Opinion No. 111

Elections—Officers — Qualifications—Conviction of Felony in Federal Court—Removal—Quo Warranto—Jurisdiction Attorney General.

HELD: 1. The conviction of a person of a felony in federal court for an offense against the federal laws does not forfeit the citizenship of said person convicted.

2. The conviction of a person of a felony in another jurisdiction does not constitute a disqualificaton or deprive a person of the right to vote within the meaning of Section 2, Article IX, Montana Constitution.

3. The Attorney General has no authority unless directed by the Governor to commence a quo warranto proceeding against a person who unlawfully holds or exercises a public office, as provided by Section 9576.

August 4, 1939.

Mr. Walter T. Murphy
County Attorney
Superior, Montana

Dear Mr. Murphy:

You have submitted the following facts and questions:

"On April 29, 1929, one James Hillier was convicted in the United States District Court, District of Montana, of the offence of unlawfully manufacturing and possessing intoxicating liquor, possessing property designed for the manufacture thereof, and maintaining a common nuisance, in violation of the National Prohibition Act. The Department of Justice advises me that he has not been restored to civil rights. The sentence imposed was imprisonment in the county jail at Deer Lodge, for a term of one hundred days and a fine of $150.00.

"In my opinion, this offence amounted to a felony, since the offence for which the defendant was convicted occurred on March 18, 1929, and the Jones Act, making violations of the N. P. A. felonies, was enacted shortly before that time. * * *

"May I have your opinion as to whether one convicted of a violation of the National Prohibition Act, committed after the enactment of the Jones Act, deprived the person convicted of his citizenship, and whether he would thereafter be qualified to hold public office, particularly that of county commissioner? * * *

"If you are not directed by the Governor to proceed with a quo warranto action what showing will you require the complainants to make, in order that you would feel justified in filing such an action?

"As there have been numerous and persistent complaints in this matter by a large number of residents of this county, I have determined that I should bring the matter to your attention and get your advice and opinion as to the various elements involved."

The qualification to hold office in this state is fixed by Section 11, Article IX of the Montana Constitution:

> "Any person qualified to vote at general elections and for state officers in this state, shall be eligible to any office therein except as otherwise provided in this constitution, and subject to such additional qualifications as may be prescribed by the legislative assembly for city offices and offices hereafter created."

By Section 4453, R. C. M., 1935, a county commissioner must be an elector of the county he represents, and by Section 4, Article XVI of the Montana Constitution he must possess certain qualifications as to residence within the county. We find no other requirements.

The, first question to determine therefore, is whether Mr. Hillier was a qualified voter at the time of his election. Among other things, Section 2, Articel IX of the Montana Constitution requires that a voter shall be a citizen of the United States. Did Mr. Hillier lose his citizenship by reason of his conviction? Since the enactment on March 2, 1929, of Chapter 473, 35 U. S. Stat. 1446, the violation of the National Prohibition Act was made punishable by fine not exceeding $10,000, and imprisonment not exceeding five years, or both, and such violation therefore constituted a felony. (Section 541, Title 18, Fed. Code Ann.; State ex rel. Anderson v. Fousek, 91 Mont. 448, 8 Pac. (2) 79.) Some question, however, might be raised since the amendment thereof made on December 16, 1930, Chapter 15, 46 Stat. 1029. Such conviction would constitute a felony even though the sentence was only for one hundred days and a fine of $150.00, and the offense was a misdemeanor in Montana for violation of the liquor law. We find no federal statute, however, by which the conviction of a felony forfeits citizenship. In the absence thereof, there can be no forfeiture and this question must therefore be answered in the negative.

Section 2, Article IX, however, includes the following:

> "Provided, first, that no person convicted of felony shall have the right to vote **unless he has been pardoned or restored to citizenship by the governor.**" (Emphasis ours.)

The question then arises whether a conviction of a felony in federal court

disqualifies one as an elector. The answer to this question depends upon the construction to be given to the language above quoted. The general rule is stated in 46 C. J. 949, Section 60;

> "Constitutions or statutes frequently disqualify for office one who has been convicted of a felony or a crime generally. Whether or not a crime is within the meaning of such a provision is a question for the courts. Ordinarily conviction in the courts of the United States of an offense created by an act of congress does not constitute a disqualification, but the legislature, under authority of the constitution, may declare that such a crime either against the laws of the state, United States, or a sister state shall operate as a disqualification."

The authorities on this question are divided however. They are listed in State v. Langer (N. D., 1934), 256 N. W. 377. In the case of In re Peters, 73 Mont. 284, 235 Pac. 772, our court had before it the question whether an attorney convicted in federal court may be removed or suspended. Section 8961, R. C. M., 1935 provides that an attorney may be removed or suspended * * * "1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence." The court, in the Peters case, said (p. 287):

> "We are not concerned with the technical question as to whether the crime for the commission of which the attorney is convicted was presented to a court of this state, of a sister state, or a federal court, but only as to whether an attorney has so far misconducted himself as to be convicted of a felony or a misdemeanor involving moral turpitude, and, therefore demonstrated that he is unworthy of the trust reposed in him by the court when it admitted him to practice."

It will be noted that the language of this section is general and much broader than Section 2, Article IX, supra. In State ex rel. Anderson v. Fousek, supra, the court held that under Section 511, R. C. M., 1935 an office became vacant upon conviction of the incumbent of a felony in federal court. The court, however, based its decision on the Peters case, which, as we have seen, ignored the question. Moreover, Section 511, like Section 8961, is general and broader than Section 2, Article IX, as we shall point out later.

A case almost exactly parallel was decided in State ex rel. Mitchell v. McDonald (Miss., 1933), 145 So. 508. There the Attorney General in quo warranto proceedings sought to remove the defendant as a member of the Board of Supervisors of Lauderdale County, because he had been convicted of a felony in the federal court. In holding that the lower court committed no error in excluding evidence of conviction in the federal court, the court had occasion to review the authorities, including Logan v. U. S., 144 U. S. 263; Commonwealth v. Green, 17 Mass. 515; Wigmore on Evidence (2nd Ed.) Vol. 1, paragraph 522 and others.

In the Logan case the Supreme Court of the United States said:

> "At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered."

Greenleaf on Evidence, paragraph 376, reads:

> "But the weight of modern opinion seems to be that personal disqualifications not arising from the law of nature but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originate. Accordingly it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States, did not render the party incompetent as a witness, in the Courts

of another State; though it might be shown in diminution of the credit due to his testimony."

It should be stated the same question arises concerning the competency of a witness convicted of a felony in another jurisdiction or foreign country. The leading case is Commonwealth v. Green, supra, which held that the conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness. The reasons of the court are summarized by Wigmore, as follows:

"The difficulty of raising an issue as to the record, (2) the diversity of ideas as to criminal conduct in different countries, (3) the hardship of disqualifying by old and forgotten offences in other lands, (4) the principle that penal laws have no effect beyond the jurisdiction, (5) the fact that infamy is a punishment as well as stigma on character."

Many other authorities might be cited. Conceding that there might be a difference of opinion in construing a statute or constitution which is general in its terms, although we think the better reason is on the side of the authorities we have cited and quoted, we think there can be no question of doubt as to the meaning of Section 2, Article IX of the Montana Constitution, above quoted.

By Section 9, Article VII of the Montana Constitution the governor is given the power to grant pardons "for any offenses committed against the criminal laws of the state." This being true, we think it follows that the "felony" referred to in Section 2, Article IX, supra, must necessarily be an offense against the criminal laws of the state, for the governor has no power to grant pardons for other offenses. If it includes offenses in other jurisdictions, then, since the governor could not remove the disqualificaton by pardon as required by this section of the Constitution, such person convicted in another jurisdiction could never vote in Montana. The power of the governor to restore to citizenship is also limtied to "any offense committed against the laws of the state." (Section 12263, R. C. M., 1935.)

If the penalty does not extend beyond the jurisdiction against which the crime was committed, then we see no good reason why incompetency which is the effect and consequence of crime, and a part of the penalty, should reach beyond the limits of the state whose laws have been violated, unless, as was said by the United States Supreme Court in the Logan Case, the state which seeks to impose such incompetency has expressly so declared. Not only did the framers of our Constitution fail to expressly so provide, but by the language used have clearly indicated that the only offense which disqualifies a voter is one against the laws of this state, an offense pardonable by the governor of the state. And wisely did they so provide for otherwise the qualification of electors might be made to depend upon the laws of other states and jurisdictons instead of our own.

In Weber v. State (Okla., 1921), 195 Pac. 510, the court said:

"While there are two or three very early decisions to the contrary, we find no sound reason, in the absence of an express statute to that effect, for holding that the conviction of the witness of the crime of perjury in the state of Kansas should of itself disqualify him from testifying as a witness in the courts of this state."

We must therefore conclude that a person convicted of a felony in the federal court, in the absence of express declaration in the Constitution, is not disqualified as an elector and therefore he is not disqualified from holding office.

Section 9576, R. C. M., 1935, provides that a civil action may be brought in the name of the state:

"1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, * * * within this state * * * ."

Section 9577, Id., provides that a like action may be brought against a corporation in certain instances which are listed.

Section 9578, Id., reads:

> "The attorney-general, when directed by the governor, shall commence any such action; and, when, upon complaint or otherwise, he has good reason to believe that any case specified in the **preceding section can be established by proof, he shall commence an action.**" (Emphasis ours.)

Apparently the authority of the attorney general to bring an action under Section 9576 to challenge the right of a person to hold office exists only "when directed by the governor" and under Section 9578 against a corporation when he has good reason to believe that any case specified in the "preceding section" (9577) can be established by proof.

While it might not be a defense available to the defendant in case the governor should direct such proceeding, it does have a bearing on the equities in the case that Mr. Hillier was convicted in March, 1929, a few days after the violation of the National Prohibition Act was made a felony; that he received only such a sentence as would be received in case of a misdemeanor; that the same offense was then only a misdemeanor under the Montana statutes; that his conviction was well known to the electors at the time of his election to the office he now holds; that in spite of that fact they voted for him and finally it is well known that the offense for which he was convicted, in the minds of many people (whether rightly or not), did not involve the degree of moral turpitude of an ordinary felony.