

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

Weak and inconclusive as are the arguments of Mr. Pomeroy as to National Sovereignty immediately after the Declaration of Independence, it will not do to assume that in disposing of them, the whole question is settled. Many able and distinguished thinkers have held the same view as to the main point, viz., that the several states were never individually sovereign and independent. That the Declaration of Independence was the Act of Congress—the joint representative of them all—that the confederation conferred all really sovereign powers upon Congress and was designed to be perpetual.

But this view is irreconcilable—let it be said with all respect—with the facts of history. We may grant that the states each recognized the unwisdom of attempting to act singly in relation to many things. That they possessed many interests in common, and that they committed to a general council called “Congress” the management of those joint interests within certain limits. All this does not at all affect the individual independence of the state any more than would a close alliance with similar provisions between France, Russia and Austria. The plain words of the declaration are “free and independent *states*,” not “*a* free and independent state.” And language could not be plainer than that of the articles of confederation.

The men who prepared and adopted the Declaration of Independence, who prepared and adopted the articles of confederation, were fully acquainted with the English language. Their various “addresses” to the King, etc., their statements of grievances, are many of them really examples of style and diction; they are admirably clear, and the words are always well chosen. It is, therefore, a most unmerited aspersion upon their intelligence and learning, and, indeed, upon their candor, to say that their meaning was very nearly the opposite of the natural meaning of their words. There is a

class of minds to which no argument is sound that is not subtle; to which, whatever else words may mean, they never have their plain and obvious meaning. To such I do not expect the evidence to be found within the "four corners of the declaration" and of the "articles" to be convincing. But it can do no harm, it can only do good, for us at this late day to face the facts as they really were, and I propose to devote a little more space to a demonstration of the fact that in the declaration and in the articles our forefathers meant what they said; that they knew perfectly well what they were about; and that, although now, so many years afterwards, we can plainly see that the trend was inevitably toward practical unification, this was not the prevailing thought at the time, and many steps were taken with great deliberation which had no such object in view. Mr. John Fiske has given us in the chapter entitled "The Thirteen Commonwealths," in this "Critical Period of American History," a really admirable sketch of the character and state of those commonwealths at the time of the revolution. He calls attention to many important points with regard to them. In the first article of this series it was mentioned that the colonies were of three kinds—Provincial, Proprietary and Charter—and that their differences in this and other respects must be borne in mind in studying their subsequent constitutional history. Without repeating what Mr. Fiske has said, I shall follow him very largely in pointing out what seems important to the present inquiry. To begin with, the provincial colonies numbered eight: New Hampshire, Massachusetts, New York, New Jersey, Virginia, North Carolina, South Carolina and Georgia. The proprietary colonies were three: Pennsylvania, Delaware and Maryland.

The charter colonies were two: Connecticut and Rhode Island. The government in the provincial colonies was by a Governor—a Viceroy—appointed by the King. In the proprietary colonies, the proprietors acted as governors themselves, or appointed the governors. These colonies "presented the appearance of limited hereditary monarchies," says Mr. Fiske.

In the charter colonies the people elected the governors, and in all the colonies of whatever description, the people elected the legislatures. The history of colonial times is full of accounts of controversies between the legislature and the governors, the representatives of central authority, and these unhappy but inevitable differences were a constant and never ceasing source of irritation, filling the people with an intense desire to have absolute control of their own affairs.

It is difficult to appreciate another most important fact: That the aggregate extent of the thirteen states at the time of the revolution was, practically speaking, far greater than that of the entire country to-day. The comparative sparseness of the population, the extreme difficulty of intercommunication, owing to the bad roads and primitive methods, made Boston and New York further apart than Boston and San Francisco are to-day. Travelling was not only slow but most uncomfortable, and rarely undertaken except from necessity. Rates of postage were high, the mails infrequent and irregular. People often lived and died without crossing the boundary of their own colony. There were great differences also in the degree of civilization of the colonies and the habits, lives and ideas of the people. The backwoodsmen of North Carolina and Georgia were unlike the cultured New Englander or the solidly respectable and well-to-do Quaker, or the courtly cavalier of Virginia. And there was a great difference in thought and general mode of life between the Southern planter and the active energetic business man of New England. On the other hand, all the governments were of English model. Most of the inhabitants were of English descent—the Scotch-Irish element having for ancestors men who, while not English, had long since imbibed the English governmental ideas. Now, having with all their differences, very wide as we have just seen them to be, a common appreciation of the rights of self-government, etc., and a common determination to insist upon those rights, they meet by representatives in a general Congress, when these rights are seriously threatened, to devise means to maintain and preserve them to *each colony severally*. For, of course, Pennsylvania

did not feel that the closing of Boston was a direct injury to her, but simply that if the Crown of Great Britain could so treat one colony it could so treat each in turn.

Reluctantly, and after many times "swearing they would ne'er consent," they "consented," through force of circumstances, to sever all political connection between them and Great Britain, and proceeded, upon the recommendation of Congress, to adopt, each of them, Rhode Island excepted, such form of government as would best conduce to the welfare of their inhabitants. Now let us see, so far as it concerns our present inquiry, what form of government or constitution was adopted by each of them, and when. For convenience they will be considered alphabetically.

CONNECTICUT.—As Fiske rightly remarks, Connecticut and Rhode Island were true republics already and did not modify their general governments, but the action of Connecticut is very significant. In 1776, after the "Declaration," she adopted a short constitution with a preamble, of which the following is the first paragraph: "The people of this state being, by the Providence of God, free and independent, have the sole and exclusive right of governing themselves as a free, sovereign and independent state;" and the first article of the constitution, after adopting the charter of King Charles as the best constitution, "under the sole authority of the people," proceeds: "And that this Republic is, and shall forever be and remain, a free, sovereign and independent state, by the name of the STATE OF CONNECTICUT (capitals in the original)." Further, by Article 3, it guarantees to the "free inhabitants of this or any other of the United States of *America*, and foreigners in amity with this state, the equal protection of the laws."

DELAWARE.—In September, 1777, Delaware adopted a constitution which contains but little that is significant. By Article 16 the "general and field officers and all other officers of the army and navy of this state" are to be appointed by the General Assembly. By Article 22 every person chosen a member of either house is required to take an oath to "bear true allegiance to the Delaware State," etc.

GEORGIA.—In the spring of 1777, Georgia, in express pursuance of the recommendation of Congress, adopted a constitution, the preamble of which, after reciting that the oppressive conduct of Great Britain had “obliged the Americans as freemen . . . to assert the rights and privileges they are entitled to by the laws of nature and reason; and, accordingly, it hath been done by the general consent of all the people of the States of New Hampshire,” etc., “given by their representatives met together in general Congress in the City of Philadelphia” goes on to say that “the following rules and regulations” shall be adopted.

This preamble is, of course, much pleasanter reading for Mr. Pomeroy than is that of Connecticut, but by Article XIV of the Constitution every person entitled to vote, shall, if required, take this oath :

“I, A. B., do voluntarily swear (or affirm as the case may be) that *I do owe true allegiance* (italics mine) to this state, and will support the constitution thereof.” And the governor elect is required to swear, *inter alia*, to “support, maintain, and defend the State of Georgia, and the constitution of the same.”

MARYLAND.—In the fall of 1776, a constitution was adopted in Maryland consisting of a declaration of rights and a form of government. The preamble recites that Great Britain has “at length constrained them (the United Colonies) to declare themselves free and independent states.” Nothing is said directly, as to Maryland being “sovereign,” etc. But in the prescribed form of oath to be taken by officers, they are required to expressly renounce allegiance to the King, and promise “true allegiance” to the state.

MASSACHUSETTS.—The constitution of Massachusetts, adopted in 1780, consists of two parts—a declaration of rights and a form of government. The preamble says that “the following” is to be the constitution of the “Commonwealth of Massachusetts.” In the declaration of rights it is laid down, that “the people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent state, and do and forever shall exercise and

enjoy every power, jurisdiction and right, which is not or may not hereafter be 'vested' by those expressly delegated to the United States in Congress assembled." The governor for the time being is to be commander-in-chief of the army and navy, with full power to train them, etc., and to use them when necessary. The prescribed oath for officers obliges them to expressly declare the sovereignty and independence of the state, and to promise it true faith and allegiance—also to renounce allegiance to the King, and that "no person, prelate, state, or potentate hath or ought to have any jurisdiction," etc., within this Commonwealth, "except the authority which is or may be vested by their constituents in the Congress of the United States."

NEW HAMPSHIRE.—After several vain attempts, New Hampshire finally adopted a constitution in 1784. It is in two parts. Part I being the bill of rights, and Part II the form of government. Article VII of the "bill of rights" is as follows: "The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled." In asserting that all its inhabitants are entitled to various rights, the expression is, "Every *subject* of this state," etc. Part II begins as follows: "THE people inhabiting the territory formerly called the Province of New Hampshire, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign and independent body-politic, or state, by the name of the STATE OF NEW HAMPSHIRE." After providing for the office of president, the duties of that officer are set forth, and among them is that of commander-in-chief of the army and navy, and the leadership of them as occasion may require against the internal or external enemies of the state. The president and certain other officers are required to take oath, *inter alia*, that the state is, and of right ought to be free, sovereign and independent, and to "bear faith and true allegiance to the

same." The close similarity between the constitution of Massachusetts will be at once noticed—the constitution of New Hampshire, however, never speaks of rights and powers "*vested*" in Congress.

NEW JERSEY.—The constitution of New Jersey made pursuant to the recommendation of Congress that each colony should adopt a suitable form of government, was prepared before the declaration of independence, and its publication ordered the day before—July 3, 1776. It speaks of Congress as the "Supreme Council of the American Colonies"—speaks of New Jersey as a "colony," and provides that in the event of a reconciliation between the colonies and Great Britain, it shall be void.

NEW YORK.—After reciting in a long preamble the wrongful acts of Great Britain, the resolutions of Congress, and the Declaration of Independence in full, the constitution of New York (1777) proceeds to lay down a form of government. New York is spoken of as a "state," and among the duties of the governor is that of acting as commander-in-chief of the "militia and navy," in the very last article it is provided that aliens who wish to become citizens "shall take an oath of allegiance to this state," etc.

NORTH CAROLINA.—In the winter of 1776, North Carolina adopted a constitution beginning with a declaration of rights, in which it is asserted that the people of the state ought to have the sole and exclusive right of "regulating the internal government and police thereof." The preamble recites the fact of separation from Great Britain, and the Declaration of Independence. It is provided in the constitution proper, that aliens coming "to settle in this state, having first taken an oath of allegiance to the same" shall have certain rights. In the "Mecklenburg Declaration" of 1775, the North Carolinians declared themselves a "free and independent people;" . . . "under the control of no power, other than that of our God and the general government of the Congress."

PENNSYLVANIA.—The constitution, adopted in the summer of 1776, begins with "a declaration of the rights of the inhabitants of the State of Pennsylvania." In the third article

of the declaration it is said that "The people of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same." Pennsylvania is spoken of indifferently as a "commonwealth" or "state"—in fact, in the first section of the plan or frame of government, the expression is "The Commonwealth or State of Pennsylvania," etc. An "oath of allegiance" by officers is to be provided for; but the words of the oath are simply a promise to be "true and faithful" to the Commonwealth. And it is provided still later that aliens having first taken an oath of allegiance to the state, may hold lands, etc.

RHODE ISLAND.—Alone, of all the states, Rhode Island failed to adopt a new constitution, and continued under her charter—a very satisfactory republican form of government.

SOUTH CAROLINA.—In the spring of 1776, South Carolina adopted a constitution, declared in the preamble of the constitution of 1778 as intended to be "temporary only." The preamble is a recital of grievances against Great Britain, and of the consequent necessity of a form of government for the colony. This form is thus provided for, and the "army" and "navy" are spoken of. In 1778, a constitution was adopted, of which the preamble recites, *inter alia*, that the "United Colonies of America have since been constituted independent states." The first article ordains that "the style of this country be hereafter the State of South Carolina." The thirtieth article mentions the "army and navy of this state;" and the thirty-third article denies to the governor the "power to commence war or conclude peace, or enter into any final treaty" without the consent of the Senate and House. The thirty-fifth article empowers the governor, in recess, with the advice of the privy council, to "lay embargoes or prohibit the exportation of any commodity" for thirty days. By Article XXXVI, officers are required to expressly acknowledge South Carolina to be a free, sovereign and independent state, and that the people thereof owe no allegiance to the King.

VIRGINIA.—In a convention of members of the House of Burgesses, which met May 6, 1776, a declaration of rights was adopted, in which the general doctrine that all power is

derived from the people is set forth, together with many other familiar principles. Section XIV seems to me the only one of much significance: "That the people have a right to uniform government; and, therefore, that no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof." This declaration was adopted June 12, 1776. On June 29th the same convention adopted a constitution which is merely a form of government, and which, oddly enough, contains nothing worthy of note in the present inquiry. It is declared to a "form of government of Virginia." On May 15th the convention had resolved to instruct the Virginia delegates to Congress to propose to that body "to declare the united colonies free and independent states." And to give the assent of Virginia to all measures thought wise by Congress as to foreign alliances and a confederation of the colonies. "Provided, that the power of forming government for, and the regulation of the internal concerns of each colony be left to the respective colonial legislatures."

Is there anything to be found in these twelve constitutions, to warrant the assertion that the states were united in a national capacity when they were formed, or to lead one to suppose that the Articles of Confederation, adopted after some of them, and before others, was intended so to unite them?

Three of them call themselves "sovereign states," one—Connecticut—calling herself a "republic." South Carolina calls herself a "country." Almost without exception they require an oath of allegiance on the part of their civil officers. Almost without exception they speak of the "army and navy" of the state, and there is not one line in any of them which would indicate that the confederation was considered to be anything but a "firm league of friendship." And what more natural? Their differences in population, their remoteness from each other, their recent bitter experience with a central power, all made it an impossibility that they should at once give up their separate independence and become politically one. Congress had not increased in respectability, as Mr. Fiske puts it, but like most bodies without real authority, was

not very much thought of, and its behests were heeded only when it pleased the particular state to heed them.

There are, of course, numerous expressions of individuals—Washington, Madison, and others—showing a belief in the essential oneness of the continent, and that this had been accomplished by the confederation. But from what has been said it must be evident, as it seems to me, that such is not the historical fact. Certain powers usually exercised by the sovereign were delegated to Congress by the states. Certain others were retained by them. And it is quite evident that these powers conferred upon Congress were considered not as actually parted with by the states, but as delegated to a common agent. The articles provided no executive head, but only a Congress—a “Supreme Council of the States” as the constitution of New Jersey puts it. And the states mutually agreed that this arrangement should be perpetual. They did not agree that this Congress should be a sovereign power, but that through its agency, and only through its agency, certain of their sovereign powers should be exercised. Judge Hare says that the states were sovereign, but not independent. And, of course, any league or alliance to a certain extent takes away from the independence of the contracting parties. A sovereign and independent state is one which is *sui juris*, so to speak, under no tutelage or over lordship. It does not seem to me that an alliance or league affects the sovereignty or independence of a state, politically speaking. Of course, the practical effect may be, to very seriously hamper the exercise of a state’s powers. And in such cases confusion and controversy are bound to ensue; and this was the case with the confederation. It was really, as suggested before as a possibility, a political Frankenstein. It was an attempt at the impossible; for no body entrusted with the exercise of such powers as were delegated to Congress, can possibly exercise them unless they are accompanied with commensurate authority. The result in this case was, as Mr. Fiske well says, that the country “had begun to drift toward anarchy even before the close of the Revolutionary War;” and he also even states the then capital defects of the confederation: *First*, The necessity for a two-thirds vote for any important legisla-

tion in Congress; *Second*, The impossibility of presenting a united front to foreign countries in respect to commerce; and, *third*, the absence of any power in Congress to enforce obedience. And yet, Mr. Fiske is to be numbered with those who deny that the states ever were sovereign!

The irresistible conclusion from all the known facts, from all the light that history can throw upon the question, seems in my humble judgment to be, that prior to the Declaration of Independence the colonies were neither sovereign nor independent, and did not pretend to be either. The only union between them was an "association" by which they agreed on certain measures of non-intercourse with Great Britain, and a continuously sitting Council or Congress, by which their joint action in armed resistance, etc., was regulated, and whose "recommendations" on other subjects were treated very generally with respect. The Declaration of Independence made them not a free and independent state, but free and independent states, with not even a well-defined league of friendship between them. Realizing the necessity for such a league, but not *as yet* realizing the necessity for true continental nationality, they formed the confederation, and set out in terms so clear that only blindness can mistake them, that they severally proposed to KEEP their sovereignty, but to enter into a firm and perpetual league of friendship, each according to a common agent the actual exercise of some of its sovereign powers. That the arrangement proved to be impracticable,—a source of confusion worse confounded—is one more proof, if any were needed, that there was no real sovereignty in the General Congress. For it shows the utter lack of unification. A detailed recital of the various troubles which beset the states during the confederation, is unnecessary here. Conditions soon became intolerable; there was commercial warfare between the states, and danger of actual warfare. Congress, as a body, fell into disrepute at home and abroad. Every state was busy looking after its own interests, as it saw them. And of real unitedness, to say nothing of union, there came to be little left but the name. It became evident that some change was necessary. As early as 1781 an amplification of the powers of Congress had been sug-

gested, but nothing came of the suggestion. In 1786, the confederation came near actual dismemberment by *secession*, the immediate cause of the trouble being the difficulties surrounding the question of the navigation of the lower Mississippi. At length, on the 11th of September, 1786, there met at Annapolis commissioners from five states (nine states had appointed commissioners) to discuss some plan for getting rid of the conflicting regulations and restrictions upon commerce. They were too few to feel justified in going on with their work. But they adopted an address by Alexander Hamilton recommending a convention in Philadelphia the following May to "devise such further provisions" as they may think necessary to render the "federal constitution adequate to the exigencies of the Union."

The suggestion was not at once adopted by Congress, or by the states, but at length all but Rhode Island appointed delegates to the proposed convention, which met in Independence Hall on May 14, 1787. How wonderful the work this convention was to do! How different from that which it assembled to do! It convened in response to a suggestion of a pronounced nationalist, Alexander Hamilton. Virginia was the first to elect delegates to it, at the instance of another pronounced nationalist, Madison. And its avowed object was to devise provisions which would render "the Constitution of the federal government adequate to the exigencies of the Union." Yet, even now, there were able and distinguished men who had no sympathy with the movement. There were men in the convention of pronounced "state rights" views, and who would have been glad to see its work a failure. It will not be wasted time to consider the "personnel" of the various delegations, the time at which and the manner in which they were chosen. The delegations from several states were chosen before any action of Congress looking to a convention had been taken, and all had representatives at the opening of the convention, or very shortly thereafter, except Rhode Island, the most persistent disturber of the general peace and harmony, though by no means alone in her guilt.

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(To be Continued.)