

REMARKS OF P. EMORY ALDRICH ON THE ORDINANCE OF 1787.

[In seconding the motion to print the foregoing paper giving the legislative history of the Ordinance of 1787, Mr. Aldrich called attention to some points of interest in relation thereto, which are not adverted to in the paper itself.]

LET us note first the absence of any authority in the Congress of the Confederation to pass any such Ordinance.

“The first day of March” (1781), says Bancroft, “was a great day in the history of the country. America had proceeded by petitions to the king, by a declaration of rights, by an appeal to the world on taking up arms, by her declaration of independence onwards to the confederation which was designed to make them one people for all time. . . . The people of the United States thought that they had established a government, and there was no government. . . . The states of America had formed a confederation, not a union. . . . No creative word could go forth: through Congress there could be no agreement in reform.” The articles of confederation contained no grant of power even to prohibit the slave-trade—much less to interfere with slavery in the States or territories. Yet that Congress, so destitute of nearly all of the ordinary powers of government, undertook by this transcendent act of legislation to determine, for all time to come, the condition, in one important respect, of the whole of the vast territory northwest of the Ohio, and of the sovereign States that were to be formed out of it. Upon this subject of the want of authority in the Confederate Congress to pass the Ordinance, Mr. Justice Curtis, in his dissenting opinion in the *Dred Scott* case, says “The Congress of the Confederation

had assumed the power, not only to dispose of the lands ceded, but to institute governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of jurisdiction as of soil. This Ordinance was passed on the 13th of July, 1787. The convention for framing the constitution was then in session at Philadelphia. The proof is certain and decisive that it was known to the convention. *It is equally clear that it was admitted and understood not to be within the legitimate power of the confederation to pass this ordinance.*"¹ Speaking of the Northwest Territory, Hamilton in No. 38 of the Federalist says, "We may calculate, therefore, that a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become national stock. Congress have assumed the administration of this stock. They have begun to render it productive. Congress have undertaken to do more; they have proceeded to form new States, to erect temporary governments, to appoint officers for them and to prescribe the conditions on which such States shall be admitted into the confederacy. *All this has been done; and done without the least color of constitutional authority.*"

Mr. Madison in a letter to Robert Walsh under date of November 27, 1819,² writes as follows: "With respect to what has taken place in the Northwest Territory, it may be observed that the ordinance giving the distinctive character on the subject of slave holding proceeded from the old congress, *acting with the best intentions, but under a charter which contains no shadow of the authority exercised.*"

To another correspondent he writes under date of October 15, 1826. "The Revolutionary Congress was the offspring of the great crisis, and the exercise of its powers prior to the final ratification of the Articles (of Confedera-

¹ Jefferson's Works, vol. IX., pp. 251, 276. Federalist, Nos. 38, 43. 20 Howard, pp. 608, 609.

² Madison's Writings, Vol. III., p. 154.

tion) governed by the law of necessity or palpable expediency. And after that event there seems to have been more regard to the former latitude of proceeding than to the text of the instrument; assumption of power, apparently useful, being considered little dangerous in a body so feeble and so completely dependent on the authority of the States."¹

The other point to which attention was directed, was the fact, that the discovery of want of authority in the Congress of the Confederacy to make rules and regulations for the government of the territories, produced a direct and controlling influence on the convention, in conferring upon Congress under the Constitution full power for these purposes. It has already been shown that the passage of the Ordinance by the Congress of the Confederacy, then sitting in New York, was known to the convention for framing the constitution sitting in Philadelphia. A newspaper containing the Ordinance and notice of its passage was sent July 15, 1787, by Richard Henry Lee, a member of the Congress, to General Washington, President of the Convention. And as Mr. Justice Curtis, in the opinion already cited, says, "The importance of conferring on the new government regular powers commensurate with the objects to be attained and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cession, made and expected, or its execution by usurpation could scarcely fail to be perceived." And upon this same ground Hamilton had argued with great effect in support of these provisions of the Constitution conferring upon Congress power to make all needful rules and regulations respecting the territories.

In the same number of the *Federalist* from which the foregoing quotation is made, Hamilton says, "I mean not, by anything here said, to throw censure on the measures which have been pursued by Congress. I am sensible they could not have done otherwise. The public interest, the

¹Madison's Writings, Vol. III., p. 531.

necessity of the case, imposed upon them the task of overlooking their constitutional limits. But is not the fact an alarming proof of the dangers resulting from a government which does not possess regular powers commensurate to its objects?"¹

Mr. Horace Gray, now an associate justice of the Supreme Court of the United States, in an elaborate review of the Dred Scott case in the *Monthly Law Reporter* of June, 1857, says, "The power of the Congress of the Confederation to pass the Ordinance (of 1787) and to provide for the admission of new States into the Confederacy, having been doubted, the following clause was introduced into the Constitution: New States may be admitted by the Congress into the Union, but no new State shall be formed or erected within the jurisdiction of any other State, &c. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territories and other property belonging to the United States," &c.

Citations of other authorities, showing the want of power in the old Congress to legislate effectively for the territories, and the purpose of the framers of the Constitution of the United States to confer upon the government of the Union that necessary authority, might easily be multiplied. But enough has been said for the present purpose of calling attention to the subject. And it may be added that although the Ordinance was passed without a shadow of constitutional authority, yet it fully accomplished its beneficent design, which has never been better described than by Webster. "It fixed," said the great orator and statesman, "forever the character of the population in the vast region northwest of the Ohio, by excluding from them involuntary servitude. It imposed on the soil itself, while it was yet a wilderness, an incapacity to sustain any other than freemen. It laid an interdict against personal servitude, in original com-

¹Hamilton's Works (Lodge's ed.), Vol. IX., p. 231.

pact, not only deeper than all local law, but deeper also than all local institutions."¹

It may not be without use to say, by way of a note to what goes before, as tending further to show the contemporary opinion of the invalidity of the Ordinance as a legal enactment, that the first Congress of the United States under the Constitution, at its first session passed an act, the express purpose of which, as declared in the preamble, was that the Ordinance of 1787 should continue to have full effect.

¹ Webster's Works, Vol. III., pp. 264, 278.

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