause "any of them" may refer to both Supreme Court and Common Pleas judges. Thomas R. White, *Commentaries on the Constitution of Pennsylvania* (Philadelphia, 1907), p. 325.

⁹⁶See C. R. Buckalew, *Examination of the Constitution exhibiting the derivation and history of its provisions* (Philadelphia, 1883), p. 126.

⁹⁷A judge could be removed upon a conviction, in due course of law, of misbehavior in office or of the commission of an infamous crime, under the first sentence of Article VI, section 4, which states: "All officers shall hold their offices on condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime." But who shall remove a judge so convicted? See Buckalew, *op. cit.*, p. 186.

⁹⁸Removal of Judge of Common Pleas (opinion of Attorney-General), 5 *Dist. Rep.*, 158 (1896).