

Some legacies of the Ordinance of 1787 /

SOME LEGACIES OF THE ORDINANCE OF 1787.* BY HON. JAMES OSCAR PIERCE.

* Read at the monthly meeting of the Executive Council, March 13, 1899.

It is not the aim of this paper to explain the place of the Ordinance of 1787 as a constitutional document, or the details of the movement of which it was the culmination. The general history of that period has been abundantly written, and the evolution of the Ordinance has been elaborately traced. While the present age has recognized this as one of the great constitutional acts in the larger history of our country, the extent of our indebtedness to it has not been generally observed. We are now so far removed from that epoch that we can distinguish some of the legacies which that Ordinance has left for the welfare and prosperity of the present generation, and for which it and its wise promoters deserve our gratitude.

NATIONALITY.

It is not often possible to mark the precise time when a people became a Nation, or the final step which made it such. All students recognize historical processes as gradual, including those by which great governments grow. The historian sees a people at a certain date unformed, with no institutions definitely or permanently established, and he does not ascribe to them statehood. At a later period, the same people are recognized as a fully formed nation. In the intervening time, one can note only a general progress from the earlier status toward the later, without being able to assign any particular date as that when the change was consummated. There is a period in American history which presents difficulties of this character.

On July 4th, 1776, our country ceased to be thirteen British colonies, and she never reverted to that status. The adoption 510 of the Federal Constitution, and the

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commencement of its operations in 1789, exhibit her as a Nation. It is not easy to define her exact political status at any time during the interim. There has been extended discussion upon this subject, developing many and persistent differences of opinion. It is not necessary to attempt to settle these disputes, in order to distinguish the whole revolutionary and confederate period as one of progress, from the League of 1774 to the Nation of 1789. There are some well-meaning and patriotic persons, who argue that it was not until the results of the Civil War had removed all doubts, and had cemented the interests of the two previously discordant sections, that full nationality resulted. The majority of students of our history, however, now agree, as the Supreme Court of the United States has so often held, that the work was accomplished when the Constitution went into operation in 1789. If we do not concede that the Declaration of Independence initiated nationality, as many constitutionalists claim, it is easy to conceive of the period of 1776 to 1789 as one of transition, during which the people were considering the merits of two rival plans of confederation, and were gradually making their choice between a League and a Nation. The Ordinance of 1787 furnishes evidence that the choice was made, and that the people had determined upon the higher and more vigorous form of political life.

Many of the intervening steps taken by the people indicated that such was their choice; but it has been argued that these steps were not necessarily irrevocable or final. The Declaration of Independence itself, professing to be the act of "one people," seemed to imply the creation of a nation composed of thirteen states; and it has often been urged that this was a complete and determinate act, and that we were thus "born United States." So the Continental Congress, which was the sole head of the revolutionary government, raised a Continental Army and placed a general at its head, put afloat a Continental Navy, created an Appellate Prize Court, sent diplomats abroad, negotiated and entered into treaties, and discharged other functions properly pertaining only to a nation.

On the other hand, it is urged that these acts do not indicate the deliberate choice of the people to become a nation, because they were all compulsory, by reason of the war

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then existing. May it not be that these were only temporary expedients, assertions 511 of central sovereignty which was but a simulacrum, and which the states tolerated only under the pressure of a foreign war? The scanty grants of power to “the United States in Congress assembled,” under the Articles of Confederation, and the reservations made therein to the states, have been appealed to as indicating that the people were not ready to establish more than a league. It is true, they had adopted one flag, under which the army drove out or captured the invaders, under which the navy swept the seas; but may this not have been the flag of a league, and could it not have been divided into thirteen flags, with one star in each, if the people so desired? What they chose to do while engaged in resisting Britain, they might prefer not to do when the pressure of war was removed, and peace succeeded.

If we concede that these considerations leave it doubtful whether the people had theretofore chosen to become a nation, the doubts are resolved when we come to observe the Ordinance of 1787. In that instrument is found evidence of a deliberate choice made in the time of peace, after an extended discussion commencing in the time of war. This debate was protracted for ten years, and was at times exceedingly heated. The diverse views presented were ardently advocated, and several plans were offered for governing and dividing the Northwestern Territory. When, with all this consideration, after the pressure of foreign war had been removed, an ordinance of a distinctly national character was adopted, this may well be taken as the final determination of the people. By this instrument there was placed upon our government the stamp of Nationality. This was before the Federal Convention at Philadelphia had completed its draft of a constitution. It was foreordained that the work of that body should be the constitution of a Nation.

The precedent discussion involved the determination of this precise question, Should America be a Nation or a League? The matter under dispute had been the proper control of the unsettled western lands, over which, as a result of the war, Great Britain relinquished authority. Four of the states laid claim to some of these lands; and Virginia, whose pretensions seemed most plausible, claimed all, and proposed to settle for herself

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their destiny. Before the war had closed. the smaller colonies, with Maryland in the lead, were resisting the Virginia 512 theory, and claiming that the western lands would belong to the Union of States, because the states had united to wrest them from Great Britain. Maryland had declined to ratify the Articles of Confederation unless her position in regard to the western lands was adopted, and she yielded her assent to those articles only when assured that those lands would be ceded to the general government. It is true that Virginia and the other colonies voluntarily ceded their claims to these lands to the United States. But it is clear that they did so in response to that demand, and for the sake of cementing and perfecting the Union of the States. The Act of cession by New York recited that it was designed "to facilitate the completion of the Articles of Confederation." So the question becomes pertinent, Upon what legal ground was the claim of Maryland based? To what theory did Virginia and New York and Massachusetts and Connecticut yield, when they chose to cede the lands?

Under the British law, the colonies were crown property. They belonged to the sovereign. All the American charters were based upon this principle. From the time of James I, this had been conceded as a canon of the British constitution. It was the war jointly conducted, and the victory of the Americans, which secured these western lands by the concession in the treaty of peace. The respective colonial charters gave their holders title only to such lands as they had respectively occupied with their settlements, which did not reach beyond the Ohio river. And as it was by war and conquest, carried on by a united people, that these lands had been acquired, what power had thereby succeeded as sovereign to the rights of King George III? Manifestly, the people of the United States, that power which had conquered the territory from him.

The idea that these lands were by right common property anticipated their actual conquest by many years. Immediately following the Declaration of Independence, and before any steps toward a Union had been taken, the Maryland Constitutional Convention, on October 30th, 1776, resolved that "if the dominion over these lands should be established by the blood and treasure of the United States, such lands ought to be considered as a

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common stock. to be parcelled out at proper times into convenient, free and independent governments.” The substance of this proposition was offered in Congress in October, 1777, before the Articles of Confederation were submitted 513 for ratification, but it received the support of Maryland alone. In 1778, Maryland instructed her delegates not to ratify those articles until this question should be settled upon the basis that the lands. “if wrested from the common enemy by the blood and treasure of the thirteen states, should be considered as a common property, subject to be parcelled out by Congress into free, convenient, and independent governments.” These instructions, when read in Congress in May, 1779, brought protest and remonstrance from Virginia, based on her claim to individual sovereignty over these lands.

Delaware, New Jersey, and Rhode Island desired to have the unoccupied lands sold for the common benefit, not claiming more than an that at first. In connection with a certain contemplated treaty with the Cayuga Indians, it was proposed, in 1779, that the Six Nations should cede a part of their territory “for the benefit of the United States in general.”

The controversy of Maryland *versus* Virginia had progressed so far in 1780 as to imperil the success of the contemplated Union under the Articles of Confederation. so that it was proposed that the “landed” states should cede their lands to the Union in order to save the Union. In October, Congress resolved that the western lands, to be ceded by the states, should be formed into distinct republican states, which should become members of the Federal Union on equal terms with the other states. New York had already offered to cede her claims in order “to facilitate the completion of the Articles of Confederation and perpetual Union.” In 1781, Virginia offered to cede her claims, on certain conditions, one being the division into new states; and Maryland, having substantially won her controversy, ratified the Articles of Confederation, not relinquishing “any right or interest she hath, with the other United or Confederated states, to the back country.” In 1782, Congress, on the motion of Maryland, accepted the offer of New York, and in 1783 that of Virginia. The

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cession of Virginia was executed in March, 1784; that of Massachusetts, in April, 1785; and that of Connecticut, in September, 1786.

The other branch of the controversy, namely, as to the legal title to the territory, arose, in an acrid form, in 1782. In the discussion over the terms of the proposed treaty of peace with Great Britain, as to the title to the lands to be recovered, the claim of the United States as successor to the British crown 33 514 was advocated by Rutledge of South Carolina and Witherspoon of New Jersey. A committee of Congress submitted to it two alternative propositions, one that the individual states had succeeded to the rights of the crown, and the other, that these lands “can be deemed to have been the property of his Britannic Majesty, and to be now devolved upon the United States collectively taken.” The last named proposition was further expounded by the committee as follows: “The character in which the king was seized was that of king of the thirteen colonies collectively taken. Being stripped of this character, its rights descended to the United States for the following reasons: 1. The United States are to be considered in many respects as an undivided independent nation, inheriting those rights which the King of Great Britain enjoyed as not appertaining to any particular state, while *he* was, what *they* are now, the superintending governor of the whole. 2. The King of Great Britain has been dethroned as king of the United States by the joint efforts of the whole. 3. The very country in question hath been conquered through the means of the common labor of the United States.” The Virginia delegates protested against this proposition. asserting the individual sovereignty of their state. Witherspoon argued for the national view, saying: “The several states are known to the powers of Europe only as one nation, under the style and title of the United States; this nation is known to be settled along the coasts to a certain extent.” To minimize this controversy, the report was recommitted.

It soon arose more sharply, when the petition of the inhabitants of Kentucky was received, on August 27th. 1782, asking that they be admitted on their own application as a separate and independent state. on the grounds that they were “subjects of the United States, and not of Virginia,” and that as a result of the dissolution of the charter of Virginia, “the country

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had reverted to the crown of Great Britain. and that by virtue of the Revolution the right of the crown devolved on the United States.” Lee and Madison of Virginia controverted. while McKean of Delaware, Howell of Rhode Island, and Witherspoon of New Jersey, maintained the theory of the succession of the United States to the rights of the crown.

In 1783, in connection with the question of organizing the Northwestern Territory, Carroll of Maryland offered in Congress 515 a resolution claiming the sovereignty of the United States over that territory, “as one undivided and independent nation, with all and every power and right exercised by the king of Great Britain over the said territory.” Congress was not ready to adopt the proposition in that form. Then followed the acceptance of Virginia's offer of cession, provided she withdrew certain objectionable conditions, and the appointment of a committee to report a plan for the government of the territory; and, later, the deed of cession by Virginia, Jefferson's ordinance of 1784, and the deeds of cession. by Massachusetts and Connecticut, gradually paving the way for the authoritative and comprehensive Ordinance of 1787.

It was, then, the argument of the smaller colonies which prevailed, and to which the larger colonies yielded. The fact of a deed of cession by Virginia does not imply, as Professor Tucker has argued in his Commentaries on the Constitution, that all parties acknowledged the sovereignty of Virginia, because the deeds of cession did not stand alone. They were given to facilitate the Union of the States, and to enable the general government to exercise her sovereignty over the western territory. What was in fact done with these lands by the United States, with the assent of the larger colonies, is of greater weight, in ascertaining the ultimate purpose, than the verbal protests of certain dissatisfied statesmen. That final action was the assertion of full sovereignty by the United States, and the exertion of that sovereignty in establishing government. “Be it ordained, by the United States in Congress assembled,” is the language of self-conscious sovereignty.

It was this legal proposition, advanced by the smaller colonies as their ultimatum in the western land controversy, which the Supreme Court of the United States approved,. in the

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case of *Chisholm v. Georgia*, as just and sound, saying: "From the crown of Great Britain, the sovereignty of their [this] country passed to the people of it, and it was then not an uncommon opinion that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or state within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, *it did not give way to the other.*"

This proposition of necessity imputed nationality to the people of the United States, and denied the existence of a 516 league. To this proposition both Virginia and New York assented when they ceded their western lands. By her action in ceding these lands and participating in the adoption of the Ordinance of 1787, Virginia, no less than New York, was in good faith and in honor estopped from ever claiming any other position than that of a Commonwealth in subordination to the Nation. That Ordinance, legislating authoritatively for the government of the territory so acquired, was a national act. It was the deliberate act of the people of the United States, assuming to themselves the power of a nation. Whether America should be a nation or a league, became then a closed question. Thenceforward, it remained only to establish finally the nationality which the people had assumed, by the framing and adoption of the Federal Constitution.

THE DUAL SYSTEM OF GOVERNMENT.

The American system of federal government is unique. It is a happy combination of a strong but limited central government, for all general and external purposes, with state governments which control all local matters and all those affairs which most concern the body of the citizens in their daily lives. It was the first experiment of the kind on a large scale, and it has had a conspicuous success. The novelty consisted in binding together a league of states in such a manner as to give them a supreme central government which should act directly upon and command obedience from the individuals of all sections of the country. Thus every citizen is subordinated at the same time to two governments, and has a dual citizenship.

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The American plan contemplates additions to the group of states by admission of new ones on equal terms with the first members. It involves the assertion and exercise, by the people of the entire nation, of their inherent sovereignty; for no less a power would be competent to ordain, by authoritative law, the enlargement of the galaxy of states by the admission of new ones, possessed of equal rights and privileges, and bound by equal responsibilities and duties, with the older states. The sovereign people thus establish the central government which secures respect and honor for the flag abroad, and authorize and guarantee the state governments which foster and protect all the domestic privileges and rights of individuals. The people of all the states finally adopted this plan when they ratified the Constitution.

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The plan was first proposed in connection with the Ordinance for the government of the Northwestern Territory. While the Revolutionary War was still in progress, and before it was settled that America should hold that territory, it was proposed to divide it up, as fast as sufficiently populated, into new states, which were to be admitted to the Union on equal terms with the original thirteen. This provision the people approved, and it was embodied in the Ordinance, and thus, became the American plan. Under it, three states were admitted to the Union before the time came for Ohio, a part of the Northwestern Territory, to apply. This form of federalism has succeeded far beyond any possible expectation of its first proposers. To it America owes her great constitutional expansion, the cementing of all her various local interests and feelings, her unusual strength as a large representative republic, and her present proud position among the nations of the earth. The Ordinance in question (including in this term the whole movement for establishing government in the Northwestern Territory) was the first evidence that this had been adopted by the American people as their ideal of government.

FREEDOM.

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The war for the preservation of the Union purged the nation from the reproach, and its flag from the stain, of African slavery. This result was not an accident. Its causes were early implanted in our national life. The power that achieved this great work was the strong arms of freemen who were bred in the life of freedom, and devoted as by native instinct to her service. It was largely through the consecration of the Northwestern Territory to freedom by the Ordinance of 1787, that the ultimate nationalizing of liberty became possible. The dedication of that vast domain as the home of a race of freemen furnished the recruiting ground from which to enlist the legions who should sustain the banner of freedom against fierce opposition. If slavery was entrenched by the compromises of the constitution so as to necessitate an internecine struggle for its final overthrow, so was freedom by the Ordinance of 1787 so thoroughly entrenched as to make her banner and her army invincible when the crisis came.

The circumstance that, in the organization of the Southwestern Territory, Congress applied to it all the provisions of the famous Ordinance, except that prohibiting slavery, only 518 emphasizes the worth of the prohibition as to the Northwestern Territory. No one will now dispute the superior value of the Northwestern over the Southwestern plan of organizing territorial government.

The labored attempt of Chief Justice Taney, in, the Dred Scott case, to decry the efficacy of the Ordinance as a charter of freedom, because of a want of expressly granted power, in the Articles of Confederation, for its enactment by Congress, has proved futile. That decision has become null, because it ran counter to the express opinion of the people. The Ordinance did not suffer for want of authority as a charter of freedom, because the people authorized and ratified it; and the wellnigh unanimous opinion of the people, since the close of the Civil War, concurs with and enforces that original opinion, and justifies the far-seeing wisdom of the men who were instrumental in dedicating an empire to freedom by an authoritative law.

RELIGIOUS LIBERTY AND POPULAR EDUCATION

were first adopted, as national ideals, by this Ordinance. They thus became a part of the birthright of the people of the states carved out of the Northwestern Territory. Though these principles were already adopted as fundamental by many of the states, they were by this Ordinance established in advance as parts of the foundations of other states whose ultimate greatness was foreseen. Never before did any. great state paper operate to develop these principles on so large a scale.

Most natural was it, that the adjacent portions of the Louisiana Purchase, when organized, should be blessed with the same precious guarantees of education and free thought, by the incorporation of like provisions into the Ordinances enacted for their government. Thus did these peculiarly American institutions, the free church and free school, become a part of our national, no less than of our state, life. Broadened by it from local into continental operation, they are not the least among the priceless legacies left to the citizens of America by the Ordinance of 1787.