

A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART III.

The contention of the advocates of the theory that Mr. Curtis advances, namely, that by virtue of the Declaration of Independence, the colonies not only lost all political connection with Great Britain, but their people became united into a nation, has the support of a good many writers. But it cannot be denied that it does not seem consistent with the wording of the Declaration, or with the action of Congress in at once appointing a committee to devise and digest a scheme of *confederation*, a term which, while implying "unitedness," so to speak, equally does *not* imply oneness. The colonies are declared to be *not* a "free and independent *state*," but "free and independent *states*." Again, not "free and independent" communities, or provinces, or commonwealths, but *STATES*. And it is fair to presume that the word was used in its ordinary sense, that is, a community possessing what are known as sovereign powers—the right to make war and peace, etc.—as distinguished from provinces, counties, towns, townships, etc., whose public powers are of a limited and subordinate nature. Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheaton, 187, expressly concedes that prior to the adoption of the Constitution the states were sovereign and completely independent, connected only by a league. Mr. Oakley, *arg.* in the same case, had said (p. 33), "By this act [The Declaration] they became 'free and independent states,' and as such have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do." "The State of New York, *having thus become sovereign and independent*," etc., and these propositions were not controverted by the other side, the Attorney General (Wirt) saying that they "might be admitted;" and so it would seem almost beyond question that such was the understanding at

the time and for half a century afterwards. But it is vigorously argued by able writers that the separate states or colonies never were really independent sovereignties. In his invaluable treatise on the Constitution, Mr. Justice Story maintains this view, citing Mr. Charles Cotesworth Pinckney's utterances in the debates in the South Carolina legislature in 1788, on the propriety of calling a convention to ratify the Constitution. Mr. Pinckney says that the declaration is enough to refute the contention of state sovereignty; that the states are not even enumerated, and makes this remarkable statement: "The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this declaration." Mr. Adams, in the Fourth of July Oration (1831), says practically the same thing. Mr. Dane, in the appendix to the final volume of his "Abridgment," goes into the subject very extensively and reaches the same conclusion, but he was writing with a bias natural enough at a time when "nullification" and "state sovereignty" were striking terror into the hearts of all friends of the Union. Much stress is laid on the fact that there never was a moment when the states were really in a condition to act as independent sovereignties; that they all jointly declared their independence, when they were in close, armed alliance against Great Britain, and were represented in a Congress to which they had expressly or tacitly confided the duty of exercising really sovereign or national powers, and all—or nearly all—the states governments were formed during the continuance of this tie.

One can hardly help concluding, however, that if the declaration did not mean that the states were severally free and independent, it is a pity it should have been expressed as it was. And when we remember its author and his views, we can entertain but little doubt of what he intended by the words when he wrote them.

The question of "state sovereignty" under the present Constitution is a very different one, and will be considered later. Mr. Dane very properly states that our Government has existed under three forms:

1. The Revolutionary, from 1774 to March 1, 1781 (date of final ratification of Articles of Confederation).

2. Under the Articles of Confederation.

3. Under the Constitution. The first period has been briefly gone over with reference to its constitutional features, and we have come to the subject of the Articles of Confederation. It will be remembered that a committee to prepare such articles was appointed at the same time as that to prepare a Declaration of Independence—in the early summer of 1776. This resolution (for the appointment of the committee) was another indication that Congress did not consider the colonies to be united as one people by the declaration of independence, *ipso facto*, nor did they, apparently, at that time expect or desire that such a state of things should soon follow. They desire to have a plan of “confederation”—a close league. So that, without adducing other reasons, it is plain to be seen that while the colonies felt themselves to be united for the accomplishment of certain ends, while they acquiesced in, from time to time, from the necessity of the case, the exercise by the Continental Congress of sovereign or national powers and functions, history forbids us to accept the position of Curtis, Story and others, that by virtue of the declaration of independence, continental nationality became an accomplished fact. This is so clearly and ably brought out by Mr. Upshur (Secretary of State under President Tyler), in his “Review of Judge Story’s Constitution,” that it would seem to render all further argument unnecessary. It is much to be regretted that Story, and others of his school, should feel it necessary to the support of the “national” theory of the Constitution, that the colonies should be said to have been merged, except as to their domestic concerns, by the declaration of independence, and to have been even in pre-revolutionary times “for many purposes one people.” Such a position is *not* necessary to their main contention, and if it were, it is none the less untenable and must fall. But Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, stated what I believe to be the truth, as follows: “It has been said that they [the states prior to the adoption of the Constitution] were sovereign, were com-

pletely independent, and were connected with each other only by a league. This is true," etc., going on to say that all this was changed by the adoption of the Constitution.

It may be said with truth, however, that from 1774, onward, the people of the colonies gradually grew accustomed to concerted action. As before noticed, they used expressions like "All America," etc., and it is not probable that, at the time of the declaration of independence, or of the adoption of articles of confederation, they had any expectation of acting, or any desire to act, except domestically, in any other way than jointly—of *how* jointly, the articles of confederation were the outward expression.

The committee to prepare and digest a plan of confederation reported on July 12, 1776. After considerable debate, Congress, on August 20, 1776, in committee of the whole, reported a new draft. The articles were finally adopted by Congress in November, 1777, and a committee was appointed to draft a letter requesting the states to authorize their delegates to subscribe them. After reciting the all but impossibility of meeting the views of every state on every point, it earnestly recommends the articles to the dispassionate attention of the legislatures of the respective states, whom they urge to bear in mind the difficulty of combining in one general system the various sentiments and interests of a continent, divided into *so many sovereign and independent communities*; but to realize the necessity of *united action* in defence of the common liberties. All the states ratified the articles in 1778 except Delaware and Maryland, who followed their sister states in 1779 and 1781 respectively. In 1780, in urging the larger states to withdraw their claims to certain parts of the western territory, Congress reminded them that it was indispensably necessary to establish the *Federal Union on a fixed and permanent basis*, on principles acceptable to its members, essential "to our very existence as *a free sovereign and independent people*." Now, in the first letter, that of the committee, there is the distinct assertion that the continent is divided into "so many sovereign and independent communities." This in 1777. Later, in exhorting the larger states to remove one of

the strong objections of the smaller ones to entering the confederacy, they, with equal distinctness, declare the necessity of a *fixed* and *permanent* Federal Union to "our existence as a free," etc., people. During the time before they assented to the articles, to what other power were Maryland and Delaware subservient in any way? Obviously, to none. In the expression of Congress, last quoted, it will be seen plainly that that body really did desire, at least, a close and *permanent league*, that each state should to that extent clog its independence, and so that we should become "*a* sovereign and independent people." I think the language here is strong enough to warrant the assertion that there had grown in the minds of some of the leaders of the day an ideal, so to speak, which was quite "nationalistic" in character. For a *permanent and fixed league* of a character to insure existence as "*a* free, sovereign and independent people" is a pretty good substitute for a nation, in fact, is such in all but the name. For a greater or less degree of local autonomy interferes not at all with the national or non-national character of a commonwealth. But this expression, of course, did not make the desired condition an actuality. Did the ratification of the articles of confederation do so? Did the ratifiers or framers really intend that they should? Let us now proceed to an examination of these articles, bearing in mind the extreme care and deliberation with which they were prepared and adopted. As signed finally they begin with reciting under a "whereas," that the articles "of *confederation* and *perpetual union*" between the states (naming them) were agreed to by Congress, "in the words following, viz," then come the articles themselves, thirteen in number. By the first article the "style" of the confederacy is ordained to be "The United States of America." Then, in Articles II, III and IV, the position of the states toward each other is set out. Article V provides for an annual Congress. Article VI sets forth what the several states shall not do. Article VII gives the appointment of certain military officers to the legislatures. Article VIII charges upon the common treasury all war expenses, etc., incurred for the general welfare, and provides for the filling of this treasury.

Article IX sets out the powers of Congress. Article X those of the "Committee of States." Article XI provides for the admission of Canada. Article XII pledges the United States for bills, etc., emitted by Congress prior to the confederation. Article XIII declares that every state shall submit to the determination of Congress on all questions proper for its exercise; and further declares that the article shall be inviolably observed in all the states; that the Union shall be perpetual, and that no alteration shall be made in the articles unless agreed to in Congress and afterwards confirmed by the legislature of every state. Now, under another "whereas" comes the solemn affirmation of the articles of the delegates in behalf of their several states; it is so impressive that I give it in full: "And whereas, it has pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determination of the United States in Congress assembled on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual." "In witness whereof," etc., "in the third year of the Independence of America." So much for a general view of this most important instrument. I propose now to go over it carefully in detail. The first article distinctly says that what is to be formed is a *confederacy*, and that its "title" shall be the "United States," etc. Article II, the very first substantial article, declares that "each state *RETAINS*," *i. e.*, keeps what is already possessed, "its sovereignty, freedom and independence," and all other rights and powers not ex-

pressly delegated to Congress by the article. By Article III it is declared that the "said states hereby severally enter into a *firm league of friendship* with each other" for the general welfare, etc., "binding themselves to assist each other" against attacks on them, or *any of them*, on account of religion, *sovereignty*, trade, or any pretence whatever. By Article IV it is provided that citizens of the different states shall have equal privileges in any of them, thus "the better to secure and perpetuate mutual friendship and intercourse between the people of the different states," etc. It is also provided that no state shall lay an imposition duty or restriction on the property of another state or of the United States. Also, that fugitives from justice charged with "treason, felony, or other high misdemeanors in any state" shall, upon requisition by the executive power of the state having jurisdiction, be handed over to said state. Also, that full faith and credit shall be given in each state to the records, etc., of every other state. Summed up, the plain meaning of these four articles is that each state without relinquishing its sovereignty enters into a firm compact or league with each and every other state for the promotion of certain objects for their common and individual welfare. Now, that is the sort of an association it is to be. They proceed by Article V and subsequent articles to provide for the *way* in which their joint interests are to be advanced and cared for. "For the more convenient management of the general interests of the United States," says Article V, "delegates shall be annually appointed" to a Congress. Congress was to be organized as follows:

1. Delegates were to be chosen annually in such manner as the legislature of each state might direct.
2. It was to meet annually on the first Monday in November.
3. A state might recall its delegates, or any of them, at any time within the year and send others in their stead.
4. No state should have less than two or more than seven delegates.
5. No person should serve as delegate for more than three years in six.

6. During his service as delegate no person could hold any salaried office under the United States.

7. Each state was to maintain its own delegates "in a *meeting of the states*, and while they act as members of the Committee of States."

8. Each state was to have *one vote*.

9. Freedom of speech was guaranteed in Congress, and immunity from arrest, except for treason, felony and breach of the peace.

Instead of proceeding in the next article to recite and define the powers of Congress, the limitations on the several states are set out with great clearness and care.

First. They are forbidden to receive ambassadors from foreign powers, or send them to such powers, without the consent of the United States in Congress assembled.

Second. They are forbidden, without the consent of the United States in Congress assembled, "specifying accurately the purpose for which the same is to be entered into, and how long it shall continue," to enter into any alliance, etc., with *each other*.

Third. They are forbidden to levy duties which interfere with United States treaty stipulations.

Fourth. They are forbidden to maintain war vessels in time of peace, or armed force on land, except such as Congress may judge necessary for the defence of the states. On the other hand each state shall always keep up a well regulated militia, etc.

Fifth. They are forbidden to engage in war without the consent of Congress, or grant letters of marque, etc., except under certain emergent conditions.

By Article VII the states are to have the appointment of all officers of land forces raised for the common defence below the rank of colonel.

The following article charges, as before noted, all war expenses and others incurred for the general welfare upon a "common treasury."

Now this treasury was not to be kept full by taxes imposed "by the United States in Congress assembled," but it was to

“be supplied by the several states in proportion to the value of the land in each state,” said value “to be estimated” in such way as the United States in Congress assembled should appoint. The actual raising of the money was to be accomplished by the legislatures of the several states by levying taxes according to their good pleasure. We come now to the ninth article, wherein is set forth clearly and in detail the powers of Congress, or of the “United States in Congress assembled,” the expression always used. The powers are

1. To determine peace or war (except in case of emergency, as provided in Article VI). Sole power.

2. To send and receive ambassadors. Sole power.

3. To enter into treaties and alliances, provided that no treaty be made restraining the legislatures of the states from impositions of such duties on foreigners as their own people are subjected to, or of prohibiting any exports or imports. Sole power.

4. To establish rules as to captures on land or sea, and the division of them.

5. Granting letters of marque and reprisal in time of peace. Sole power.

6. Appointing courts for the trial of piracies and felonies on the high seas and of final appeal in case of capture. Sole power.

7. To be the last resort on appeal in disputes arising between two states.

8. To regulate the alloy and value of coin to be struck by authority of the United States or of any state. Sole power.

9. To fix the standard of weights and measures. Sole power.

10. To regulate trade and manage affairs with the Indians, not members of any state, provided that the legislative right of any state within its own tenets be not violated or infringed. Sole power.

11. Establishing and regulating post-offices from one state to another, and exacting such postage as will defray expenses. Sole power.

12. Appointing all army officers except regimental officers. Sole power.

13. Appointing all naval officers and commissioning all officers whatever in the service of the United States. Sole power.

14. Making rules for the government and regulation of such forces and directing their operations. Sole power.

15. To appoint a Committee of States "and such other committees and civil officers as may be necessary for managing the general affairs of the Union."

16. To ascertain the amount of, and to appropriate, money necessary for public expenses.

17. To borrow money and emit bills on the credit of the United States, transmitting half yearly to the various legislatures an account of the moneys so borrowed, or bills emitted.

18. To build and equip a navy.

19. To agree on the number of land forces and make binding requisitions upon each state for its quota; the legislature to appoint regimental officers and raise and equip the troops at the expense of the United States.

20. "The Congress of the United States" shall have power to adjourn, from time to time, not longer than six months.

Such were the powers of Congress, but many of the most important could only be exercised with the consent of nine states, namely, the first, third, fifth, eighth, sixteenth, seventeenth, eighteenth and nineteenth powers, and the same restriction is placed on the power to *coin money*—nowhere expressly given to the United States in Congress assembled—and to "agree upon the number of naval vessels to be built or purchased," also nowhere expressly given. And the twelfth power is also thus restricted so far as regards the appointment of a Commander-in-Chief.

All other powers are to be exercised only by the votes of a majority of the states, except the power to adjourn from time to time. In addition to an annual Congress, there was to be a Committee of States, consisting of one representative from each state. This committee, or any nine of them, were to execute in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the vote of nine states, might from time to time invest them with.

But none of the powers requiring the vote of nine states could be delegated to them.

Every line of these remarkable articles shows them to have been intended for just what the second article implies—a written expression of the terms and conditions of the close and compact association of sovereign states. There is not one word—except the provision that the citizens of one state are to have equal privileges in another—that touches the individual, or in any way concerns itself with the personal rights so stubbornly fought for, and so clearly stated by Camillus. Not a line again, of the community rights, so to speak—taxation only with representation, etc. No provision whatever for any sanction for the violation of any article. No assertion of the rights of the United States to lay any tax whatever. No provision for the representation of the people as such in United States Councils. On the contrary, a provision that each state shall have one and but one vote, and that in times of Congressional recess a Committee of States shall have the executive power within limits. It does not seem possible, to the ordinary understanding, that in the face of the plain words of the articles, and in view of their inception and adoption, any one could be found hardy enough to maintain that there was anything like national unity under this “Confederation,” or that there was ever intended to be. Such a contention is too much for Mr. Curtis, at all events, committed as he was to the proposition that the Declaration of Independence made us “one people.” He says (Vol. I, Chap. VI): “The parties to this instrument were free, sovereign and independent political communities, each possessing within itself all the powers of legislation and government over its own citizens, which any society can possess,” and lest this last sentence should be thought to qualify the first, I may quote later on from the same chapter. “This office of the confederation was to demonstrate to the people of the American states the practicability and the necessity for a more perfect union. This confederation showed . . . that there were certain great purposes of civil government which they could not discharge by their separate means; that independence of

the Crown of Great Britain could not be achieved by any one of them, unassisted by all the rest. That no one of them, however respectable in population or resources, could be received and dealt with by the governments of the world as a nation among nations," etc., etc. Very well; if the confederation taught these lessons, and that to teach them was its "office" in American history, the lessons were not known at the time it was formed. The extreme view of the nationalists—a most unnecessary one, as it seems to me—is stated at length and with great earnestness and even desperation by Mr. Pomeroy. Naturally, he is driven into some tight corners, from which he tries hard to escape. But escape was impossible, and I can but repeat that the troubles of the extreme nationalists are largely of their own making. He gives (Const. Law, 9th Ed., p. 38, *et seq.*) the usual argument about the Declaration of Independence having been by united colonies as one, and not severally. "There never was, in fact, a moment's interval when the several states were each independent and sovereign." How odd, then, that at the time of the appointment of a committee to prepare the declaration, the very body which was to adopt it thought it necessary to appoint a committee to prepare a plan for a confederation. How can that have been thought necessary, if we were already a united nation? And as to his assertion that there never was a moment when the states were absolutely independent, what obedience did Maryland owe before signing the confederation articles, for example? But no matter, the proposition that the states were never independent sovereignties is "the key to the whole position," and must be maintained, *ruat coelum!*

"Grant that in the beginning the several states were in any true sense independent sovereignties, and I see no escape from the extreme position reached by Mr. Calhoun." Why? Because, forsooth, a community once sovereign cannot part with its sovereignty—cannot commit political suicide—vide the works of Ortolan, and other profound writers on international law. I dare say it would startle the Hawaiians, and possibly the rest of the world, to learn that Hawaii is still a sovereign state, and must remain so forever unless over-

whelmed by some outside force. Brought face to face with the articles of confederation and their really unmistakable language, he coolly says that while as "a grand historical *fact*," (italics his) the "words and the declaration were the work of, and had resulted in, one nation, *yet it must be at once conceded that the theory was not yet perfected in the minds of the revolutionary leaders, or of the people themselves,*" Was ever the like heard! As well say that the theory of free trade is not yet fully developed in the mind of an avowed and pronounced protectionist!

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(To be Continued.)