Florida Historical Quarterly

Volume 17
Number 2 *Florida Historical Quarterly, Vol 17, Issue 2*

Article 3

1938

Florida's First Constitution

FLORIDA'S FIRST CONSTITUTION

By JAMES B. WHITFIELD

The constitution of 1838-1839, formulated by representative delegates and adopted at the polls, represented the dominant will of the people of the Territory of Florida in emerging from a status of territorial dependence upon the Federal government into that of a sovereign State subject only to the Federal constitution.

The leading purpose of the learned and experienced men composing the convention was to organize a State government economical and efficient but suitable to a vast area, sparsely settled, with little means of communication. The constitution as framed proved to be what was needed and many of the general principles of state government contained in that instrument have been continued by later organic law. It provided for a state government with general but limited powers and ample safeguards of the fundamental rights of citizens against oppression by arbitrary acts of any official or governmental body.

The constitution itself contained provisions for its submission "to the people for ratification at the election for Delegate" to Congress on the first Monday of May 1839, and for the president of the convention to make proclamation of the result. It was adopted by a majority of only 119 votes.

Also, it was provided that "in case the Constitution be ratified by the people, and immediately after official information shall have been received that Congress have approved the Constitution, and provided for the admission of Florida, the President of this convention shall issue writs of election" for "an election to be held for Governor, Representative in Congress, and Members of the General Assembly . . . . on the first Monday after the lapse of

sixty days following the day of the date of the President's proclamation" provided, however, that in case of the absence or disability of the President of the Convention or its Secretary, "a committee consisting of five, towit: Leigh Read, George T. Ward, James D. Westcott, Jr., Thomas Brown and Leslie A. Thompson, or a majority of them, shall discharge the duties herein imposed" on the president or secretary of the convention. Due to the death of the president and the absence of the secretary, it devolved upon Messrs. Ward, Westcott and Brown to carry out these duties.

But Florida was not admitted as a state until March 3, 1845, when an act of Congress enacted that "the States of Iowa and Florida be, and the same are hereby declared to be States of the United States of America, and are admitted into the Union on equal footing with the original States, in all respects whatsoever."

\- - -

With sundry variations the first constitution contained most of the essential provisions of a representative democracy that are included in the later ones, though a few provisions peculiar to that period appear in it. The differences between the first and subsequent constitutions manifest the development and modernizing of the dominant political thought of the State as its citizens were influenced by advancing social and material needs.

The general outline of governmental provisions and principles are in accord with those contained in the subsequent constitutions. Such variations as there are in the later instruments grow out of the disappearance of the institution of slavery, the desire for an extension of the suffrage, to eliminate duelling, for direct election of officers, for better education ; also for the regulation of public services

such as common carriers and public utilities, the need of better highways, for protection of health, for internal improvements and adequate transportation and communication facilities, for greater authority in municipalities, for the enforcement of criminal law; also for fair treatment and encouragement to those who have been given their freedom and the electoral franchise ; and numerous other objects in the advancement and development of the State and the welfare of its people.

The constitution of 1838-1839 was divided into seventeen sections, all of which are similar to the divisions of later ones, except that there were articles on public domain and internal improvements, and on banks and other corporations, which do not appear as separate articles in the constitutions of 1868 and 1885.

The Declaration of Rights contained twenty-six sections stating principles of representative democratic government and concludes with the following :

"27. That to guard against transgressions upon the rights of the people ; we declare that everything in this article, is excepted out of the general powers of government, and shall forever remain inviolate ; and that all laws contrary thereto, or to the following provisions, shall be void."

This last-quoted provision is also in the constitutions of 1861 and 1865. In its stead the constitutions of 1868 and 1885 contain the following:

"This enunciation of rights shall not be construed to impair or deny others retained by the people."

The Preamble of the first constitution expressed a purpose of "the people of the Territory of Florida . . . to form ourselves into a free and independent State." No issue seems to have been made when Florida was admitted as a state as to the meaning of the last four quoted words with reference to the

relation to the Union of states admitted into the Union under Section 2, Article IV, Constitution of the United States.

The general concept now is that the states of the Union are not "free and independent States" in the sense that they are separate nations having entire sovereignty within their limits with power to deal with other nations; but that each state of the Union is a sovereign whose authority within its borders as to general external relations and stated internal matters is subordinate only to the paramount authority of the government of the United States within its spheres of operation in or upon the states, as is granted or conferred and limited by the constitution of the United States. The Federal authority within its limits is supreme as to interstate and foreign matters and as to contract and other personal and property rights and other matters defined in the Federal constitution.

Unlike the constitutions of 1839, 1861, and 1865, Section 2 of the Declaration of Rights of the constitutions of 1868 and 1885 contain the following:

"All political power is inherent in the people. Government is instituted for the protection, security and benefit of the citizens, and they have the right to alter or amend the same whenever the public good may require it; but the paramount allegiance of every citizen is due to the Federal Government, and the people of this State have no power to dissolve its connection therewith."

A material difference between the oath of office contained in the first constitution and in the constitution of 1885, is that the latter includes the obligation to "support, protect and defend the Constitution and Government [!] of the United States and of the people of Florida." Prior to 1868 the organic oaths of office did not include the words "and Government."

Only freemen were then given franchise and other political rights, including the right to acquire, possess and protect property; though, like subsequent constitutions, the first Declaration of Rights ordained "that all courts shall be open, and every person [!] for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law; and right and justice administered without sale, denial or delay."

In some respects the constitution of 1839 was more advanced, than some of the later ones, e.g. perpetuities and monopolies were disapproved ; the collection of more revenue than was required for necessary governmental expenses was expressly forbidden, the creation and operation of banking and other corporations were limited and regulated. (In fact, in the convention-as it had been and was later in the Territorial Council-that was the subject of the sharpest division of opinion and the greatest controversy.) Legislative divorces, which had often been granted by the Council heretofore, were forbidden. Some provisions were archaic: ministers of the gospel were forbidden to hold an executive or legislative office, nor was an officer of a bank eligible; only male freeman had a right to vote and to keep and bear arms for the common defense.

All State officers except the governor, members of the General Assembly, and delegates to Congress were elected by the General Assembly. But amendments required some of these to be elected by the people. This principle was ignored by the constitution of 1868, but was made general by that of 1885.

In 1845, under the first constitution, the electors were "every free white male person of the age of twenty-one years and upwards-a citizen of the United States who shall have resided . . . in Florida for two years . . . and in the county for six months

and who shall be enrolled in the Militia . . . No soldier, seaman or marine in the regular Army or Navy of the United States, unless he be a qualified elector previous to his enlistment shall be considered a resident of the State." Those participating in a duel were not eligible to hold any post of honor, profit, trust, or emolument, civil or military, legislative, executive, or judicial under the State government.

The legislative power of the State was vested in a General Assembly which was to hold annual sessions. (The first amendment adopted provided for biennial sessions.) There were seventeen members of the Senate and forty-one members of the House. Each senatorial district had one senator except the district of Leon county which had two. The membership of the House was: Escambia 3, Walton 1, Washington 1, Jackson 3, Franklin 2, Calhoun 2, Gadsden 4, Leon 6, Jefferson 3, Madison 1, Hamilton 1, Columbia 2, Alachua 2, Duval 2, Nassau 1, St. Johns 3, Mosquito (afterwards Orange) 1, Dade 1, Monroe 1, Hillsborough 1.

It was provided that no legislative bill "shall have the force of law until on three several days it be read in each house, and free discussion be allowed thereon, unless in cases of urgency, four-fifths of the house in which the same shall be pending, may deem it expedient to dispense with the rule." Under the present constitution a bill may be introduced and passed at any time on being read in full on final passage, the rules being waived by a two-thirds vote at each step.

The first four State administrative offices were provided for, *viz.* Secretary of State, Attorney-General, Comptroller, Treasurer. The Superintendent of Public Instruction and the Commissioner of Agriculture were added by subsequent constitutions.

Like the present constitution the first organic law limited the governor to one term of four years and there was no lieutenant-governor. But the State officers except the governor were chosen by the General Assembly.

The judicial power of the State was vested in a supreme court, courts of chancery, circuit courts, and justices of the peace. Chancery courts not being organized, equity jurisdiction was exercised by the circuit courts. Corporation courts were authorized, but their jurisdiction was not to extend to capital offences. Originally it was provided that the circuit judges should be elected by the General Assembly for five year terms and should act as supreme court judges until the establishment of a supreme court. After the first five years the justices of the supreme court and the circuit judges were to be elected "for the term of and during their good behavior." Later the constitution was amended so that the circuit judges and also the justices of the supreme court and chancellors should be elected at the polls for terms of six years. For a time the sittings of the supreme court were not, as now, held only at Tallahassee. The constitution of 1839 provided that "The Supreme Court when organized shall be holden at such times and places as may be provided by law. An act of 1851 required four terms of the court per year, one each at Tallahassee, Jacksonville, Tampa, and Marianna-one term in each of the four circuits, Western, Middle, Eastern, and Southern.

Officers could be removed by the concurrent act of the governor and the General Assembly. The present organic law provides for the impeachment of the governor, the administrative officers of the executive department, justices of the supreme court, and judges of the circuit courts for any misdemeanor in office. All other State and county officers may

be suspended by the governor, or may be removed by the governor and the senate, and the governor may fill vacancies in office by appointment. Thus the governor now has more power over officers who are not subject to impeachment than under the first constitution.

The governor alone had the power to grant pardons and reprieves. Under the constitution of 1885 the three justices of the supreme court were members of the Board of Pardons with the governor and the attorney-general. An amendment of 1896 provides that the governor, comptroller, attorney-general, and commissioner of agriculture, or a major part of them, of whom the governor shall be one, may upon conditions grant pardons after conviction, commute punishment, and remit fines and forfeitures.

There is a distinct tendency of the Legislature, caused by the enormous growth of the State and a corresponding need for a more intimate administrative regulation and supervision of many professional, business, and industrial enterprises and occupations, to create and enlarge the authority and duties of administrative boards and commissions in addition to those created by the constitution.

However, it was under the constitution of 1839, which had an article on internal improvements, that the Internal Improvement Act of January 6, 1855 was passed for the administration of the millions of acres of swamp and overflowed lands and other lands which were granted to the State by the act of Congress of September 28, 1850. Under these acts the original railroad system of the State was constructed and other internal improvements encouraged.

There was an article on education, but its provisions relate to the conservation of the lands do-

nated by the Federal government for school purposes. There was then no system of public schools. Since then the development of public schools has more and more become one of the leading purposes of the State government. It is believed that the first public school supported by taxation in Florida was in the city of Tallahassee under the guiding influence of David S. Walker, afterwards State land commissioner and *ex-officio* Superintendent of Public Education, before becoming governor in 1865.

An article on homesteads and a section on married women's property first appear in the constitution of 1868, and articles on married women's separate property and on public health first appear in the constitution of 1885.

While the first three constitutions contain no express provision with reference to the seperate property of married women, the first constitution did contain the following :

"The General Assembly shall declare by law what parts of the common law and what parts of the civil law, not inconsistent with this Constitution, shall be in force in this State."

A Territorial act, approved December 23, 1824, provided "That all the rights and privileges of husband and wife, established or derived by marriage under the civil laws of Spain, while this State was under the jurisdiction of that government, shall be held, possessed, and exercised by the husband and wife respectively in this State, and each shall be permitted to sell, succeed to, dispose of, and convey by sale, devise, or will their goods, chattels, lands, and tenements, in the same manner as they could or might have done under the laws of Spain. . . ."

An act approved March 6, 1845, three days after the act of Congress admitting Florida as a state,

provided in detail for rights of married women in property acquired by them either before or after their marriage.

Thus the separate property rights of married women and the protection of the home for the family and for the widow and heirs of the homestead owner have been steadily extended and preserved for the public social welfare.

Many of the contrasts between the first and present constitutions indicate a general purpose to increase the reserve powers of the people through election of officers and by correspondingly curtailing the legislative and executive powers, and at the same time extending the executive powers in suspensions from office and the filling of vacancies temporarily.

The original constitution provided that no convention of the people should be called unless by the concurrence of two-thirds of each house of the General Assembly. It provided for amendments to the constitution by two-thirds of each house at two succeeding sessions, the second to be after six months notice of the first vote.

The present constitution authorizes amendments to it upon a three-fifths vote of each house, and adoption at the next general election after the required publication. A revision of the constitution may now be had by a two-thirds vote of the members of each house and approval at the next general election, when the succeeding legislature shall provide for such convention to revise the constitution.

Several amendments were adopted to the first constitution, mainly to define the qualifications of electors and officials and to make State judicial and other officers elective by the people instead of by the General Assembly.

The eminent men who framed the constitution of 1838-1839 foresaw the future of Florida as evidenc-

ed by the wise and appropriate provisions of that organic law under which the State was admitted to the Union in 1845.

From 1845 to 1861 under the first constitution there was steady growth in population and material development in Florida. Then came the Civil War and the convention* which adopted the Ordinance of Secession as well as the constitution of 1861-1862 which amended the first charter of the State in order to conform to that ordinance and to permit cooperation with the Southern Confederacy. These were adopted without submission to the electorate.

As an immediate result of the War, the constitution of 1865 was formulated pursuant to a proclamation of President Andrew Johnson, by delegates** chosen by those who had theretofore been electors of the State and "who are [were] loyal to the United States." A State government was formed with David S. Walker as governor. But this was not satisfactory to the Congress of the United States, and under acts passed over the veto of President Johnson the convention of 1868 was called under military authority to frame a constitution to accomplished the congressional theory of reconstruction-the delegates being representative of the new electorate as determined by those acts, through which a majority was created of recently emancipated colored men, prior to the adoption of the 14th and 15th amendments to the Federal constitution.

Thenceforward the people of Florida suffered from arbitrary and inefficient government until the Conservative-Democratic party of the State resumed control and elected George F. Drew as governor in 1876.

*Five of the members of that convention had been delegates to that of 1838-1839, *viz.* James G. Cooper, S. B. Stephens, Jackson Morton, John C. McGehee, and George T. Ward.

**Benjamin D. Wright and Thomas Baltzell, delegates, had been delegates in 1838-1839.