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RECONSTRUCTION.

Speech of Hon. T. A. Hendricks, of Indiana, in the U. S. Senate, Jan. 30th, 1868, on the Supplemental Reconstruction Bill.

Mr. HENDRICKS. Mr. president, the policy and measures of congress in relation to the south are maintained in this debate upon two propositions; first, that at the end of the war there were no governments of any kind existing in those states; and second, that in such case congress has the power under the clause of the constitution which declares that the "United States shall guarantee to every state in this union a republican form of government," to reconstruct the state governments, or, in plainer words, to make new state governments. These propositions I deny. First, I deny that at the close of the war there were no state governments in the southern states. What was the exact fact in regard to that matter? No one disputes that at the commencement of the war there were legal state governments in the ten states now excluded from representation. Those governments were organized under constitutions which the people had adopted. I submit to senators, then, as a question of law, what became of the constitutions of the states in force at the commencement of the war?

A state constitution is the bond of its organization; not only the bond of political organization in the state but to some extent the bond that holds it to the federal union. I do not very clearly understand how a state can be in the union without a state government. I do understand that if a state should cease to have a government (if I may so express what seems to be a paradox) that the people would still be under the law and authority of the federal government to the extent of the jurisdiction of that government. But, sir, a state to be a state in the union must have a political organization. The people of the territories owe obedience to the laws of the United States; but the territories are not organized states, and form no part as states of the federal union.

Then, sir, when a state constitution is once formed and the state under that constitution is admitted into the union, that state organization is not a separate and independent thing, but in its organization becomes a part of the federal union. The constitution of the state, when the state has been thus admitted, becomes a part of the national union and compact, and I deny that the people of that state have a right to destroy their state government and thus cease to be within the Union. I deny that a convention of the people, that the legislature of the state, or any assembly of the people whatever can voluntarily terminate the existence of a state government and thus cut off their connection with the federal union. That, in my judgment, can only be accomplished with the consent of all the states. Take the case of Louisiana. The people formed her state government; under that government and constitution she was admitted into the union. Is that constitution of hers (subject of course, to her amendment and her modification) not a part of the federal system which she is thus admitted; and is it possible that that bond of society, that means of political organization can cease to exist so that there is no longer any state of Louisiana?

Sir, if the state government ceased to exist in any state of the south, if the constitution of any state ceased to be a constitution, I want to know by what act it occurred. Was it the ordinance of secession? Every senator will say no; that no ordinance of secession could destroy the state constitution, because the ordinance itself, in law and in the eye of the constitution, is a nullity. Was it the war? War was not made upon the organization of the states; war was not made upon the constitution and laws of any state; but only for the purpose of holding those states under their organization in the federal union, and the people of the states in obedience to the laws of the United States.

Then, sir, I deny that any act of any state or of the people thereof, intended to separate that state from the federal union, had any force or validity, whatever. I maintain that during all the years of the rebellion every single act of a southern state intended to promote the cause of the rebellion was void; that it had no effect to disturb, as a question of law, the relation of the state to the federal union.

Practically the relations were disturbed; directly the state was not in harmony with the federal government; but its existence as a state, its organization as a state, its constitution, which was the bond of its organization, continued all the way through the war; and when peace came it found the state with its constitution and laws un-repealed and in full force, holding that state to the federal union, except all laws enacted in and of the rebellion.

Mr. president, I regret that my colleague (Mr. Morton) is not in his seat, as I shall have occasion to refer to some of his arguments so ably presented in the senate, and to some views that he has heretofore expressed on this and some other questions that I intend to discuss. The opinion I have just now expressed I think was the opinion two years ago of my colleague, and I will refer to his views as then expressed in a carefully prepared speech. Speaking of the different propositions and opinions held in regard to the relations of the states to the union at the close of the war my colleague said:

"There is another plan, and that is the theory which regards these states as being out of the union, and holding them as conquered provinces, subject to the jurisdiction of congress like unorganized territory; saying that congress has the power to provide for calling conventions in these states just as in the territory of Dakota, and may prescribe the right of suffrage and determine who shall vote in electing delegates to these conventions, just as in the territory of Dakota; that it may then determine whether it will accept the constitution offered, or as might be determined in the case of any other territory."

That is the statement of opinion which my colleague then attributed to certain politicians, the very opinion which he so

ably maintained in this debate the other day. Now, Mr. President, how well he answers himself:

"I will not stop to argue this question at length, but I will say that, from the beginning of the war up to the present time every message of the president, every proclamation, every state paper, and every act of congress has proceeded upon the hypothesis that no state could secede from the Union; that once in the union always in the union. Mr. Lincoln in every proclamation went on the principle that the rebellion was a rebellion against the constitution and laws of the United States, not a rebellion of the states, but a rebellion of individuals, the people of the several southern states, and every man who went into it was personally and individually responsible for his acts and could not shield himself under the action or authority of his state. He went on the principle that every ordinance of secession, every act of the legislatures of the rebel states in that direction was a nullity, unconstitutional, and void, having no legal force or effect whatever, and that these states were, according to law, in the union. Their standing could not be affected by the action of the people; that the people of those states were personally responsible for their conduct, just as a man is responsible who violates the statute in regard to the commission of murder, and to be treated as criminals just as the authorities thought proper; that the people of a state can forfeit their rights, but that so far as their action is concerned, in a legal point of view, they had no power to affect the condition of the state in the union. Every proclamation and every act of congress have proceeded upon this hypothesis."

Mr. JOHNSON. What is the date of the speech from which the senator reads? Mr. HENDRICKS. The 29th day of September, 1865. He then goes on to say that Mr. Buchanan had held the opposite doctrine, and that the rebellion was a rebellion of states, and that the states as such could not be subjugated. Then he goes on to say:

"This was our answer to Mr. Buchanan. Upon this hypothesis we have just put down the rebellion. But it is now proposed by some that we shall practically admit that the southern states did secede; that the work of secession was perfect, was accomplished; that the states are but of the union, that a government de facto was established, and that we now hold these states as conquered provinces, just as we should hold Canada if we were to invade it and take possession of it."

He closes upon this point by using this English language:

"That is what this doctrine leads to. It leads to a thousand other evils and pernicious things never contemplated in the nature of our government."

Upon this subject I will read from the debates in this body four years ago and before the close of the war the argument of the senator who now presides over this body, who is now the second officer of the government. That debate was before this new idea was thought of, that under the guarantee clause of the constitution congress could do in regard to the southern states, whatever it chose to do—a doctrine all-absorbing and as dangerous as the most despotic sentiment that governs any country in the world. Pondering the debate on what was known as the Winter Davis bill, Mr. Wade used the following language:

"It has been contended in the house of representatives, it has been contended upon this floor, that the states may lose their organizations, and their rights as states, may lose their corporate capacity by rebellion. I utterly deny that doctrine. I hold that once a state of this union always a state; that you cannot by wrong and violence displace the rights of anybody or disorganize the state. It would be a most hazardous principle to assert that. No, sir, the framers of your constitution intended no such thing."—*Thirty-eighth Congress, p. 3450.*

And how, gentlemen, with this principle of the constitution staring them in the face, can fancy that states can lose their rights because more or less of the people have gone off into rebellion is marvelous to me.

Four years ago that senator, then holding high position in the republican party of the United States, declared that a state could not lose its organization, that once a state always a state, and a state under its organization. Now, however, to maintain the policy that has been adopted, you declare these states to be without governments; that in some way it resulted that the state governments ceased to exist.

Now, Mr. president, I wish briefly to consider the clause of the constitution, which has been referred to so frequently, making it the duty of the government of the United States to guarantee to every state in this union a republican form of government. I think this is the right construction; it is an obligation and a duty imposed upon the government, and I agree with my colleague when he says that the legislative department is not the executive department; nor is the judiciary the government; but the whole taken together, in the proper exercise of the powers conferred by the constitution, makes the government of the states. When a duty is imposed upon the government of the United States that duty must be discharged by the appropriate department of the government. If the act which must be done in the discharge of a duty imposed by the constitution is a judicial act, then the duty is upon the judiciary. If it be a legislative act and if it be an executive act the duty then rests upon the executive, and must be discharged by that department of the government.

No, sir, I hold that this clause of the constitution is addressed to each department of the government. This clause exemplifies an existing state government, republican in form. It speaks of state governments as in existence. If senators will observe the language of the section itself, they will find that after the words which I have quoted, imposing on this

government the duty of guaranteeing to every state a republican form of government, the provision goes on, "and shall protect each state against invasion or application of the legislature or of the executive, (when the legislature cannot be convened,) against domestic violence." The section speaks of an organized state government with an executive and a legislative department, and imposes upon the government of the United States duties to be discharged when called upon by the executive or the legislative department of the state; so that the very clause itself contemplates an existing state government, republican in form, and simply imposes upon the government of the United States the duty to protect, maintain and defend that republican form of government. This word "guarantee" does not confer an original power, either in its legal sense or common meaning. It means to maintain or assure that which is already in existence. And this was the view taken by the fathers who had much to do with the formation of the constitution. Madison, Hamilton, and Story have all said that this clause contemplates a pre-existing state government republican in form, and that it simply confers upon the general government the power, and imposes the duty of protecting that republican form of government to the state.

In the nature of the provision itself, in the scope, force, and meaning of the language used, and according to contemporary construction, it confers upon the general government no power to make a state or to control the people in that work. It is the high prerogative and business of the people to make state governments. No state governments can ever go into existence at the will and nod of the congress of the United States. It is not within your power. The constitution has not said you might do it; and the whole practice of our government to recognize state governments when they have been made by the people.

Mr. president, frequent reference has been made to the case of Duder vs. Borden, in 7 Howard, an important case decided by the supreme court of the United States, and my colleague felt himself justified, instead of stating what was the force and meaning of the decision, in reading the dictum of one of the judges. Instead of that opinion, as read by my colleague, giving the decision of the supreme court, that court decided in that case a very different proposition. Instead of deciding that congress had the right to recognize a state government the court decided that the recognition of a state government by the executive was controlling upon the judiciary. That was the celebrated case of Rhode Island. The question before the court was this: had an officer under the charter of the government of Rhode Island the power to execute a mandate issued pursuant to martial law in that state? and it raised the question whether the charter government or what was known as the Dorr government was the legitimate and valid government of Rhode Island. The court in deciding that question did not hold that the charter government was the government of Rhode Island because congress had recognized it, for congress had not recognized it. The court expressly said that the question did not come before congress, for the reason that the Dorr government never sent representatives to the house and senators to this body, and therefore congress was not called upon to act under any power it possessed.

But, sir, the charter government of Rhode Island, through its executive, did call upon the president of the United States to aid in putting down what was regarded as an insurrection in the state by interposing military power against the Dorr government; and the president of the United States recognized the charter government of Rhode Island in responding to that call. Although troops were not called out, yet the president did respond to that call, and recognized by that response the charter government of Rhode Island; and the supreme court of the United States says that the action of the executive, in connection with the decision of the highest court of Rhode Island, was conclusive upon the judicial department of the United States; yes, sir, conclusive upon the question whether the charter government was the legitimate and valid government of Rhode Island. Then the case of Luther vs. Borden establishes this proposition: that the executive of the United States having recognized a state government, the state having once been in the union, that recognition is binding upon the judiciary. That was the case of Rhode Island. That was the case of Tennessee. You say that recognition of state governments in the south, and that there is no power to restore state governments except in congress. That is your doctrine to-day as proclaimed in your legislation. Let us see what you did, and see if you have stood consistently upon that doctrine. In the month of December, 1864, the executive committee of Middle Tennessee issued a call to the people of Tennessee for a state convention, "to take steps as wisdom may direct to restore the state of Tennessee to its own honored status in the great national Union." That was the purpose of the call. It signed by Tillman, Spence, Brant, Lacey and Fowler. I believe the distinguished senator who is now of our body. Those gentlemen did not undertake to call the convention under any authority of law, but as an executive political committee they called the people together, to meet at Nashville, to consider what steps ought to be taken to restore Tennessee to her proper relations to the Government of the United States. Mark you, Mr. president, that was after Tennessee had passed an ordinance of secession; that was after she had sent her regiments into the southern army. After she had done every act that a state could do, or the people of a state could do, in hostility to the government of the United States, and before congress had authorized any restoration, this executive committee called a convention to meet at Nashville. That convention did meet at Nashville in January or February, 1865, and they adopted certain amendments to the constitution of the state of Tennessee. They did not undertake to make a new constitution. They recognized the old constitution as still in force. 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