

THE LEGISLATIVE HISTORY OF THE ORDINANCE OF 1787.

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It is the purpose of this sketch to show the progress, step by step, of the congressional action which culminated in the "Ordinance of 1787."

The Continental Congress, even before those lands which later became the subject of the Northwest Ordinance were ceded to the United States, committed itself to a policy which determined (1) that the lands in the Northwest should be held as the common property of all the States, and (2) that ultimately they should be divided into States and admitted into the Union on equal terms with the original States.

Maryland refused to ratify the articles of confederation, unless the western country which was unsettled at the beginning of the Revolution and was claimed by the British crown, and "had been wrested from the common enemy by the blood and treasure of the thirteen States," should be ceded, by the States claiming title to it, to the United States to be held for the general good of all.¹

New Jersey, in the act to authorize her delegates to ratify the Articles of Confederation, declared "that every separate and detached state interest ought to be postponed to the general good of the Union"; and Delaware expressed the same conviction.²

It was in response to these expressions on the part of the different States, and especially as an answer to the determined demand of Maryland, that Congress, on the

¹ Journals of Congress III. 282. ² Journals of Congress III. pp. 135, 201.

recommendation of a committee to whom had been referred the instructions of Maryland to her delegates, the remonstrance of Virginia to the amendment proposed by Maryland, and the proposed cession of New York, made a call upon all the States having claims to western lands to cede them for the general benefit. This resolution was adopted September 6, 1780.¹

More definite provision was made October 10, 1780, for lands that might be ceded in pursuance of the above resolution. It was resolved:—

“That the unappropriated lands which may be ceded or relinquished to the United States, by any particular state, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states; that each state which shall be so formed shall contain a suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto as circumstances will admit: That the necessary and reasonable expenses which any particular state shall have incurred since the commencement of the present war, in subduing any British posts, or in maintaining forts or garrisons within and for the defence, or in acquiring any part of the territory that may be ceded or relinquished to the United States, shall be reimbursed.

“That the said lands shall be granted or settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them.”²

The Ordinance of 1787 is but the elaboration of the plan outlined in these two resolutions. By adopting them Congress assumed power to receive these lands from the States; promised to hold them for the general good of the United States; took upon itself jurisdiction over the territory and its settlers when the former should be ceded and settled; and promised the settlers admission into the Union on terms of equality with the original States.

New York had offered to relinquish her claim February 19, 1780. Connecticut and Virginia, in answer to the

¹Journals of Congress III. 517.

²Journals of Congress III. 535.

resolution of September 6, tendered deeds of cession October 10, 1780, and January 2, 1781, respectively.¹ By these deeds of cession the subject of the government of the Northwest was presented to Congress for legislation. A committee was appointed and a report was made November 3, 1781. The original draft of this report is in the Papers of the Old Congress, Vol. 30, in the State Department at Washington. It is endorsed: "Report of Com^o on Cessions of New York, Virginia, & Connecticut, & Petitions of the Indiana, Vandalia, Illinois & Wabash Companies. Delivered and read Nov^r 3^d, 1781. No. 1." This report recommends the acceptance of the offer of New York, and the rejection of those of Connecticut and Virginia, as the latter contained conditions to which it was not deemed wise for Congress to assent, and which were finally modified. The report concluded with several resolutions on the subject of the government of the territory covered by the deeds of cession :

Resolved, That whenever the United States in Congress assembled shall find it for the good of the Union to permit new settlements on unappropriated lands, they will erect a new State or States, to be taken into the federal Union, in such manner that no one State so erected, shall exceed the quantity of 130 miles square and that the same shall be laid out into Townships of the quantity of about six miles square.

Resolved, That whenever such new State or States shall be erected, that the *bona fide* settlers within the same, at the time of the erection of such States, shall be confirmed in their respective Titles to their reasonable settlements on the same terms as shall be allowed to other new settlers.

Resolved, That Congress will reimburse all just and reasonable Expenses that may have heretofore accrued to any of the States since the present Revolution, in conquering, protecting or defending any of the unappropriated Lands so erected into a State or States.

Resolved, that nothing herein before determined by Congress, shall be construed so as to suppose any claim or right on Congress in point of property of soil, to any Lands belonging to the Indian Nations, unless the same have been *bona fide* purchased of them by the Crown of England, or which may hereafter be purchased by the United States in Congress assembled, for the use of the United States, and that at a publick Treaty to be held for that purpose."

¹Public Domain, 67, 72.

This report was recommitted to Mr. Boudinot, Mr. Varnum, Mr. Jenifer, Mr. T. Smith and Mr. Livermore. A second report, containing exactly the same resolutions that have been quoted from the first report, was read April 10, 1782, and April 15 was assigned for its consideration. The report was entered in the Journal but no action was taken upon it. It is this report that Bancroft calls "most elaborate."¹ It is a careful summary of the claims of New York and Virginia, and also of the companies which disputed the claims of the States.

Theodorick Bland of Virginia brought forward the next proposition touching the government of the northwest lands. He made a motion

"That the said Territory shall be laid off in districts not exceeding two degrees of Latitude & three degrees of Longitude each, and each district in townships, not exceeding - - - - miles square. That the lines of said district shall be run at the expense of the United States by surveyors appointed by the U. S. in Congress assembled and amenable to Congress for their conduct, that each of the said districts shall, when it contains 20,000 male inhabitants, become and ever after be and constitute a separate and independant (*sic*) free & sovereign state and be admitted into the Union as such with all the privileges and immunities of those states which now compose the Union."

There is one clause in Bland's motion to which attention ought especially to be called. In it was a provision for the support of schools. He proposed to grant thirty acres of land to every revolutionary soldier for every dollar that appeared to be due to him. To the statement of the terms of this grant was added the proviso:—

"That out of every hundred thousand acres so granted, there shall be reserved as a domain for the use of the United States, ten thousand acres, each of which ten thousand acres shall remain forever a common property of the United States, inalienable but by the consent of the U. S. in Congress assembled—the rents issues profits and produce of which lands when any such shall arise to be appropriated to the Payment of the Civil List of the United States, the erecting positive forts, the founding Seminaries of Learning and the Surplus after such purposes (if any) to be appropriated to the Building and equipping a Navy."²

¹History of United States, Vol. VI., '81.

²Papers of Old Congress, No. 36, Vol. II.

Hamilton seconded this motion. According to the endorsement on the original draft, it was made June 5, 1783, and referred to the Grand Committee of May 30. In apparent contradiction of this endorsement it is stated in the Journals of Congress, June 4, 1783, that

“the committee consisting of Mr. Rutledge, Mr. Bedford, Mr. Carroll, Mr. Higginson and Mr. Wilson to whom was referred a motion of Mr. Bland for accepting the cession of territory made by the legislature of the commonwealth of Virginia, on the 2nd day of January, 1781, report, that in their opinion, it will be proper for Congress to proceed to a determination on the report of the 3rd of November, 1781, and which is entered on the journal of the 1st of May, 1782, respecting the cession from the state of Virginia, and that a decision upon the said motion be postponed until that report shall be taken into consideration.”¹

This report shows that the report which was made November 3, 1781, was deemed still to be pending before Congress.

In October, 1783, Congress, for the third time, started anew to devise a plan for the temporary government of the western territory. This effort is plainly due to Washington. September 7, 1783, Washington wrote a long letter to James Duane, then a delegate in Congress from New York, in which he recommended an adjustment of the difficulties with the Indian tribes, a division of the western territory and a provision for the admission of States. (Sparks VIII. 439). A committee was appointed of which Duane was Chairman, and Peters, Carroll, Hawkins and A. Lee, associates. The following resolutions, in addition to those dealing with Indian troubles, were reported and adopted, October 15, 1783 :

“*Resolved*, That it will be wise and necessary, as soon as circumstances shall permit, to erect a district of the western territory into a distinct government, as well for doing justice to the army of the United States, who are entitled to such lands as a bounty, or in reward of their services, as for the accommodation of such as may incline to become purchasers and inhabitants; and in the interim, that a committee be appointed to report a plan, consistent with the principles of the confederation, for connecting with the union by a temporary government, the

¹ Journals of Congress IV., 226-227.

purchasers and inhabitants of the said district, until their number and circumstances shall entitle them to form a permanent constitution for themselves, and as citizens of a free, sovereign and independent state, to be admitted to a representation in the union; provided always, that such constitution shall not be incompatible with the republican principles, which are the basis of the constitutions of the respective states in the union."¹

It was probably in pursuance of these resolutions that Jefferson of Virginia, Chase of Maryland, and Howell of Rhode Island were appointed a committee to report an ordinance. Their report was presented March 1st, 1784, the very day when Virginia's modified deed of cession was delivered to Congress. This report is among the papers in the State Department. It is endorsed as follows: "Report. Mr. Jefferson, Mr. Chase, Mr. Howell. Temporary government of Western Country. Delivered 1 March 1784. Ent.— Read—Mch 3, Monday next assigned for consideration of this report. Mch 17, 1784 recommitted."

The full text is given below, copied from the original manuscript, which is in the hand-writing of Jefferson. The published copy of this report in *The Public Domain* is inaccurate in at least one important particular.

"The Committee appointed to prepare a plan for the temporary government of the Western territory have agreed to the following resolutions.

Resolved that the territory ceded or to be ceded by Individual States WHENSOEVER THE SAME SHALL HAVE BEEN PURCHASED OF THE INDIAN INHABITANTS & OFFERED FOR SALE BY THE U. S. [interlineation in another hand] shall be formed into distinct States, bounded in the following manner, as nearly as such cessions will admit, that is to say; Northwardly and Southwardly by parallels of latitude so that each State shall comprehend from South to North two degrees of latitude beginning to count from the completion of thirty-one degrees North of the Equator, but any territory Northwardly of the 47th degree shall make part of the state next below, and Eastwardly and Westwardly they shall be bounded, those on the Missisipi by that river on one side and the meridian of the lowest point of the rapids of the Ohio on the other; and those adjoining on the East by the same meridian on their Western side, and on their Eastern by the meridian of the Western cape of the mouth of the Great Kanhaway, And the territory Eastward of this last

¹Journals of Congress IV., 296.

meridian between the Ohio, Lake Erie, & Pennsylvania shall be one state.

That the settlers within (*any of the said states*) THE TERRITORY SO TO BE PURCHASED & OFFERED FOR SALE [erasure and interlineation in another hand] shall, either on their own petition, or on the order of Congress, receive authority from them, with appointments of time and place, for their free males of full age to meet together for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of these states, so that such laws nevertheless shall be subject to alteration by their ordinary legislature, and to erect subject to a like alteration, counties or townships for the election of members for their legislature.

That such temporary government shall only continue in force in any state until it shall have acquired 20,000 free inhabitants; when giving due proof thereof to Congress, they shall receive from them authority with appointments of time and place to call a convention of representatives to establish a permanent constitution and government for themselves.

Provided that both the temporary & permanent governments be established on these principles as their basis. 1. [That they shall ever remain a part of the United States of America] 2. that in their persons, property and territory they shall be subject to the government of the United States in Congress assembled, and to the Articles of confederation in all those cases in which the original states shall be so subject. 3. That they shall be subject to pay a part of the federal debts contracted or to be contracted, to be apportioned on them by Congress according to the same common rule and measure, by which apportionments thereof shall be made on the other states. 4. That their respective governments shall be in republican forms, and shall admit no person to be a citizen who holds any hereditary title. 5. That after the year 1800 of the Christian aera, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty.

That whensoever any of the sd states shall have, of free inhabitants, as many as shall then be in any one of the least numerous of the thirteen original states, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original states: after which the assent of two-thirds of the United States in Congress assembled shall be requisite in all those cases, wherein by the Confederation the assent of nine states is now required, provided the consent of nine states to such admission may be obtained according to the eleventh of the articles of Confederation. Until such admission by their delegates into Congress, any of the said states, after the establishment of their temporary government, shall have authority to keep a sitting member in Congress, with a right of debating, but not of voting.

That the territory Northward of the 45th degree, that is to say of

the completion of 45° from the Equator & extending to the Lake of the Woods, shall be called SYLVANIA.

That of the territory under the 45th & 44th degrees of that which lies Westward of Lake Michigan shall be called MICHIGANIA, and that which is Eastward thereof within the peninsula formed by the lakes and waters of Michigan, Huron, St. Clair, and Erie shall be called CHERSONESUS and shall include any part of the peninsula which may extend above the 45th degree.

Of the territory under the 43d & 42d degrees, that to the Westward thro' which the Assenisipi or Rock river runs shall be called ASSENSIPIA, and that to the Eastward in which are the fountains of the Muskingum, the two Miamis of Ohio, the Wabash, the Illinois, the Miami of the lake and Sandusky rivers, shall be called METROPOTAMIA.

Of the territory which lies under the 41st & 40th degrees, the Western, thro' which the river Illinois runs, shall be called ILLINOIA; that next adjoining Eastward SARATOGA, and that between this last & Pennsylvania & extending from the Ohio to Lake Erie shall be called WASHINGTON.

Of the territory which lies under the 39th and 38th degrees to which shall be added so much of the point of land within the fork of the Ohio & Missisipi as lies under the 37th degree, that to the Westward within and adjacent to which are the confluences of the rivers Wabash, Shawaney, Tanissee, Ohio, Illinois, Missisipi and Missouri, shall be called POLYPOTAMIA, and that to the Eastward farther up the Ohio otherwise called the Pelisipi shall be called PELISIPIA.

That the preceding articles shall be formed into a Charter of Compact, shall be duly executed by the President of the U. S. in Congress assembled under his hand and the seal of the United States, shall be promulgated and shall stand as fundamental constitutions between the thirteen original states & those now newly described, unalterable but by the joint consent of the U. S. in Congress assembled and of the particular state within which such alteration is to be made."

As the endorsement shows the report was recommitted March 17. The second report is endorsed "Report on western territory. Delivered March 23, 1784. Read, Wednesday 24th assigned for consideration." The point of difference between these two reports, is the omission in the latter of the proposed names of the new States. The consideration of this report did not come up until April 19, 1784. On that day the report was amended by striking out the clause prohibiting slavery after the year 1800. This amendment was proposed by Spaight of North Carolina. The question of rejection having been raised, the votes of

seven states were necessary to retain the clause. New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania all cast undivided affirmative votes; Maryland and South Carolina undivided negative votes; Virginia voted no, Jefferson's affirmative vote being outweighed by the votes of his two associate delegates. Only one delegate from New Jersey was present and his affirmative vote could not represent the vote of the State. Delaware and Georgia were absent. This clause therefore was not retained, although only seven delegates voted no, while sixteen voted aye. Had Mr. Beatty of New Jersey been present and voted aye, as his later vote on King's anti-slavery amendment shows that he would have voted, New Jersey's vote would have been counted and the clause, therefore, would have been retained. On the following day other amendments were adopted. It was moved by Mr. Sherman and seconded by Mr. Ellery to strike out from the clause providing that the temporary and permanent governments in the new States should be "subject to the government of the United States in Congress assembled; and to the articles of confederation in all those cases in which the original states shall be so subject," the words "to the government of the United States in Congress assembled and." Maryland was the only State to cast a vote in favor of this clause.

The provision excluding from citizenship all persons holding hereditary titles, was also stricken out. This amendment was proposed by Hand of Pennsylvania and seconded by Read of South Carolina. Massachusetts, Rhode Island and Virginia were unanimous in favoring this precaution against the dangers of royalty. The other States evidently were satisfied with the safeguard guaranteed by a republican form of government.

The next important amendment was the addition of the following clause: "That the lands of non-resident proprietors shall, in no case, be taxed higher than those of resi-

dents within any new State, before the admission thereof to a vote by its delegates in Congress."¹

It was proposed, until the settlers had made arrangements for a temporary government, to place them under the authority of magistrates or rulers appointed by Congress. Blanchard of New Hampshire, Ellery of Rhode Island, Sherman and Wadsworth of Connecticut, and Paine of New York, were the only ones to cast negative votes on this proposition, but as only six states were found to favor it, it was lost. April 23rd, under the lead of Gerry and Williamson, a more guarded substitute for this provision was proposed and passed, as follows: "That measures not inconsistent with the principles of the confederation, and necessary for the preservation of peace and good order among the settlers in any of the said new states, until they shall assume a temporary government as aforesaid, may, from time to time, be taken by the United States in Congress assembled."

This ordinance was then adopted. It is the first positive legislation on the subject of the government of the north-west lands.

It may be summarized as follows: The western lands were to be divided into ten States, each one of which was to be able to adopt, as a temporary form of government, the constitution of any one of the thirteen original States, under which a legislature was to be elected with power to amend such constitution; each State furthermore, upon gaining a population of 20,000, was to be admitted as a State of the Union under a permanent constitution, and was to be admitted to full representation in Congress when its population equalled that of the least numerous of the thirteen original States, and until such admission each State, after the formation of its temporary government, could send a delegate to Congress with right of debating but not of voting. The limitations placed on these State governments

¹Journals of Congress, IV., 377.

were that they should always remain a part of the confederation ; that they should be subject to the Articles of Confederation ; that their form should be republican ; that they should be subject to federal taxation according to the apportionment by Congress ; that they should not interfere with the primary disposal of the soil by Congress ; that those lands, the property of the United States, should be exempt from State taxation ; and that non-resident land proprietors should not be taxed at a higher rate than proprietors within the State.

The articles of this ordinance were made a compact between the original United States and each new State. It will be noticed that the subject of private securities for person and property with which the final ordinance dealt so fully, was wholly overlooked in the ordinance of 1784.

Jefferson's name is most closely connected with the ordinance of 1784. He was also chairman of the committee which in May reported an ordinance for the survey and sale of the western lands. This ordinance is connected with the subject of this sketch only in one particular. In it was a provision that lands should pass in descent and dower according to the customs of Gavelkind. This provision is inserted for the purpose of comparison with the law of descent as enacted in the ordinance of 1787.

“Until a temporary government shall be established in any state according to the resolutions of Congress of April, 1784, the lands therein shall pass in descent and dower according to the customs known in the common law by the name of Gavelkind ; and shall be transferable by deed or will proved by two witnesses, but as soon as a temporary government shall be so established they shall become subject to the laws of the state and shall never after in any case revert to the United States. Where a grant shall be made out to the heir or devisee of the persons in whose name the warrant was originally issued, he shall be named in the sd grant as heir or devisee.”

The original draft of this ordinance is endorsed “Report of Mr. Jefferson, Mr. Williamson, Mr. Howell, Mr. Gerry, Mr. Read. An ordinance for ascertaining the mode of locating and disposing of lands in the western territory.

Entered. Read April 30, 1784. Friday, May 7, assigned." No action was taken on this ordinance during the session of Congress in which it was reported. When Congress again assembled Jefferson was in France and his ordinance was recommitted March 16, 1785, to Long, King, Howell, Johnson, R. R. Livingston, Stewart, Gardner, J. Henry, Grayson, Williamson, Bull and Houston. Their report provided that the central section of every township should be reserved for the support of schools, and the one adjoining northward for the support of religion. In the discussion of this provision Charles Pinckney moved, seconded by Grayson, that the words "for religious and charitable uses" be substituted for the "support of religion." This amendment was amended on motion of Ellery and Smith by striking out the words "religious and." Pinckney then withdrew his amendment. Ellery and Smith, however, moved to strike out the entire provision for the support of religion and, as only New Hampshire, Massachusetts, Pennsylvania, Delaware and Virginia voted in support of the clause, their motion was successful. A further amendment was offered to reserve one township "for charitable purposes," but only New Hampshire, Massachusetts, Delaware and Virginia voted for it.

This ordinance was enacted May 20, 1785. It provided for the survey of the western lands and for their division into townships six miles square, and also for the sale of sections and of lots. It was a practical plan for selling the western lands and is associated with the ordinance for government of 1784, just as the ordinance for sale of lands to the Ohio Company passed July 27, 1787, was connected with the ordinance for government of that year.

It was not long before an amendment to Jefferson's ordinance of an important nature was proposed. Rufus King brought forward the following motion, March 16, 1785:

"That there shall be neither slavery nor involuntary servitude in any of the states described in the resolve of Congress of the 23rd of April, 1784, otherwise than in punishment of crimes, whereof the party shall

have been personally guilty; and that this regulation shall be an article of compact, and remain a fundamental principle of the constitutions between the thirteen original states and each of the states described in the said resolve of the 23rd of April, 1784."

King's motion was referred to a committee composed of King, Howell and Ellery, a strong committee and one surely predisposed in favor of the motion.

On the question of commitment, the yeas and nays being required by Mr. King, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland voted aye; Virginia, North Carolina, South Carolina voted no; and Georgia and Delaware did not vote.

Beatty of New Jersey, who was absent when the vote on Jefferson's anti-slavery proposition was taken, was present on this day and voted in favor of commitment, thus showing his probable vote had he been present at the former time. Grayson of Virginia, whose name is connected so honorably with beneficial legislation for the northwest, voted in favor of commitment, but his colleague, R. H. Lee, voted no, though later he voted for the exclusion of slavery. Many historical writers have stated that the matter was dropped on the reference of this motion to a committee and the Journals of Congress do not show that even a report was made. There is, however, a report among the Papers of the Old Congress, endorsed "Report on Mr. King's motion for the exclusion of slavery in the new states. Mr. King, Mr. Howell, Mr. Ellery. Ent. 6 April, 1785. Read. Thursday 14 assigned for consideration." The draft of the original report is in the handwriting of Mr. King, the chairman.

"The committee consisting of &c to whom was referred a motion from Mr. King for the exclusion of involuntary servitude in the states described in the Resolve of Congress of the 23rd day of April, 1784, submit the following resolve—

Resolved that after the year 1800 of the Christian era there shall be neither slavery nor involuntary servitude in any of the states described in the Resolve of Congress of the 23rd day of April 1784, otherwise than

in the punishment of crimes whereof the party shall have been personally guilty — and that this resolution shall be an article of compact, and remain a fundamental principle of the constitutions between the 13 original states, and each of the states described in the said Resolve of Congress of the 23rd day of April 1784, any implication or construction of the said Resolve to the contrary notwithstanding — Provided always that upon the escape of any person into any of the states described in the said resolve of Congress of the 23rd day of April 1784, from whom labor or service is lawfully claimed in any one of the 13 orig^l states, such fugitive may be lawfully reclaimed and carried back to the person claiming his labor or service as aforesaid this Resolve notwithstanding.”

In addition to the written draft of this report, printed copies are found among the Papers of the Old Congress, a fact which would seem to show that it was clearly presented to the attention of Congress. No action, however, was taken upon it; indeed there is no record even of discussion upon it.

This motion made by King, the fate of which has been shown, was doubtless inspired by a letter from Timothy Pickering, which was written to King, March 8, 1785, about a week before the motion was made. Pickering's words admit no doubtful meaning. “Congress once made this important declaration,—‘that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are *life, liberty, and the pursuit of happiness*,’ and these truths were held to be *self-evident*. * * * To suffer the continuance of slaves till they can gradually be emancipated, in states already overrun with them may be pardonable, because unavoidable without hazarding greater evils; but to introduce them into countries where none now exist—countries which have been talked of, which we have boasted of, as asylums to the oppressed of the earth—can never be forgiven. For God's sake, then, let one more effort be made to prevent so terrible a calamity! The fundamental constitutions for those states are yet liable to alterations, and this is probably the only time when the evil can certainly be prevented. * * * It will be infinitely easier to prevent the evil at

first than to eradicate it, or check it in any future time.”¹

Monroe was the mover of the next proposed amendment to Jefferson’s ordinance. He had become convinced from examination of the western territory that the number of States into which it was to be divided was too large.

As Virginia had ceded her lands to the United States on condition that they should be divided as Jefferson had proposed, it became necessary to induce her to change her terms of cession if Monroe’s plan was to succeed. Monroe at once attempted to secure this result. March 24, 1786, a report was presented from a general committee. It was termed a “report in part.” It called upon Virginia to revise her deed of cession, and recommended that the western land be divided into “not less than two nor more than five states.” The report was amended and adopted. It is as follows :

“Whereas it appears, from the knowledge already obtained of the tract of country lying north-west of the river Ohio, that the laying it out and forming it into states of the extent mentioned in the resolution of Congress of the 10th of October, 1780, and in one of the conditions contained in the cession of Virginia, will be productive of many and great inconveniences: That by such a division of the country, some of the new states will be deprived of the advantages of navigation, some will be improperly intersected by lakes, rivers, and mountains, and some will contain too great a proportion of barren unimprovable land, and of consequence will not for many years, if ever, have a sufficient number of inhabitants to form a respectable government, and entitle them to a seat and voice in the federal council: And whereas in fixing the limits and dimensions of the new states, due attention ought to be paid to natural boundaries, and a variety of circumstances which will be pointed out by a more perfect knowledge of the country, so as to provide for the future growth and prosperity of each state, as well as for the accommodation and security of the first adventurers. In order therefore that the ends of government may be attained and that the states which shall be formed, may become a speedy and sure accession of strength to the confederacy :

Resolved, That it be and it hereby is recommended to the legislature of Virginia to take into consideration their act of cession and revise the same so far as to empower the United States in Congress assembled to make such a division of the territory of the United States lying north-

¹Pickering’s Life of Pickering I. 509-10.

erly and westerly of the river Ohio into distinct republican states not more than five nor less than three as the situation of that country and future circumstances may require: which states shall hereafter become members of the federal union and have the same rights of sovereignty, freedom and independence as the original in conformity with the resolution of Congress of the 10th of October, 1780."¹

Nathan Dane of Massachusetts aided Monroe in his attempt to revise the Ordinance of 1784. There is found among the Papers of the Old Congress a report of a committee, consisting of Monroe, Johnson, King, Kean and Pinckney, to whom had been referred a motion of Mr. Dane for considering and reporting the form of a temporary government for the Western States. It was entered and read May 10th, 1786, and July 13th was recommitted probably to the same committee.

Monroe's proposed ordinance left the division of the country into States to be determined later when the action of Virginia on the proposition to revise her deed of cession should have been ascertained. It provided for the appointment of a governor, secretary, council and court. The territorial legislature was to consist of two houses, one composed of the governor and council, and the other elected from districts into which the governor was authorized to divide the territory. All laws were to originate in the lower house, according to the report, but this was modified by Congress, so that this restriction was placed only on "money bills."

Jefferson's provision relating to the admission of the States to full representation in Congress, when each one could number as many inhabitants as the least numerous of the thirteen original States then contained, was inserted.

This ordinance, as reported by Monroe's committee, contained no compact limiting the powers of the temporary government, or providing safeguards to property or person. It is the most inadequate and insignificant frame of government for the Northwest reported to Congress.

¹Journals of Congress IV. 663.

About this time the Indians of Kaskaskia petitioned Congress for the establishment of a temporary government in the Northwest Territory. Their petition was referred to Monroe, Johnson, King, Pinckney, and Smith. This is the same committee that made the report of May 10, with the exception that Smith is substituted in the place of Kean. There is no explanation of this change. Probably, however, this committee was the successor of the other, and had under consideration the whole subject of the government of the Northwest Territory. Their report on the subject of the petition of the Kaskaskies, made August 24, 1786, informs them that Congress is considering a plan for the government of the western lands, "and that its adoption will be no longer protracted than the importance of the subject and due regard for their interest require."¹

Monroe's connection with the schemes for the government of the Northwest Territory comes to an end with this report on the petition of the Kaskaskies. Both Monroe and King resigned their active work in Congress for that in the Constitutional Convention. Their places on the committee before whom was pending the matter of the Northwest, were filled by Dane of Massachusetts and Henry of Maryland.

September 19, 1786, the committee, now consisting of Johnson, Pinckney, Smith, Dane and Henry, made a report which was read and fixed as the order of the day for September 21st. With the exception of an unimportant discussion on September 29, this report received no attention until, in the next Congress it was brought forward again, as a new report from the same committee, April 26, 1787.

Johnson's ordinance, as reported, contained the following important provisions:

"And to secure the rights of personal liberty and property to the inhabitants and others, purchasers in the said districts, it is hereby resolved: That the inhabitants of such districts shall always be entitled to the benefits of the act of *habeas corpus* and of the trial by jury:

¹Journals of Congress IV. 688.

That the judges shall agree on the criminal laws of some one state, in their opinion the most perfect, which shall prevail in said district until the organization of the general assembly; but afterwards the general assembly shall have authority to alter them as they shall think fit:

That the real estates of resident proprietors, dying intestate previous to the organization of the general assembly, shall descend to the heirs of such proprietors, male and female in equal parts; that is to say, if a father dies intestate, leaving a son and two daughters, the real estate shall be divided into three equal parts, and descend to each in such equal proportions; provided however that such proprietors shall be at liberty to dispose of such lands by alienation, by bargain and sale, testamentary devise, or otherwise as he shall think proper; but after the organization of the general assembly, the estates of resident proprietors shall be subject to such disposition, by alienation, bargain and sale, descent or otherwise, as the said assembly shall direct.

The real estates of non-resident proprietors shall be subject to such alienation while living, and disposal by testamentary devise as they shall think fit; but the real estates of non-resident proprietors dying intestate, shall descend in the same manner as those of resident proprietors, previous to the organization of the general assembly, until such district shall be admitted into the Confederacy."

When these provisions were discussed in Congress, that relating to criminal law was modified, and those relating to the law of descent were stricken out.

This report was called up May 9, was read a second time and the next day was assigned for the third reading. On that day Massachusetts, represented by Gorham, King and Dane, called for the order of the day, but it was postponed for the consideration of the question of adjournment of Congress for a brief vacation, the reassembling to be at Philadelphia, where the Constitutional Convention was about to sit. It may be well to note, in view of the statement made in *The Public Domain*, p. 153, that this proposition to adjourn was not adopted.¹ Congress, therefore, met on May 11 in New York, but the subject of the northwest was not taken up. There was no quorum from May 12 to July 5, inclusive.

On the 9th of July the Northwest Ordinance was taken from the table but not for a third reading. It was referred,

¹ Journals of Congress, IV., p. 747-8.

as Congress had read it for the second time, to a new committee consisting of Carrington of Virginia, Dane of Massachusetts, R. H. Lee of Virginia, Kean of North Carolina and Smith of New York. In order to contrast the ordinance which was referred to this committee with that which the committee reported, the text of the former is given in full. This copy is a reproduction of one of several printed copies found among the papers of the Old Congress. [The small capitals denote parts added to the report after it was submitted to Congress; the parentheses and italics, parts stricken out.]

An Ordinance for the government of the [*Western*] TERRITORY OF THE U. S. N. W. OF THE RIVER OHIO, [UNTIL THE SAME SHALL BE DIVIDED INTO DIFFERENT STATES.] [Note.—This last clause was added and then stricken out in Congress.]

It is hereby ordained by the United States in Congress assembled, that there shall be appointed from time to time, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress.

There shall be appointed by Congress, from time to time, a secretary, whose commission shall continue in force for four years, unless sooner revoked by Congress. It shall be his duty to keep and preserve the acts and laws passed by the general assembly, and public records [*of the district*] and of the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months, to the secretary of Congress.

There shall also be appointed a court, to consist of three judges, any two of whom shall form a court, who shall have a common law jurisdiction, whose commissions shall continue in force during good behaviour.

And to secure the rights of personal liberty and property to the inhabitants and others, purchasers in the said [*district*] TERRITORY, it is hereby ordained, that the inhabitants [*of such district*] THEREOF shall always be entitled to the benefits of the act of habeas corpus, and of the trial by jury.

The governor and judges, or a majority of them shall adopt and publish in the [*district*] TERRITORY AFORES'D such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the [*district*] INHABITANTS and report them to Congress from time to time, which LAWS shall [*prevail in said district*] BE IN FORCE TERRITORY [*sic*] until the organization of the general assembly, unless disapproved of by Congress, but afterwards the general assembly shall have authority to alter them as they shall think fit; provided, however, that said assembly shall have no power to create perpetuities.

The governor for the time being shall be commander in chief of the militia, and appoint and commission all officers in the same, below the rank of general officers; all officers of that rank shall be appointed and commissioned by Congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.

The governor shall, as soon as may be, proceed to lay out the [district] SAID TERRITORY into counties and townships, subject however to such alterations, as may thereafter be made by the legislature, so soon as there shall be 5,000 free male inhabitants, of full age, within the said [district] TERRITORY upon giving due proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships as aforesaid, to represent them in general assembly; provided that for every 500 free male inhabitants there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives amount to 25, after which the number and proportion of representatives shall be regulated by the legislature; provided that no person shall be eligible or qualified to act as a representative unless he shall be a citizen of one of the United States, or have resided within such [district] TERRITORY three years, and shall likewise hold in his own right, in fee simple, 200 acres of land within the same; provided also, that a freehold, or life estate in fifty acres of land in the said district, if a citizen of any of the United States, and two years residence if a foreigner, in addition, shall be necessary to qualify a man as elector for the said representative.

The representatives thus elected, shall serve for the term of two years, and in case of the death of a representative or removal from office, the governor shall issue a writ to the county or township for which he was a member to elect another in his stead, to serve for the residue of the time.

The general assembly shall consist of the governor, a legislative council, to consist of five members, to be appointed by the United States in Congress assembled, to continue in office during pleasure, any three of whom to be a quorum, and a house of representatives, who shall have a legislative authority complete in all cases for the good government of said [district] TERRITORY; provided that no act of the said general assembly shall be construed to affect any lands the property of the United States, and provided further, that the lands of the non-resident proprietors shall in no instance be taxed higher than the lands of residents.

All bills shall originate indifferently either in the council or house of representatives, and having been passed by a majority in both houses, shall be referred to the governor for his assent, after obtaining which, they shall be complete and valid; but no bill or legislative act whatever, shall be valid or of any force without his assent.

The governor shall have power to convene, prorogue and dissolve the general assembly when in his opinion it shall be expedient.

The said inhabitants or settlers shall be subject to pay a part of the federal debts, contracted, or to be contracted, and to bear a proportional part of the burthens of the government, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states.

The governor, judges, legislative council, secretary and such other officers as Congress shall at any time think proper to appoint in such [district] TERRITORY, shall take an oath or affirmation of fidelity AND OF OFFICE, (the governor before the president of Congress, and all other officers before the governor), [according to the form prescribed on the 27th day of January, 1785, to the secretary at war, *mutatis mutandis*.]

[*Whensoever any of the said states shall have of free inhabitants as many as are equal in number to the one thirteenth part of the citizens of the original states, to be computed from the last enumeration, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original states; provided the consent of so many states in Congress is first obtained, as may at that time be competent to such admission.*]

Resolved, That the resolutions of the 23d of April, 1784, be, and the same are hereby annulled and repealed.

[Endorsed]

Report temporary Government transcribed agreeably to order May 9th, 1787, & Assigned for thursday, May 10th.

May 10th postponed.

July 9, 1787, Referred to

Mr. Carrington
Mr. Dane
Mr. Lee
Mr. Kean
Mr. Smith

The account of the action of the Committee in the Journal of Congress is confined to the one fact that their report was made July 11, only one day intervening between their appointment and their report. The ordinance thus reported, after amendment, as will be explained in detail later, was read a second time July 12, and was enacted July 13.

The vote on its passage was unanimous, that is, the votes

of the eight States present, Massachusetts, New York, New Jersey, Delaware, Virginia, North Carolina, South Carolina and Georgia, were all affirmative. Yates of New York was the only individual who voted no. The statement that he voted aye, made in *The Public Domain*, p. 152, is an error. See *Journals of Congress*, iv., 754. The only explanation of this vote to be found, is given in Dane's letter to Rufus King, Bancroft's *History of the Constitution*, vol. ii., p. 431, that Yates "appeared, in this case, as in most others, not to understand the subject at all."

Three printed copies of the Ordinance are preserved in the Library of Congress: one showing the report as made on the 11th and the amendments adopted on the 12th before the second reading; the second being a corrected print of it as it passed; and the third a copy arranged so as to show the report and all amendments, the additions being underlined and the clauses stricken out being written in. A reproduction of this copy is added below, the small capitals showing the additions, and the italics the clauses stricken out. A note is added to each addition stating in whose handwriting the addition is found in the amended report. Comments are also added after each paragraph summarizing all that can be learned in regard to the source of each particular principle.

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO.

Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

All previous reports had contemplated the organization of the temporary government in the form of one district, although no precise statement had been made in regard to the subject. See resolutions reported by Duane's committee *supra*, page 307.

Be it ordained by the authority aforesaid, That the estates, both of resident and non-resident proprietors in the said territory, dying intestate,

shall descend to, and be distributed among, their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and, among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents' share; AND THERE SHALL, IN NO CASE, BE A DISTINCTION BETWEEN KINDRED OF THE WHOLE AND HALF-BLOOD; saving, in all cases, to the widow of the intestate her third part of the real estate for life, and one-third part of the personal estate; and this law, relative to descents and dower, shall remain in full force until altered by the legislature of the district.

In language and substance this statement of the law of descent closely resembles the Massachusetts statute of 1783, ch. 36. The verbal changes are unimportant, and the only point of difference in substance is that in Massachusetts until June 8, 1789, the eldest son received a double portion. It is also to be noticed that the law of descent of real estate as stated in the report of Johnson's committee, was the same as the law which was enacted, in its main principle,—equal distribution among the children of the intestate. The clause in regard to half-blood was added as an amendment to the report in Congress. It is written into the printed copy referred to above in the hand of Grayson, at that time President of Congress.

And, until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however to the (*inhabitants of Kaskaskies and Port Vincent*) FRENCH AND CANADIAN INHABITANTS, AND OTHER SETTLERS OF THE KASKASKIAS, ST. VINCENTS, AND THE NEIGHBORING VILLAGES WHO HAVE HERETOFORE PROFESSED THEMSELVES CITIZENS OF VIRGINIA, their laws and customs now in force among them, relative to the descent and conveyance of property.

Nathan Dane, in his abridgment, Vol. VII. p. 389, thus explains the source of this part of the ordinance. "This ordinance" (i. e. of 1787) " (formed by the author of this work) was framed mainly from the laws of Massachusetts, especially in regard to titles. * * * * Thus the laws of Massachusetts laid the foundation of titles to real and personal estates, by deed, by will, and by descent, in all the territories of the Union northwest of the river Ohio;—and substantially in the other territories to which this ordinance has been extended." The amendment is in the hand of Grayson.

Be it ordained by the authority aforesaid, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in 1000 acres of land, while in the exercise of his office.

Jefferson's ordinance left the form of the executive and legislative departments of the temporary government to be determined by the selection by the free males of one of the state constitutions. Monroe and Johnson both placed the executive department in the hands of a governor to be appointed by Congress. The first clause of the above is taken almost verbally from Johnson's report. *See supra*, page 321.

There shall be appointed, from time to time, by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked; he shall reside in the district, and have a freehold estate therein in 500 acres of land, while in the exercise of his office; it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his Executive department; and transmit authentic copies of such acts and proceedings, every six months, to the Secretary of Congress:

There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction; and reside in the district, and have each therein a freehold estate in 500 acres of land while in the exercise of their offices; and their commissions shall continue in force during good behavior.

With the exception of the clauses giving to the Secretary and Judges freehold in 500 acres of land, the above articles are taken from Johnson's report. *See supra*, page 321.

The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time: which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress; but, afterwards, the legislature shall have authority to alter them as they shall think fit.

To the corresponding provision in Johnson's report, was added the clause "provided, however, that said assembly shall have no power to create perpetuities." This clause does not appear in any shape in the final ordinance.

The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all (*above that rank*) GENERAL officers shall be appointed and commissioned by Congress.

This amendment was written in by Thompson, the Secretary of Congress.

Previous to the organization of the General Assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the General Assembly shall be organized, the powers and duties of the magistrates and other civil officers, shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

These articles are copied almost verbatim from Johnson's report.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

The latter half of the above paragraph is copied with but slight verbal changes from Johnson's ordinance.

So soon as there shall be 5000 free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their coun-

ties or townships to represent them in the General Assembly: *Provided*, That, for every 500 free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to 25; after which, the number and proportion of representatives shall be regulated by the legislature:

Provided, That no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, 200 acres of land within the same:

Provided, also, That a freehold of life estate in 50 acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected, shall serve for the term of two years; and, in case of the death of a representative, or removal from office, the governor shall issue a writ to the the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

There is nothing to call for comment in these paragraphs. They are all in substance the work of Monroe's and Johnson's committees.

The General Assembly, or Legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together; and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in 500 acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom Congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed.

Johnson gave to the members of the council tenure dur-

ing the pleasure of Congress. The manner of their selection and appointment as stated above is new.

And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the General Assembly, when, in his opinion, it shall be expedient.

The first sentence is new.

The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office; the governor before the President of Congress, and all other officers before the governor.

This is practically the same as in Johnson's report.

As soon as a legislature shall be formed in the district, the council and house assembled in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not of voting during this temporary government.

This privilege was accorded to the territory by Jefferson's ordinance.

And, for extending (*to all parties of the Confederacy*) the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

Jefferson's form of the statement of this compact did not make the people of the States a party to it. The compact entered into by the enactment of Jefferson's ordinance is completely re-stated and re-enacted in the articles below, and thus was not broken in a single particular.

ART. 1st. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

Religious freedom was secured generally to the citizens of the different States by their constitutions. Connecticut and Rhode Island were probably the only exceptions at the time of the ordinance of 1787. The charter of 1663 of Rhode Island, guaranteed religious liberty to her citizens. Delaware's constitution prohibited an established church. The language of Article 1st of the Ordinance of 1787, bears a strong resemblance to the last clause of Article II., Part I. of the Constitution of 1780 of Massachusetts.

ART. 2d. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury:

These two private safeguards were guaranteed by Johnson's ordinance. *See supra*, page 321.

Of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law.

Proportionate representation of the male inhabitants in the legislature was secured by Johnson's ordinance.

All persons shall be bailable, unless for capital offences where the proof shall be evident or the presumption great.

The provision in regard to bail usually found in the bills of rights, is "that excessive bail ought not to be required." In the short bill of rights of Connecticut, adopted in 1776, is found the following, to which the above is closely parallel: "And that no man's person shall be restrained or imprisoned, by any authority whatsoever, before the law hath sentenced him thereunto, if he can and will give sufficient security, bail or mainprize for his appearance and good behavior in the meantime, unless it be for capital crimes.

* * * *"

All fines shall be moderate; and no cruel or unusual punishments shall be inflicted.

This language was probably suggested by the Virginia

Bill of Rights, which declared "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." These words were borrowed directly from the English Bill of Rights of 1688-9. The corresponding clause in the Massachusetts Constitution of 1780, is: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.

Virginia and Massachusetts together contributed the above. In the Bill of Rights of the former is the statement, "That no man be deprived of his liberty except by the law of the land or the judgment of his peers," and the constitution of 1780 of the latter contains the provision, "And whenever the public exigencies require that the property of an individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." There is also in the Constitution of Massachusetts a sentence which may have suggested the first clause of the above.

And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.

So far as is known the sacredness of private contracts is here for the first time recognized as putting the obligation contained in them beyond the rightful interference of legislation. It seems clear that the motive of this article was suggested by Shays's Rebellion and that Nathan Dane deserves the credit of having originated and stated it as it now stands in the Ordinance. Dane claims this credit in his letter of March 26, 1830, to Daniel Webster in the following words: "I have never claimed *originality* except in

regard to the clause against impairing contracts, and perhaps the *Indian* article, part of the third article, including also religion, morality, knowledge, schools, etc.”¹

Hon. George F. Hoar, in his Marietta Oration, thus speaks of this article :

“For the first time in history the Ordinance of 1787 extended that domain from which all human government is absolutely excluded by forbidding any law interfering with the obligation of good faith between man and man. This provision, adopted afterward in substance in the Constitution of the United States, and thereby made binding as a restraint upon every State, is the security upon which rests at last all commerce, all trade, all safety in the dealing of men with each other. To-day its impregnable shield is over the dealing of sixty millions of people with each other and with mankind.”

Mr. Hoar also explains the probable motive of this article as follows : “Shays’s insurrection in Massachusetts in 1787 was inspired mainly by the desire to prevent the enforcement of debts by the courts. To it was doubtless due the clause in the Ordinance of 1787—inserted also in the Constitution—forbidding the passage of any law impairing the obligation of contracts.”

ART. 3d. (*Institutions for the promotion of*) religion, morality, AND KNOWLEDGE, BEING NECESSARY TO GOOD GOVERNMENT AND THE HAPPINESS OF MANKIND, schools and the means of education shall forever be encouraged (*and all persons while young shall be taught some useful occupation*).

Bland foresaw the need of establishing schools. See *supra*, page 306. The scheme for sale and survey of lands, which was enacted May 20, 1785, also provided that the central section of every township should be reserved for the support of schools.

The clause in small capitals is an interlineation in the handwriting of Thompson.

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be

¹ Proceedings of the Mass. Hist. Soc., vol. x., p. 479.

invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Dane claims to have originated this provision in his letter to Webster, which is quoted above. While these exact words are not found in any prior report, yet the rights of the Indians to the soil were recognized in the early reports and in Jefferson's ordinance.

ART. 4th. The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto.

This stipulation was made in Jefferson's ordinance as one of the principles on which the temporary and permanent governments were to rest.

The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes, for paying their proportion, shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled.

The principle of the above was stated in the same language in Jefferson's and in Johnson's ordinances. *See supra*, pages 309, 323. The method of levying the taxes is first stated in the final ordinance.

The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States;

These two articles of compact were included in Jefferson's ordinance, as enacted, but not in his first report. They were added as amendments to his second report by Congress.

And, in no case, shall non-resident proprietors be taxed higher than residents.

This had already been enacted in Jefferson's ordinance.

The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty, therefor.

This clause had already been enacted. It was passed as a resolution of Congress, May 12, 1786. Grayson moved it and King seconded him. The resolution contained the entire substance of the above, and it was stated in almost the same words.¹

ART. 5th. There shall be formed in the said territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and (*authorize*) CONSENT to the same, shall become fixed and established as follows, to wit: The Western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post St. Vincent's, due North, to the territorial line between the United States and Canada; and, by the said territorial line, to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincent's, to the Ohio; by the Ohio, by a direct line, drawn due North from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The Eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however*, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies North of an East and West line drawn through the Southerly bend or extreme of lake Michigan.

This article was confirmed by Virginia, December 30, 1788. The word "consent" was inserted in the handwriting of Grayson, and the other amendments made in the hand of Thompson.

And, whenever any of the said States shall have 60,000 free inhabitants therein, such State shall be admitted, by its delegates, into the

¹ Journals of Congress, iv., 637, 638.

Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government.

This was the third proposed regulation of the time of admission to statehood. Jefferson's plan provided for admission of each State when the number of its inhabitants equalled that of the least numerous of the thirteen original States at such time of admission. Monroe adopted the proposition of Jefferson. Johnson wished to exclude each new State until it could show a population one-thirteenth of the population of the original States. This last proposition was probably rejected by Congress, inasmuch as it is stricken out from the draft of that ordinance as it passed a second reading. *See supra*, page 323.

Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than 60,000.

A republican form of government was required by Jefferson.

ART. 6th. THERE SHALL BE NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE IN THE SAID TERRITORY, OTHERWISE THAN IN THE PUNISHMENT OF CRIMES, WHEREOF THE PARTY SHALL HAVE BEEN DULY CONVICTED: PROVIDED ALWAYS, THAT ANY PERSON ESCAPING INTO THE SAME, FROM WHOM LABOR OR SERVICE IS LAWFULLY CLAIMED IN ANY ONE OF THE ORIGINAL STATES, SUCH FUGITIVE MAY BE LAWFULLY RECLAIMED AND CONVEYED TO THE PERSON CLAIMING HIS OR HER LABOR OR SERVICE AS AFORESAID.

This sixth article is the most prominent feature of the Ordinance. Its history in Congress will be seen by following Jefferson's proposition to exclude slavery after 1800 in his first report; Spaight's amendment by which it was stricken out; King's motion to amend by adding the clause as above which unqualifiedly prohibits slavery; the report of King, Howell and Ellery proposing again Jefferson's provision and adding to it the fugitive slave clause as above; Monroe's and Johnson's Ordinances which totally omit the

subject of slavery; Carrington's report without the sixth article; and Dane's amendment which was adopted without question and added as above.

The most surprising facts in connection with this article are that it hung fire so long when it would seem that its best friends were interested in it; that Dane and King especially were ready on May 10th to vote for an ordinance which omitted it, and that when proposed in Congress as an amendment to a matured plan, it was so readily adopted.

This historic amendment is in the handwriting of Nathan Dane and is annexed by wafer to the printed copy of the report which was made and read on the 11th, and not to the report which was made by Johnson's committee April 26, as is stated in *The Public Domain*, p. 152.

Dane has given his reason for not pressing his amendment on the members of the committee while their report was under consideration, in a letter to Rufus King, which has been referred to already and will be found in Bancroft's *History of the Constitution*, Vol. II., p. 431. He writes: "When I drew the ordinance (which passed, a few words excepted, as I originally formed it), I had no idea the states would agree to the sixth article prohibiting slavery, as only Massachusetts, of the eastern states, was present, and therefore omitted it in the draft; but finding the house favorably disposed on this subject, after we had completed the other parts, I moved the article, which was agreed to without opposition."

There is another explanation of the fact that Dane waited until the committee had reported before he brought forward this sixth article, given by Charles W. Upham in a speech delivered in the House of Representatives of Massachusetts, in 1849. Mr. Upham's theory is that the committee wished to report only what they could agree to unanimously, and it was found impossible to come to an arrangement on the subject of slavery. Dane, therefore, proposed his amendment and gained unanimous support for it, by means of the

fugitive slave clause, which was offered as a compromise to the demands of the southern states. This theory is not wholly satisfactory. It overlooks the fact that King's report placed precisely the same proposition before Congress, April 6, 1785, and yet it was not accepted, nor even discussed. Mr. Upham does not give his authority.

In connection with this sixth article it is deemed fitting to quote a letter from Dane to John H. Farnham, written May 12, 1831, and to be found in the *New York Tribune* of June 18, 1875:

“As to the article excluding slavery, an important one, though perhaps not more so than the provision against impairing contracts, two questions arise: Who first thought of excluding slavery from the North Western territory? Who caused the article to be made a part of the ordinance? The Committee that reported the plan of April, 1784, including an article against slavery, very imperfect, * * * consisted of Mr. Jefferson, Mr. Chase of Maryland and Mr. Howell of Rhode Island. As Mr. Howell was from a non-slaveholding state, an active and able member, might he not more probably first think of excluding slavery? Be that as it may, the slave article in the plan of 1784 was very deficient, and the plan being adopted, and the slave article rejected, there was an end of it. The next year, '85, Mr. King of Massachusetts moved to add a slave article, better in words, but imperfect in substance; this being only committed, a slave article was no longer proposed by any committee. When the ordinance of '87 was reported to Congress, and under consideration, from what I heard, I concluded that a slave article might be adopted, and I moved the article as it is in the ordinance. It was added, and unanimously agreed to, I thought to the great honor of the slave-holding states.”

The mystery surrounding the enactment of this sixth article, which the passages quoted from Dane's letters do not solve, is explained, perhaps not with perfect satisfaction, by the publication of the “*Life, Journal and Correspondence of Manasseh Cutler.*” Mr. William F. Poole of Chicago first called attention to the very important influence

exerted by Cutler, as the agent of the Ohio Company, in the formation and passage of both the "Ordinance of 1787" and the accompanying ordinance for the sale of land to the Ohio Company. The recent publication of Cutler's letters and diary has made it still clearer that the Ohio Company, represented in New York by Cutler, when the subject of the Northwest Territory was at last considered with energy, was the power which demanded and enforced from the hitherto undecided and irresolute Congress an ordinance for the government of their State or States which would secure the rights of property and of person, maintain education and religion, and irrevocably prohibit slavery.

A few passages from Cutler's "Life, Journal and Correspondence" will serve to support this view.

April 7, 1783, Timothy Pickering wrote a letter to Mr. Hodgdon, in which is the following passage: "But a new plan is in contemplation, no less than forming a *new state* westward of the Ohio. Some of the principal officers of the army are heartily engaged in it. About a week since the matter was set on foot and a plan is digesting for the purpose. Inclosed is a rough draft of some propositions respecting it, which are generally approved of. They are in the hands of General Huntington and General Putnam, for consideration, amendment and addition."¹

Here are three of the articles of the rough draft to which Pickering referred. "11. That a Constitution for the new State be formed by the members of the association previous to their commencing the settlement, two-thirds of the associators present at a meeting duly notified for that purpose agreeing therein. The total exclusion of slavery from the State to form an essential and irrevocable part of the Constitution."

"(12). That the associators, so assembled, agree on such general rules as they shall deem necessary for the prevention and punishment of crimes, and the preservation of

¹ Vol. I., p. 149.

peace and good order in the State; to have the force of laws during the space of two years unless an assembly of the State, formed agreeably to the Constitution, shall sooner repeal them."

"13. That the State so constituted shall be admitted into the Confederacy of the United States, and entitled to all the benefits of the Union, in common with the other members thereof."¹

April 14, 1783, Colonel Pickering again writes to Mr. Hodgdon. He says "General Putnam is warmly engaged in the new planned settlement on the Ohio."²

Later a petition signed by two hundred and eighty-eight officers in the Continental army is presented to Congress praying for the location and survey of the western lands promised to them by the resolution of September 20, 1776. General Rufus Putnam is the first signer from Massachusetts. He writes a long letter to Washington stating the terms on which the petitioners propose to receive the lands, and in these terms are liberal provisions for the support of the ministry and of schools. This letter is submitted to Congress with the petition.

March 1, 1786, the Ohio Company was formed in Boston, and later General Samuel H. Parsons, General Rufus Putnam and Rev. Manasseh Cutler were chosen the three directors.

General Parsons made an unsuccessful application for the purchase of lands from Congress, after which the Ohio Company resolved to attempt to make "a private purchase of lands of the Honorable Congress," and Manasseh Cutler was authorized to conduct the purchase.

Before starting on his important mission he visits Boston and consults with Rufus Putnam. He writes of their interview: "Conversed with General Putnam. Received letters. Settled the principles on which I am to contract with Congress for lands on account of the Ohio Company."³

¹ Vol. I., p. 158.

² Vol. I., p. 149.

³ Vol. I., p. 204.

The day of this interview was June 25, 1787. On the following day Cutler started for Providence on his way to New York. He arrived there July 5, four days before the appointment of the final committee on the Ordinance. During this time he was very diligent presenting letters of introduction to members of Congress, and others, and pushing his propositions in regard to the northwest lands. His greatest friend in Congress appears to have been Carrington of Virginia, who was made chairman of both the committee on the frame of government and the committee on the sale of lands.

He records in his diary, pp. 236-7, that he had two conferences on the ninth with the Committee. July 10 he states that he had another conference with the Committee in the morning. His account of that day contains this significant paragraph: "As Congress was now engaged in settling the form of government for the Federal Territory, for which a bill had been prepared, and a copy sent to me with leave to make remarks and propose amendments, and which I had taken the liberty to remark upon, and to propose several amendments, I thought this the most favorable opportunity to go on to Philadelphia. Accordingly after I had returned the bill with my observations I set out at seven o'clock and crossed North River to Paulus Hook."¹

It seems probable that the bill which had been prepared and a copy of which had been sent to Cutler, and to which he had proposed amendments, was the ordinance reported by Johnson and read a second time on May 9, inasmuch as this extract shows that the copy with Cutler's proposed amendments was returned July 10, and the committee which drafted the final ordinance was appointed only the day before. Unless, therefore, the committee took immediate action on the day of their appointment, and revised the work of the former committee sufficiently to offer a complete ordinance to Cutler, he must have received a copy

¹ Manasseh Cutler, *Life, Journals and Correspondence*, i., 242.

of the old report which had been referred to Carrington's committee. This report had, as has already been stated, passed a second reading, and had been printed. When Cutler had returned to New York after the Ordinance had been enacted, he was provided with a copy of it, as the following entry in his diary shows: July 19, "Called on members of Congress very early this morning. Was furnished with the Ordinance establishing a Government in the Western federal Territory. It is in a degree new modeled. The amendments I proposed have all been made except one and that is better qualified."

The statement that "it is in a degree new modeled" seems to justify the inference that comparison was made with the bill which had been sent to Cutler, and that that bill was the ordinance which was at that time on the table of Congress.

These passages from Cutler's diary show conclusively that he went to New York armed with great power, and for definite purposes which had been discussed and agreed upon with Rufus Putnam before he started. The precise articles in the final ordinance which were due to the foresight and wisdom of Putnam and Cutler cannot now be precisely pointed out. It seems probable, however, in view of the earlier stand taken by Putnam and Pickering and their associates, that provisions for the support of religion and education, and the prohibition of slavery, were among the terms of the negotiation. It is only upon this supposition that the readiness of Congress to agree upon the sixth article can be explained.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, RELATIVE TO THE SUBJECT OF THIS ORDINANCE be, and the same are hereby, repealed and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

CHARLES THOMPSON, Secy.

The amendment appears to be in the handwriting of Thompson.

In conclusion, reference is given to Dane's note A in the appendix of volume 9 of his *Abridgment of American Law*. It is not thought necessary to repeat it in full, as the substance has already been given in what has been said as comments on the different clauses of the Ordinance. But a single paragraph therefore will be given. Mr. Dane's conclusion is

“On the whole, if there be any praise or any blame in this ordinance; especially in the titles to property and in the *permanent* parts; so the most important, it belongs to Massachusetts; as one of her members formed it and furnished the matter with the exceptions following. First, he was assisted in the committee of '86, in the *temporary* organization, almost solely by Mr. C. Pinckney, who did so little he felt himself at liberty to condemn this ordinance in that debate. Secondly, the author took from Mr. Jefferson's resolve of '84 in substance, the six provisions in the fourth article of compact as above stated. Thirdly, he took the words of the slave article from Mr. King's motion made in 1785, and extended its operation, as to time and extent of territory. * * * as to matter, his invention furnished the provisions respecting impairing contracts and the Indian security and some other smaller matters, the residue, no doubt, he selected from existing laws.”

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