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Tros Tyrinnque mihi nullo discrimine agetur.

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APRIL, 1876.

ART. I.—DR. CUTLER AND THE ORDINANCE OF 1787.

On the 13th of July, 1787, the Congress of the old Confederation, sitting in New York, passed "an Ordinance for the Government of the Territory Northwest of the River Ohio," which has passed into history as the "Ordinance of 1787."

The Territory embraced what is now the States of Ohio, Indiana, Illinois, Michigan, and Wisconsin. Its provisions have since been applied to all the Territories of the United States lying north of latitude $36^{\circ} 40'$, which now comprises the States of Iowa, Minnesota, Nebraska, and Oregon. August 7, 1789, the Constitution of the United States having then been adopted, Congress, among its earliest acts, passed one recognizing the binding force of the Ordinance of 1787, and adapting its provisions to the Federal Constitution.

The Ordinance, in the breadth of its conceptions, its details, and its results, has been perhaps the most notable instance of legislation that was ever enacted by the representatives of the American people. It fixed forever the character of the immigration, and of the social, political, and educational institutions of the people who were to inhabit this imperial territory,—then a wilderness, but now covered by five great States, and teeming with more than ten million persons, or one fourth of the entire population of the United States. It forever prohibited slavery and involuntary servitude,—that

pestilent element of discord and tyranny in our American system, which then existed in all the States except Massachusetts, where it had come to an end, by a decision of its Supreme Court, only four years before. It declared that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall always be encouraged." It prohibited the feudal law of primogeniture, and provided that the property of a parent dying intestate should be divided equally among his children or next of kin; that no person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments; that the inhabitants shall always be entitled to the benefits of the writ of *habeas corpus*, of trial by jury, of a proportional representation in the legislature, and of judicial proceedings according to the course of the common law; that all persons shall be bailable, unless for capital offences, when the proof shall be evident, or the presumption great; that all fines shall be moderate, and no cruel and unusual punishment shall be inflicted; that 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 to take any man's property, or to demand his particular services, full compensation shall be made for the same; 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 said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously made.

This was the first embodiment in written constitutional law of a provision maintaining the obligation of contracts. Six weeks later it was, on motion of Mr. King of Massachusetts, incorporated in the draft of the Constitution of the United States.

The Ordinance further provided, that "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."

Such are some of the broad and enlightened provisions which have made the Ordinance of 1787 so beneficent and memorable. They entered not only into the organic laws of the territory, but were made perpetual and irrevocable. When new States were organized on this territory, the people were not left with the discretion of accepting or discarding the provisions of the Ordinance in their constitutions. Its vital principles, some of which have been enumerated, were embodied in six "articles of compact between the original States and the people and States of the said territory, and forever to remain unalterable unless by common consent." It was well understood that common consent to any material change could never be obtained. No other instance exists in American legislation of laws enacted under the form of "articles of compact," except in the ordinance relating to this same territory drawn by Mr. Jefferson in 1784, which will come under our notice in a later part of this discussion. If the slavery prohibition had not been an "article of compact," Indiana and Illinois, and possibly Ohio, would have been admitted into the Union as Slave States. As early as 1802 Gen. William Henry Harrison, then Governor of the Indiana Territory, and later President of the United States, called a convention of delegates to consider the means by which slavery could be introduced into the territory; and he himself presided over its deliberations. The convention voted to give its consent to the suspension of the sixth article of compact, and to memorialize Congress for its consent to the same. The memorial laid before Congress stated that the suspension of the sixth article would be highly "advantageous to the territory," and "would meet with the approbation of at least nine tenths of the good citizens of the same." The subject was referred to a committee, of which Mr. John Randolph of Virginia was chairman, who reported adversely as follows: "That the rapidly increasing population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only be employed to advantage in the cultivation of products more valuable than any known in that quarter of the

United States; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants of the territory will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration."*

Ohio was admitted to the Union the same year, and in the formation of her Constitution the advocates of slavery made a bold and decided stand for its introduction, but were defeated. Several memorials were sent to Congress at a later date, from Indiana and Illinois, asking for the repeal of the antislavery prohibition, and several committees in Congress reported in favor of the repeal; but Congress firmly maintained the integrity of the compact of 1787.

The only persons dwelling in the territory at that time were about three thousand Louisiana and Canadian French settlers on its western and northern borders, a few families in the southern border, who claimed to be citizens of Virginia, and roving tribes of Indians. Although the Ordinance protected the personal and land rights of the French settlers, among whom a few slaves were held, they took no part in the political affairs of the territory, and gradually moved across the Mississippi and into Canada. The Ordinance had, therefore, no old rubbish to clear away, and no deep-seated customs and prejudices to contend against. It stamped itself upon the soil while it was yet a wilderness, and its impress can be seen to-day in the laws, the character, the social habits, and thrift of these great Northwestern States. Compare these States with Kentucky on the south and Missouri on the west, over which this Ordinance did not extend. Across the Ohio and Mississippi Rivers can be found an order of civilization and social customs that might suggest to a Northern traveller that he was in a foreign country. This disparity in industrial habits, general education, and business enterprise was even more marked before the late war than it is now.

* *Am. State Papers, Pub. Lands, I. 160.*

Extend this comparison to the events which occurred from 1861 to 1865. Every square mile of territory that was covered by the Ordinance of 1787 was patriotic, and gave its men and its means for the support of the Union. South and southwest of that boundary-line were treachery and rebellion under the plausible semblance of neutrality. Kentucky and Missouri probably furnished more men who fought *against* the United States flag than fought *under* it. The Northwestern States put more than a million soldiers into the Union armies; and they were the men who fought at Forts Henry and Donelson, Pittsburg Landing, Stone River, Jackson, and Vicksburg, and achieved the only Union victories gained during the first two years of the war. If, instead of the principles of the Ordinance of 1787, the institutions of Kentucky and Missouri had been allowed to gain a foothold in these States, can any one doubt what would have been the result of the war and the fate of this Union?

If Mr. Webster were living to-day, would he not see new reasons for that splendid encomium which in 1830, in his speech in answer to Hayne, he pronounced on the Ordinance of 1787? "We are accustomed," he said, "to praise the law-givers of antiquity; we help to perpetuate the fame of Solon and Lycurgus; but I doubt whether one single law of any law-giver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787. We see its consequences at this moment, and we shall never cease to see them, perhaps, while the Ohio shall flow."

Judge Timothy Walker of Ohio, in an address delivered at Cincinnati in 1837, said: "Upon the surpassing excellence of this Ordinance no language of panegyric would be extravagant. It approaches as nearly to absolute perfection as anything to be found in the legislation of mankind; for after the experience of fifty years, it would perhaps be impossible to alter without marring it. In short, it is one of those matchless specimens of sagacious forecast which even the reckless spirit of innovation would not venture to assail. The emigrant knew beforehand that this was a land of the highest political as well as national promise, and under the auspices of another Moses, he journeyed with confidence towards his new Canaan."