

CHAPTER IV.

THE ROPE OF SAND—THE BAND OF STEEL.

LEGAL VS. REVOLUTIONARY.

Let us consider briefly the mode of separation which had already been adopted by the Gulf States and was now being pressed upon Virginia. This whole Southern revolt must be justified, if at all, on one of two theories. It was the assertion of either a legal right or the right of revolution. Legal rights are to be determined by the written law. The right of revolution for cause is never questioned; but without good cause it may be a crime of stupendous proportions. The claim that secession was a legal right must be decided by an appeal to the national Constitution.

OLDER THAN THE CONSTITUTION.

The theory of secession and nullification—two forms of the same thing, the assertion of State sovereignty as against national sovereignty—is as old as the Constitution itself; older, for it raised its head in the original Confederation. The surrender of assumed sovereignty by the States—a thing none of them ever really possessed, for they had surrendered the claim to it even under the Articles—was fought bitterly by some of the States in the

discussions on the Constitution; and though consolidation triumphed and the claim for State independence in the exercise of national functions was absolutely surrendered in the Constitution, the dogma, as an abstraction, survived; and after the enactment of the "alien and sedition" laws, raised its head again in the Virginia and Kentucky resolutions of 1798 and 1799.

VIRGINIA NULLIFIERS.

The Virginia resolves were drawn by Madison, who in the Convention had been the foremost and ablest advocate of nationality, but who now declared the right of the States to "interpose" against the encroachments of the central government (of which they were to be the judge), while the Kentucky resolves, drawn by Jefferson, used the word "nullification" as the remedy. So jealous were the States of their prerogatives—so afraid of centralization—that it was only as a choice of supposed evils that the Constitution was at last agreed to. Von Holst says it was "extorted from the crowning necessity of a reluctant people" so jealous for their liberties that they were on the brink of ruin for lack of unity and mutual concession. Webster said in the Senate that "the Union had its origin in the necessities of disordered finance, prostrate commerce and ruined credit."

CALHOUN IMPROVES ON THEM.

Though this dogma dated from so early a period, it had not before been so exhaustively formulated as by Calhoun about 1832. He took as his starting-point the assumption

that so far from the Constitution being the work of the American people collectively, no such political body had ever existed; that the people of the United States had been federated not as individual citizens, but as political municipalities—that is to say, States; that the articles of ratification themselves declared the Constitution to be binding between the States ratifying. From the use of this phrase he argued that the Constitution was the work of the States and that there was no direct connection between the citizen and the national government; that it was only through ratification by the State that the individual became a citizen of the United States. Tyler put the creed even more acutely by saying he “owed obedience to the laws of the Union because he owed allegiance to Virginia.” This was the precise ground on which the secession doctrinaires stood in 1861. They claimed they were citizens of the United States only because the State had made them so, and that the State could unmake this citizenship at pleasure. This would have left the Union but a rope of sand; but the fatal weakness of Calhoun’s theory was that it was founded on an untruth. The ratification was not by States as municipalities nor by bodies representing them. The ratifying conventions expressly chosen for the purpose represented the people in each State, in whose name the Constitution had been drawn. The people could not ratify in the mass. They had in the necessary formalities to utilize local bodies, and the agency of conventions had been prescribed. But all the conventions in their act of ratification recognized the popular character of the act. “We, the people of Virginia,” said

the Convention of 1788. The Virginia secession Convention when it undertook, in April, 1861, to repeal that ratification, employed the same language.

THE DOGMA IN 1861.

The theory of secession was stated with precision in the platform upon which Dr. Zadok Kidwell was a candidate for Congress in the Fairmont district, in the Spring of 1861 (till called off by the Richmond Convention). Following is the declaration:

Resolved, That we owe obedience to the Federal Government only because Virginia has commanded us to obey its laws; and, therefore, whenever Virginia shall release us from this obligation, we will acknowledge the binding authority of that Government no longer.

Resolved, That our allegiance is due to the sovereign State of Virginia; and we maintain that Virginia, speaking by her people in sovereign convention assembled, has the right to command the services of her citizens as against any other State, power, government or authority whatever.

UNDER THE ARTICLES.

If there is any ground for these declarations it must be found in the United States Constitution. Let us inquire, first, what excuse there would be for them under the Articles of Confederation which the Constitution superseded. The Articles created a "Confederacy" styled "The United States of America." Article II provided that each State "retains its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States in Congress assembled." But the

sovereignty and independence essential to such an act as secession were expressly delegated to the United States. The power to send or receive foreign ambassadors and to enter into any conference, agreement or treaty with any foreign power, was expressly forbidden to the States. They were forbidden to make any "treaty, confederation or alliance whatever" between themselves; forbidden to lay duties or imposts in contravention of treaties; forbidden to keep vessels of war or military forces in time of peace or to engage in war without the consent of the United States, or to grant commissions to ships of war or issue letters of marque and reprisal; and the United States was made the final arbiter in any dispute of whatever nature between States. In a word, none of the attributes of independence or sovereignty were "retained" by the States, the same being expressly delegated to the United States in Congress assembled. While this is true, these powers could not be exercised by the Congress without the assent of nine out of the thirteen States; and such was the jealousy of the States that this bar was continually interposed to prevent the most necessary action by Congress in matters of finance and foreign relations. It was this kind of double check which put the individual States and the United States at such cross purposes as to make an efficient government for the Confederacy impossible. It was in this condition of affairs—"the necessities of disordered finance, prostrate commerce and ruined credit," as Mr. Webster stated it—that the States turned to a new form of government and found it under the Constitution.

Under Article XIII, every State had been required to "abide by the determination of the United States in

Congress assembled on all questions which by this Confederacy are submitted to them;” and the Articles were to be “inviolably observed by every State, *and the Union shall be perpetual;*” nor could any alteration in the Articles be made unless agreed to in Congress and “afterwards confirmed by the legislature of every State.”

Can anybody discover in all this standing room for secession ?

UNDER THE CONSTITUTION.

What was true under the Articles would be truer under the Constitution, if there were degrees in the absolute; for the Constitution was designed to make a still firmer Union. It is declared in the Constitution, Art. 6, that “This Constitution and the laws made in pursuance thereof, and all treaties made and which shall be made under authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” Nothing could be more express or sweeping. The firm sovereign authority thus established is not weakened by amendments IX, X and XI. The first provides that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;” the Xth that “the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people;” the XIth that the judicial power of the United States shall not extend

to any suit in law or equity brought against a State by a citizen of another State, or a citizen or subject of any foreign State; in short, that a State cannot be sued. Whatever politicians may have sought to accomplish at the time by IX and X, the effect of these amendments must be limited to subordinate matters such as are left to the control of each State within its own limits. Nothing in either can touch the supremacy of the United States in matters national, "prohibited to the States." The XIth amendment, which seems to have given Mr. Carlile some trouble in the Richmond Convention, is simply a specific limitation on one branch of the Government—and not one that exercises the political, executive, treaty-making or war-making power.

The Constitution, like the Articles of Confederation, makes no provision for its own destruction. The Union under each was to be perpetual. Mr. Madison said in the Convention that the Union could not be adopted by any State temporarily. It was to be "adopted, if at all, in toto and forever." There is nothing to imply that it might be broken except by unanimous consent. The method of amendment is this: Congress, by two-thirds majority in each House, may propose alterations, or may call a convention to propose them on application of the legislatures of two-thirds of the States. But in either case, such alterations require the assent of three-fourths of the States, through legislatures or conventions as Congress may prescribe. When mere amendments are rendered so difficult, it is not to be assumed that any State may destroy the whole compact at pleasure?

NOT EVEN STANDING ROOM.

The claim for the right of secession finds no place in either the present organic law of the Union nor the former one. It never had an existence under any American system; and it would be no system under which it had an existence. Gen. James S. Wheat, in a speech in front of the old court house at Wheeling, one afternoon in the Summer of 1861, put the question tersely and well:

The government of the United States was created by the people of the United States. The people of the United States alone can abrogate that government; and any attempt in the name of a State, or under color of its sovereignty, is nothing more nor less than a rebellion against the authority of the government of the Union: unless it should be successful, and then it becomes revolution.

THE LOGIC OF WEBSTER.

In Webster's discussion of this question, he, in his profound way, went to the root of it. His argument embodied the idea that the State and the supremacy of law were conceptions involving each other; that there could be no State which was not supreme over all its parts; that these parts existed for their peculiar, subordinate and necessary functions additional to and distinct from the central supreme power without any right in conflict with it. A constitution which in its terms negated the idea of a supreme authority was no constitution and created no State—defeated its own purpose. A government must be supreme over all its parts or it is no government. The

right of nullification and the conception of the State exclude each other. Both cannot exist in the same instrument. The Constitution of the United States does not provide for events which must be preceded by its own destruction. "The Constitution was received as a whole for the whole country. If it cannot stand all together, it cannot stand in parts; and if the laws cannot be executed everywhere, they cannot long be executed anywhere."

JACKSON'S DEMONSTRATION.

Perhaps no stronger statement refuting the whole theory of secession has ever been made, or can be made, than that contained in President Jackson's proclamation issued for the benefit of South Carolina:

The ordinance adopted by the South Carolina Convention is not founded in the indefeasible right of resisting acts which are plainly unconstitutional and too oppressive to be endured, but on the strange position that any State may not only declare the acts of Congress void but paralyze their execution. . . . The Constitution of the United States forms a government, not a league. It is a government in which all the people are represented, which operates directly on the people individually, not upon the States. They retained all the power they did not grant, but each State having expressly parted with so many powers as to constitute jointly with the other States a single nation, cannot from that period possess any right to secede, because such secession does not break a league but destroys the unity of a nation; and any injury to that unity is not only a breach which would result from the contravention of a compact but it is an offense against the whole Union. To say that any State may at pleasure secede from the Union is to say that the United States are not a nation; because it would be a solecism to contend that any part of a nation might dissolve its connection with other parts to their injury or ruin without committing any

offense. Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right is to confound the meaning of terms and can only be done through gross error or to deceive those who are willing to assert a right but would pause before they made a revolution or incurred the penalty consequent on a failure.

NATIONAL UNITY.

Bismarck said in 1872 that "Sovereignty can only be a unit—the sovereignty of law." Dr. Draper in his "Civil Policy," referring to this idea of national unity, speaks of it as "that inappreciable privilege that has fallen to the lot of America;" and he says it was to sustain this bond of Union on which depended the development of national power that the Civil War was prosecuted by the North with such inflexible resolution. "Was ever such a thing known in the world," he asks, "as the spending of eight hundred million dollars a year for four consecutive years to sustain an idea?"

If the claim of a right to secede from the American Union were unassailable instead of preposterous, there would still remain the greater and supreme law declared in the Convention by Mr. Madison: "The transcendent law of nature and nature's God which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed" if they fail to attain this end. If a theory of government which makes unity, safety and the highest good of the greatest number impossible be ever so pleasing as a barren abstraction, it ought to be discarded

for one that better secures "the safety and happiness of society" even though it be not so attractive to the fancy of the doctrinaire.

It was considerations like these that drove the people of the United States, after their failure to establish an impossible union of independent republics, into "a more perfect Union." Their experience under the Confederation showed that their political existence demanded a government with one supreme, unquestioned authority. Gouverneur Morris declared at that time in prophetic spirit: "This country must be united. If persuasion does not unite it, the sword will." It was believed the country would be united by the adoption of the Constitution; but the event showed that in the toleration of slavery the germ of a later and greater conflict had been left in the instrument of union, in due course of time and growth to burst the nation wide asunder with an appeal to the arbiter forecast by Morris.