



LEWIS HANES Editor & Proprietor.

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WHOLE NO. 204

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RECONSTRUCTION.

Opinion of the Attorney General of the United States.

ATTORNEY GENERAL'S OFFICE, MAY 24, 1867.

TO THE PRESIDENT: Sir: I have the honor to state my opinion upon questions arising under the act of March 24, 1867, entitled "an act to provide for the more efficient government of the rebel States," and the act of March 23d, 1867, entitled "an act supplementary to an act entitled 'an act to provide for more efficient government of rebel States,'" upon which questions the Military Commanders of the districts, in which those States are comprised, have asked your instructions.

The first and most important of these questions may be thus stated:—Who are entitled to vote, and who are disqualified from voting, at the elections provided for, coming within the purview of these acts? The first provision upon this subject is to be found in the fifth section of the original act, and declares the qualifications and disqualifications of voters at elections to be held for delegates to proposed Constitutional Conventions in each State and at elections to be held for ratification of Constitutions that may be framed by such Conventions. That section provides that delegates to such Conventions shall be elected by the male citizens of said State, 21 years old and upward, of whatever race, color or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in rebellion or for felony at common law, and that the same qualifications, so required for election of delegates, shall also be required upon election for ratification.

The proviso to this section also excludes from the right to vote for delegates to Convention every person excluded from the privilege of holding office by an amendment to the Constitution of the United States, proposed by the 39th Congress, and known as Article XIV. The sixth section provides "that until the people of said rebel States shall be by law admitted to representation in Congress, any civil government which may exist therein, shall be deemed provisional only, and in all respects subject to the paramount authority of the United States, at any time to abolish, modify, control or supersede the same, and in all elections to any office, under such provisional governments, all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the fifth section of this act; and no person shall be eligible to any office under such provisional governments who would be disqualified from holding office under the provisions of the third article of said Constitutional Amendment."

It is to be observed here, that the qualifications of a voter, are, by the fifth section limited to election of delegates to the Convention and to the question whether such

Convention shall or shall not be held, and that no qualification is declared for a delegate so to be elected, but, by the sixth section, the same qualifications as to a voter are required in all elections to any office under the existing provisional Governments during their continuance, and as to eligibility at such elections certain classes are excluded.

The first section of the supplemental act provides that the commanding general in each district shall cause a registration to be made of male citizens of the United States, twenty-one years and upwards, residents in each county or parish in the State or States included in his district, which registration shall include only those persons who are qualified to vote for delegates by the original act. The person offering himself for registration is also required to take an oath, which, for convenience, I now divide into paragraphs or sections, preserving as near as may be, the language of the act:

He must swear or affirm as follows, first: That he is a citizen of the State and has resided in said State for — months next preceding the day when he takes the oath, and that he now resides in the county of — or in the parish of — in said State.

Second, that he is twenty-one years old. Third, that he has not been disfranchised for participation in any rebellion or civil war against the United States nor for felony committed against the laws of any State or of the United States. Fourth, that he has never been a member of any State Legislature, nor held any executive or judicial office in any State and afterwards engaged in insurrection or rebellion against the United States or given aid or comfort to the enemies thereof. Fifth, that he has never taken an oath as a member of Congress of the United States, or as an executive or judicial officer of any State, to support the Constitution of the United States and afterwards engaged in insurrection or rebellion against the United States or given aid or comfort to the enemies thereof.

Sixth, that he will faithfully support the Constitution and obey the laws of the United States, and will use the best of his ability, encourage others so to do.

The second section of this act provides that after the completion of this registration in any one State, and after at least thirty days public notice of the time and place, which the Commanding General shall appoint and direct, an election shall be had for delegates to a convention, and a rule is given to fix the number of delegates to be elected and the appointment of these delegates in proper civil subdivisions, giving to each sub-division representation in ratio of the registered voters.

The third section provides that at the election for delegates, the registered voters shall vote for or against a Convention. The fourth section provides for an election to ratify the Constitution that may be framed by delegates, and the right to vote at this election is confined to persons registered.

The sixth section provides that all elections in the States mentioned in said original act shall, during the operation of such act, be by ballot, and all officers making such registration of voters and conducting said elections shall, before entering upon the discharge of their duties, take an oath prescribed by the act of July 2d, 1862, entitled "an act to prescribe an oath of office."

The first consideration which requires my attention, upon the question as to the right to vote, arises upon the registration of voters. The question of qualification or disqualification is fixed by registration. No power is given to any other board, or any other authority, after registration is completed, to change the registry. Persons whose names are admitted to registration are entitled to vote, subject to the limitations hereinafter mentioned, and none others. This registration must be completed before the 1st day of September, 1867. The functions of the board, as a board of registration, cannot be extended beyond that fixed time, after that, the duties which remain to be performed by the officers composing this board are limited to holding and supervising elections and making proper returns to the commanding general. This brings us to the direct question, who are entitled to registration. First, as to citizenship and residence; no person is entitled to vote who shall not be a resident in the State for one year previous to the day of election. It is your previous to this previous residence from year should exist at the time a person applies for registration. A person in all other respects entitled to vote is entitled to registration, although he has not at that time been a resident of the State for a full year; for we find in the supplemental act that the oath to residence does not require the applicant to swear that he has been a resident for a year, but only requires him to swear the number of months of his residence, contemplating a period less than, as well as, a full year of residence. Therefore, as to such a person as registered, if it happens at any election subsequently to it that he has been a resident of the State, less than the time of his residence, contemplated by the act, does not cover an entire year, he cannot vote at such elec-

tion, for this supplemental act does not, as to residence, change the provisions of the original act, as it is expressly provided by it, as to registration, that it shall include only those who are qualified to vote by the original act. To carry out the purposes of the law in this respect, as to residence, the board of registration should note opposite the name of the person, whose residence has not extended to the full term, the exact time of his residence.

As to citizenship, the qualification stated in the original act is citizenship of the State, but, by the first clause, first section, in the supplemental act, registration is to be made of male citizens of the United States, and, as to the oath, the applicant is only required to swear that he is a citizen of the State. I am of opinion that the phrase "citizen of the State," as used in the oath, is intended to include only such persons as are citizens of the United States, and citizens of the State, and that an alien, who has not been made citizen of the United States, cannot safely take the oath. But, as the board of registration has every authority to administer the prescribed oath, they cannot require any further oath or proof as to citizenship; and if an alien, not made a citizen of the United States, takes the oath, he takes it at his peril, and is subject to prosecution for perjury.

Second, as to age. No one is entitled to registration who is not at least twenty-one years of age on the day he appears for registration. In this respect, the qualification as to age differs from the qualification as to residence, and the fact that majority must exist, at the date of registration, has relation to the day of registration and not to the day of subsequent election.

Third, Next, as to disfranchisement. I shall consider the various clauses of disfranchisement according to order and the division into sections herein before stated. And, first, as to the general clause declaring disfranchisement: The fifth section of the original act denies the right to vote to "such as may be disfranchised for participation in the rebellion, or for felony at common law."

The words here used, "in the rebellion," must be taken to mean recent rebellion, for the supplemental act enlarges the disqualification, and requires the applicant to swear that he has not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State or of the United States. What, then, works a disfranchisement under these provisions? Whether we consider this disability as arising out of participation in a rebellion or in commission of felony, the mere fact of such participation or commission of a felonious offence does not of itself work disfranchisement. It must be ascertained by judgment of court or legislative act passed by competent authority. Disfranchisement for felony committed against the laws of a State or of the United States, consequent on a conviction in courts either of the United States or of a State, or declared by the laws of either, would be fatal under these acts. I am not aware of any law of the United States which works disfranchisement as to the right of suffrage by force of the act itself, nor does such consequence follow from conviction for treason, or conspiracy to commit treason, or for any other act of participation in rebellion. The provision in the Constitution of the United States, as to treason against the United States, nor does declare what shall be the punishment on conviction for treason. That is left for Congress, with the limitation that corruption of blood shall not follow as a consequence, or any forfeiture except during the life of the party. Congress in the exercise of its power to declare the punishment, has limited such punishment, as a consequence of conviction, to a penalty of death or imprisonment, and to disqualification from holding any office under the United States. I am not advised of any statute, now in force in either of these States, except, perhaps, Virginia, which declares disfranchisement as in the right of suffrage by force of the act itself.

The fourth and fifth sections may be considered together. The party applying for registration must swear, "that I have never been a member of any State Legislature, nor held any executive or judicial office in any State, and afterwards engaged in insurrection or rebellion against the United States or given aid and comfort to the enemies thereof; that I have never taken an oath, as a member of Congress of the United States, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection against the United States, or given aid and comfort to the enemies thereof." These clauses of the oath in effect extend the disfranchisement beyond the provisions of the original act, and the prior clauses of the oath, in the important particular that neither conviction, nor a judgment of court, nor an express legislative enactment, are required to establish the fact of disfranchisement. In legal parlance, disfranchisement under these clauses of the oath results from matters in *en pais*,

but, in one respect, these clauses limit the generality of the original act as to disfranchisement. The original contemplated disfranchisement under these clauses does not arise from participation in rebellion alone but other elements must concur,—that is to say, holding certain offices or taking official oath by certain officers, and afterwards participating in rebellion against the United States. The consideration of these

of matter of enquiry: First, What offices or officers are comprehended? Second, What acts amount to engaging in insurrection or rebellion against the United States or giving aid and comfort to the enemies thereof? I will first consider what offices or officers are comprehended. As to some officers there is no room for doubt. Members of a State Legislature, and members of Congress, are clearly enough designated. The question might, however arise, whether a convention, held in a State for framing an amendment of its Constitution, would answer to the description of a State Legislature within the meaning of the act. Such a convention, although it is clothed with legislative power, cannot properly be denominated a State Legislature. And in the acts now under consideration, a convention and legislature are expressly distinguished from each other, for they require the Constitution to be framed by a Convention, and they require the Legislature of the same State to adopt the Constitutional amendment. When, then, in the same acts, they again use the phrase "Legislature of the State," they must be understood to use it in the same sense and as distinguished from a constitutional Convention; but as to those legislative bodies, which passed what are called ordinances of secession, by whatever name they may be called, I am of opinion that their members are properly comprehended within this disqualifying clause, for I can imagine no official legislative position to which the duty of allegiance was more distinctly violated.

The next and more difficult inquiry is, who is to be considered an officer of the United States or as an executive or judicial officer of any State, within the meaning of these clauses. Various classes of officers are here intended, State officers and Federal officers, and executive or judicial officers. No legislative officer is mentioned except members of a State Legislature or members of Congress. The descriptions used as to other officers are, as to State officers, that they must be judicial or executive, and, as to a Federal officer, the terms executive or judicial are not expressed. He is described simply as an officer of the United States. It has been shown that the Federal officers and State officers are classified separately in the clauses of the act under consideration. I deem it profitable, and conducive to a clear order, to follow this classification. I shall accordingly first consider, what State officers are included in the terms "executive or judicial." This phrase is twice used in these clauses, with the superadded description "in any State," in the first clause, and "of any State," in the second clause. I think the controlling term of description, if there is any redundancy in the terms, must be taken to be the last, for that is used in the first clause and in others. Besides, it is the same term of description used in the act of Congress 1789, declaring what State officers are required to take the oath to support the Constitution of the United States, and in the third section of the constitutional amendment. Both use the same terms of description, "executive and judicial officers of a State." The terms are so general and indefinite that they fail to express, with sufficient certainty, a distinction of the persons intended to be reached.

It is to be regretted, in a matter of so much importance, that the rule of distinction adopted as to members of Congress and of a State Legislature had not been followed up, or, if that were found impracticable, that some more definite general rules had not been declared. The uncertainty becomes manifest in the application of the law, and this uncertainty necessitates construction. The necessity for construction, which arises from the generality of the law cannot be better stated than in the language of *Plovidan*:

"Though words be general, they are to be reduced to a particularity by exposition made according to the intent of the act.—Those statutes which comprehend all things in the letter, the sages of the law have expounded to extend but to some things; those which generally prohibit all people from doing such an act, they have interpreted to permit some persons to do it; and those which include every person in the letter they have adjudged to reach some persons only,—all founded upon the intent, collected by considering the cause and necessity of the act and comparing one part with another and sometimes by foreign circumstances."

I deem it proper, here, to fix some clear ideas of the general intent of these acts and by what rule of construction, strict or liberal, that intent may best be ascertained. The intent, as expressed, is to enable the people of each of these States to form