INDEX

CITATIONS.

(31199)

In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. 480.

L. A. NIXON, PLAINTIFF IN ERROR,

VS.

C. C. HERNDON AND CHARLES PORRAS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

STATEMENT OF THE CASE.

This is an action at law for damages against election officers by one whom they prevented from voting in the primary election because of his race. It involves the validity of an act of the Texas Legislature, which provides that a negro cannot vote at a democratic primary election.

Suit was filed by plaintiff in error in the district court of the United States for the Western District of Texas, at El Paso, for damages, against defendants in error here, who filed a motion to dismiss, which

was sustained by the court; whereupon, the plaintiff filed his petition for writ of error to the Supreme Court of the United States, which was duly allowed, and the matter is before this court for review.

The issues are presented by plaintiff's trial petition (R. 2-8).

Briefly stated, the plaintiff alleged that on July 26th, 1924, a general primary election was held in the State of Texas and the county of El Paso, for the purpose of selecting candidates for all precinct, county, district and state offices, and for representative of the United States Congress and for United States Senator, on the Democratic ticket. That plaintiff was a bona fide Democrat with all the qualifications of a voter, in possession of his poll tax receipt duly issued, and entitled to vote in Precinct Number Nine in El Paso County, Texas, and that he duly and timely applied to the defendants, who were the judge and associate judge, respectively, of elections in said precinct number nine, and they refused to supply him with a ballot, or permit him to vote, solely on the ground that he was a negro (R. 3).

That said refusal was based upon the following act of the legislature of the State of Texas, enacted in May 1923, at the first called session of the thirty-eighth legislature of said state, which is designated as Article 3093a, a portion of which is as follows:

> "All qualified voters under the laws and constitution of the State of Texas, who is a bona fide member of the democratic party, shall be eligible to participate in any democratic primary

> election, provided such voter complies with all laws and rules governing party primary elections; however in no event shall a negro be eligible to participate in a democratic party primary election held in the State of Texas and should a negro vote in a democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

That said Act of the legislature is in violation of the constitution of Texas, especially Article Six thereof, prescribing the qualifications of voters, and of Section Nineteen of Article One, providing that no citizen shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land, and of Section Twenty-Nine of Article One of the Texas Constitution, which provides that everything in said Bill of Rights is excepted out of the general powers of government and shall forever remain inviolate, and all laws contrary thereto (....) shall be void (R. 4).

Also, that said Act is violative of the Fifteenth Amendment to the Constitution of the United States, and of Sections 1979 and 2004 of the United States Statutes (R. 5).

That plaintiff has voted for many years in all elections, both primary and general, as a democrat, and was willing to make an affidavit that he was a bona fide member of said party, and at the preceding general election, had voted for the nominees of said party. That he possessed all the qualifications pre-

scribed by the constitution and laws of Texas, as an elector and voter, in all elections, save and except that portion of the Act of the legislature of May, 1923, providing that a negro shall be ineligible to vote in a democratic primary election, and that he was prevented from voting solely because of his race (R. 5-6).

That said defendants presented to the plaintiff in writing the following certificate of their refusal for him to vote, to-wit:

> "This is to certify that we, C. C. Herndon and Chas. Porras, Presiding and Associate Judges, respectively, have not permitted L. A. Nixon to vote, as per Instruction 26 given in ballot boxes to election holders.
>
> C. C. Herndon
> Chas. Porras."
>
> July 26, 1924

That said Act applies only to the democratic primaries, thereby discriminating between the two great political parties, and restricts his freedom of choice, in violation of the fourteenth amendment to the Constitution of the United States, and to Section Two of the Bill of Rights in the Constitution of Texas, which guarantees the preservation of a republican form of government (R. 6-7).

That if said Acts be upheld on the ground that a primary is not an election, the same is void as in conflict with Section Thirty-five of Article Three of the Texas Constitution, prohibiting plurality of subjects embraced in the title; because said Act contains in addition to the Article 3093a above, another Article numbered 3089a, as follows:

> "All supervisors, judges and clerks of any election shall be qualified voters of the election precinct in which they are named to serve" (R. 7).

Damages are claimed in the sum of $5,000.00 (R. 7).

Defendants filed a motion to dismiss upon ten distinct grounds, the substance of which seems to be:

1. That the subject matter of the suit is political in its nature and the court is therefore without jurisdiction; and

2. That said primary election was not an election within the meaning of the constitution of the United States, or of any laws pursuant thereto, or of the fourteenth and fifteenth amendments to said constitution; and

3. That the petition states no cause of action against defendants for damages for refusing a vote, for the reason that the statutes and laws of the state of Texas forbid the defendants to receive such vote (R. 8-9).

The court sustained said motion and entered his order accordingly, but without stating the grounds upon which his action was based (R. 9).

ASSIGNMENTS OF ERRORS.

I.

That the United States District Court for the western district of Texas erred in sustaining the motion to dismiss interposed by the defendants to the amended complaint filed in said cause.

II.

The said district court for the western district of Texas erred in sustaining defendants' motion to dismiss and in dismissing said cause by its order of December 4, 1924, for the following reasons, to-wit:

(a) This case involves the construction and application of the Constitution of the United States, and especially of the Fifteenth Amendment thereto.

(b) This is a case in which a law of the state of Texas is claimed to be in contravention of the Constitution of the United States.

(c) This is a suit for damages to redress the deprivation under color of law of a right and privilege secured by the laws of the United States, providing for equal rights of its citizens and of all persons within its jurisdiction.

(d) This is a suit for damages for being deprived of the right to vote, solely on account of race and color, and is based upon rights guaranteed by the Constitution and laws of the United States.

(e) The plaintiff was denied the right to vote in the democratic party primary election by the elec-

tion judges in charge thereof, because of an instruction that no negro should be allowed to vote, his ballot should be void and not be counted; which Act is in violation of the Constitution and laws of the United States and of the state of Texas, and discriminates against plaintiff solely (fol. 18) because of his race and color.

(f) Under the allegations of the complaint in this cause, plaintiff, at the time he presented himself at the polls, possessed every qualification of a voter which had been prescribed by the constitution and laws of the state of Texas prior to that date, and that he was prevented from casting a ballot by the defendants herein solely upon the ground that he was a negro as defined by the statutes of Texas, and belonged to the colored race.

(g) Under the Acts of Congress, and especially Sections 1979 and 2004 thereof, the defendants in this cause are liable in damages to the plaintiff for their act in depriving him of the right to vote.

III.

The petition in this cause having alleged that plaintiff possessed all the qualifications of a voter prescribed by the constitution and laws of the state of Texas prior to the enactment of the legislature denying a negro the privilege of casting a ballot in a democratic primary; and the Constitution and laws of the United States having by their own force expunged from said Act of the legislature said proviso discriminating against the negro, the trial court erred in sustaining the motion and dismissing said cause.

IV.

The trial court erred in dismissing a complaint, the allegations of which upon the motion to dismiss are admitted, which clearly and unequivocally alleges damages in excess of the sum of three thousand ($3,000.00) dollars for the deprivation of the rights and privileges guaranteed by the Constitution and laws of the United States and of the state of Texas, and of an act of discrimination against him for the sole reason that he belongs to the negro race.

V.

The trial court erred in sustaining a motion to dismiss which (fol. 19) admits the allegations of the complaint and advances no valid ground to escape liability fixed upon the defendants by the statutes of the United States enacted in conformity with the Constitution thereof.

We shall undertake to discuss briefly the legal questions, which we feel will cover the questions raised by our assignments of errors under the following points.

Point 1. The plaintiff in error asserts rights under the Constitution and laws of the United States, and by virtue thereof this action is within the jurisdiction of the District Court of the United States.

Point No. 2. A democratic primary election in Texas is a public election established, recognized and regulated by the constitution and laws of said state.

Point No. 3. Casting a ballot in a primary election established and regulated by state law is an act

of voting within the meaning of the Fifteenth Amendment to the Constitution of the United States; and the immunity against discrimination on account of race or color which is guaranteed by said amendment, protects the plaintiff in his right to vote in such primary election where the only obstacle to be interposed is that he is a negro.

Point No. 4. When the negro, by virtue of the Fifteenth Amendment, acquired immunity from discrimination in voting on account of his race and color, he thereby acquired the right and privilege as a free man to exercise, to the same extent as a white man, his untrammeled choice in the selection of parties or candidates; and when the legislature of a state, solely because of his race and color, undertakes by law to exclude him from any party, or deny him the same latitude in registering his preference as a member of any party of his choice that it allows to white members of such party, it thereby abridges his right to vote under the Fifteenth Amendment and denies to him the equal protection of the law guaranteed by the Fourteenth Amendment.

Point No. 5. That Article 3107, Revised Statutes of Texas (1925), violates Article Six of the Constitution of the State of Texas.

POINT No. 1.

The plaintiff in error asserts rights under the Constitution and laws of the United States, and by virtue thereof this action is within the jurisdiction of the District Court of the United States.

The Act of the Legislature of the State of Texas (1st Called Session 1923, page 74), by virtue of which

the defendants in error as officers of the general democratic primary election refused to permit the plaintiff in error to vote because of his race and color, is as follows:

> Article 3093a: All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the democratic party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a democratic party primary election held in the State of Texas, and should a negro vote in a democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same.
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> Sec. 2: Also amending Article 3089 of the Revised Civil Statutes of the State of Texas, of 1911, by adding thereto a new section, to be known as Article 3089a, and to read as follows:
>
> Article 3089a. All supervisors, judges and clerks of any election shall be qualified voters of the election precinct in which they are named to serve.

Section One of the Fifteenth Amendment to the Constitution of the United States, provides:

> The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color or previous condition of servitude.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are

> citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section twenty-four of the judicial code of the United States provides that the District Courts shall have original jurisdiction (.....) of all suits (.....) which arise under the Constitution and laws of the United States, where the amount of the controversy exceeds $3,000.00, with the further proviso that the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of said section. Among such succeeding paragraphs are the following:

> Eleventh: Of all suits brought by any person to recover damages for any injury to his person or property on account of any act, done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.
>
> Twelfth: Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.
>
> Fourteenth: Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any

law, statutes, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Anderson v. *Myers,* 182 Fed. 223.

Myers v. *Anderson,* 238 U. S. 368; 59 L. Ed. 1349.

Guinn v. *U. S.,* 238 U. S. 347; 59 L. Ed. 1340.

Wiley v. *Sinkler,* 179 U. S. 58; 45 L. Ed. 84.

POINT No. 2.

A democratic primary election in Texas is a public election established, recognized, and regulated by the Constitution and laws of said state.

Chapter Ten, Title 49, Revised Statutes of Texas of 1911, in force when said primary was held, provides for nomination by parties, and in Article 3085 defines a primary as follows:

> The term, "primary election," as used in this chapter, means an election held by the members of an organized political party for the purpose of nominating the candidates of such party to be voted for at a general or special election, or to nominate the county executive officers of a party (Art. 3100-1925 Revision).

The succeeding articles of said chapter provide in detail for the time and manner of holding such elections. Article 3093, as amended by the Acts of the Legislature of Texas of 1918, Fourth Called Session, Chapter Sixty, Section One, provides the qualifications for voting as follows:

No one shall vote in any primary election or convention, unless he is a citizen of the United States and has paid his poll tax or obtained his certificate of exemption from its payment, in cases where such certificate is required, before the first of February next preceding, which fact must be ascertained by the officers conducting the *primary election* by an inspection of the certified lists of qualified voters of the precinct, and of the poll tax receipts or certificates of exemption; nor shall he vote in any *primary election* except in the voting precinct of his residence; provided, that if this receipt or certificate be lost or misplaced, or inadvertently left at home, that fact must be sworn to by the party offering to vote; and provided further, that the requirements as to presentation of the poll tax receipt, certificate of exemption or affidavit shall apply only to cities of ten thousand population or over as shown by the last United States census; provided, that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries, not inconsistent with this title.

This Act shall not be held or construed to repeal or in any way limit or restrict the right of women to vote in *primary elections* or conventions given them by any law enacted at the fourth called session of the 35th legislature.

All laws or parts of laws in conflict herewith are repealed.

(Note: The italics are ours, as they clearly set out the legislative view.)

The Act complained of in this suit amends this Article by adding thereto Article 3093a, which is copied above.

The following sections provide for paying the expenses of such election, for official ballot, the party pledge, and minute details unnecessary to state.

Article 3118 is as follows:

> The same precautions required by law to secure the purity of the ballot box in general elections, in regard to the ballot boxes, locking the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all *primary elections.*
>
> Chapter 10a embracing the Acts of the Legislature of 1913, Special Session, page 101 (being Chapter 12 of the 1925 Revision, Art. 3086 *et seq.*), provides for election for United States Senators by direct vote.

Section Two of said Act, being Article 3174-C, provides:

> Every law regulating or in any manner governing elections or the holding of primaries in this state shall be held to apply to each and every election or nomination of a candidate for a United States senator so long as they are not in conflict with the Constitution of the United States or of any law or statute enacted by the congress of the United States regulating the election of United States senators or the privisions of this Act.

Article 3174-D, provides:

> The name of no candidate for United States senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless said candidate has been duly nominated and selected as herein provided.

Article 3174-E, provides:

> Each and every party desiring to nominate a candidate for United States senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidate or candidates for United States senator at a general *primary election* to be held throughout the state on the fourth Saturday in July next preceding such election for United States Senator.

Article 3174-F, provides:

> At each and every *primary election* held in this state for the nomination of a candidate for United States senator, each and every provision of the laws of this state which has for its object the protection of the ballot and the safe guarding of the public against fraudulent voting, illegal methods, undue influence, corrupt practices, and, in fact, each and every restriction of whatever kind or character or nature as applied to any *election* held in this state *whether general, special* or *primary* shall be held to apply to a *primary election,* held for or when a candidate for United States senator is to be nominated, when not in conflict with the provisions of this Act. And the violation of any such provisions or restrictions at any such *primary election* shall be punished in the same manner as prescribed by law for the violation of any election law whether general, special or primary.

Article 3174-G, provides:

> When the law with reference to holding senatorial primaries is silent, the election officers in securing supplies, in conducting the *election,* and in making returns and in canvassing the votes shall in every particular follow the methods provided by law covering *primary elections* or gen-

eral elections held for the purpose of electing or nominating state, district, county and precinct offices.

Article 3174-WW, provides the qualifications of voters:

> At each and every primary held for the purpose of nominating a candidate for United States senator no person not a qualified elector to vote for United States senator under the Constitution of the United States shall be permitted to vote and no person shall vote for any candidate for the nomination for United States senator who does not belong to the same political party with which the voter affiliates and when any voter attempts to vote for any person as a candidate for the nomination for United States senator, and is challenged, he shall, before being permitted to vote, make an affidavit that he is a bone fide member of said party, and if he voted in the preceding general election held for the election of state officials, he voted for the nominees of the party whose ticket he desires to vote. Upon making such an affidavit he shall be permitted to vote.

Section Eight of Article Five of the Constitution of Texas provides that the District Court shall have original jurisdiction—of contested elections. This provision has been held by the courts of Texas to confer upon the District Court jurisdiction over contested primary elections.

Ashford v. *Goodwin,* 103 Tex. 491; 131 S. W. 535 Ann. Cases 1913A, 699.
Hammond v. *Ashe,* (Sup. Ct.) 131 S. W. 539.
Anderson v. *Ashe,* 62 Tex. Civ. App. 262; 130 S. W. 1044.

Argument.

We copy from the opinion of the court in the Anderson Ashe case, the following:

> "We come now to a consideration of the question of whether the Constitution authorizes the legislature to confer jurisdiction upon the district court to hear and determine primary election contests. Section Eight of Article Five of the Constitution, as amended in 1891, expressly confers upon the district court jurisdiction 'of contested elections,' and further provides that 'said court shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction original and appellate as may be provided by law.' It is insisted by respondents that the term 'contested elections,' as used in this section of the Constitution, cannot be construed to include primary election contests, but must be restricted to the contest of elections by which the final choice of the people for a public officer or measure is expressed. * * * We are of opinion that the word 'elections' as used in the section of our Constitution above quoted, should be construed to include any election in which the public or a large portion thereof participates, and which is held under and regulated by the statutes of this state. * * * The contest of a primary election held under the present statutes of this state authorizing and governing such elections is in no sense more of a political or non-judicial question than the contest of a general election, and, while primary elections were not authorized by law at the time the amendment to the Constitution was adopted and was not in the minds of the electors when they voted for said amendment, we think such elections

were clearly included in the terms of the amendment.

Scarbrough v. *Eubank,* 52 S. W. 569; *Lytle* v. *Halff,* 75 Tex. 134, 12 S. W. 610."

If the Texas Courts in the above cases hold a *primary election* comes within the term *election* as used in Article Five of the Texas Constitution, we fail to appreciate the force of the argument attempting to exclude it under Article Six of the same Constitution.

In *Waples* v. *Marrast,* 108 Texas, 5, 184 S. W. 180, and in *Koy* v. *Schneider,* 110 Tex. 369, 218 S. W. 479-87, both by the Texas Supreme Court, the above decisions are recognized as established law; although the Waples case holds that taxes may not be levied to bear the expenses of the primary, and the Koy case, that the legislature may permit women to vote in a primary, although they were not at that time entitled to vote in a general election. We call especial attention to the dissenting opinion in the Koy case by Chief Justice Phillips, who wrote the majority opinion in the Waples case; he reviews this decision carefully and we think well.

It is alleged in plaintiff's petition in this case, and for the purpose of this hearing is admitted, that the plaintiff possessed every qualification of a voter prescribed by the Constitution and laws of Texas prior to the enactment of Article 3093a and every qualification subsequent thereto save only that he falls within the proviso of said Article which prohibits a negro from voting in a democratic primary.

Article Six of the Constitution of Texas gives the qualifications of voters and the same qualifications are re-enacted by the legislature in chapter four of title forty-nine of the Revised Statutes of Texas. These and other statutory provisions we deem it unnecessary to copy in view of the fact that it is undisputed that plaintiff possessed all such qualifications and had complied with every requirement of the law entitling him to vote in said primary and that he had actually participated in all general elections and in all democratic party primary elections for a number of years past, and that he was refused a ballot in this instance solely because he was a "negro."

POINT No. 3.

Casting a ballot in a primary election established and regulated by state law is an act of voting within the meaning of the fifteenth amendment to the Constitution of the United States; and the immunity against discrimination on account of race or color which is guaranteed by said amendment protects the plaintiff in his right to vote in such primary where the only obstacle to be interposed is that he is a negro.

U. S. Constitution, 14th and 15th Amendments.

Rev. Stat. U. S. Art. 1978 & 2004.

Guinn v. *U. S.,* 238 U. S. 347, 59 L. Ed. 1347.

Myers v. *Anderson,* 238 U. S. 367, 59 L. Ed. 1349.

Anderson v. *Myers,* 182 Fed. 223.

United States v. *Reese,* 92 U. S. 214, 23 L. Ed. 563.

Strauder v. *West Virginia,* 100 U. S. 303, 25 L. Ed. 664.

Ex Parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

Ex Parte Yarborough, 110 U. S. 651, 28 L. Ed. 274.
Love v. *Griffith,* 266 N. S. 32.

Argument.

Section Two of the 15th amendment to the United States Constitution provides that Congress shall have the power to enforce said Article by appropriate legislation.

Section 2004, United States Revised Statutes, provides:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any state or territory or by or under its authority to the contrary notwithstanding.

From the opinion of the court in the Anderson-Myers case above, we quote the following extracts:

> The common sense of the situation would seem to be that, the law forbidding the deprivation or abridgment of the right to vote on account of race or color being the supreme law, any state law commanding such deprivation or abridgment is nugatory and not to be obeyed by anyone; and anyone who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

It was primarily the right of suffrage and its protection as against any discriminatory legislation of the states which was the subject matter dealt with by the Fifteenth Amendment and the Revised Statutes; and, considering the purpose of the law, it does not seem that any other construction can be defensible. *United States* v. *Reese,* 92 U. S. 214-218, 23 L. Ed. 563.

Nothing in the way of interpretation by the legislative body which itself had framed the amendment could be more significant than this enactment passed by Congress immediately upon its adoption. I do not find in the cases cited from the Supreme Court anything opposed to that interpretation. IT SEEMS CLEAR THAT WHEN, BY THE FIFTEENTH AMENDMENT, IT IS DECLARED THAT THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE SHALL NOT BE DENIED OR ABRIDGED BY ANY STATE ON ACCOUNT OF RACE OR COLOR, IT MEANS WHAT CONGRESS UNDERSTOOD IT TO MEAN, NAMELY, THE RIGHT TO VOTE AT ALL PUBLIC ELECTIONS.

POINT No. 4.

When the negro, by virtue of the fifteenth amendment, acquired immunity from discrimination in voting on account of his race and color, he thereby acquired the right and privilege as a free man to exercise to the same extent as a white man, his untrammeled choice in the selection of parties or candidates; and when the legislature of a state, solely because of his race and color, undertakes by law to exclude him from any party, or deny him the same latitude in registering his preference as a member of any party of his choice that it allows to white members of such party, it thereby abridges his right to vote under the fifteenth amendment and denies to him the equal protection of the law guaranteed by the fourteenth amendment.

United States v. *Reese,* 92 U. S. 214, 23 L. Ed. 563.

United States v. *Cruikshank,* 92 U. S. 542, 23 L. Ed. 588.
Ex Parte Virginia, 100 U. S. 339, 25 L. Ed. 676.
Yick Wo v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220.
G. C. & S. F. Ry. Co. v. *Ellis,* 165 U. S. 150, 41 L. Ed. 666.
Strauder v. *W. Virginia,* 100 U. S. 303, 25 L. Ed. 664.
Connolly v. *United Sewer Pipe Co.,* 184 U. S. 558, 46 L. Ed. 679.
Ex Parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274.
McPherson v. *Blacker,* 146 U. S. 1, 36 L. Ed. 869.

Argument.

From *U. S.* v. *Reese,* page 217, we quote:

The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude

From *Gulf, C. & S. Ry. Co.* v. *Ellis,* 165 U. S. 150-155, 41 L. Ed. 666-668, we quote:

> But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrary. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. * * *

From *Strauder* v. *West Virginia,* 100 U. S. 303, 307, we quote:

> It (The Fourteenth Amendment) ordains that no state shall make or enforce any laws which shall abridge the privileges of immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the state in which they reside). It ordains that no state shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, * * * the

> right to exemption from unfriendly legislation against them distinctively as colored, * * * exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. * * *
>
> Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it * * *.
>
> The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.

In *McPherson* v. *Blacker,* 146 U. S. 1, 39, Mr. Chief Justice Fuller said:

> The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Citing *Pembina Company* v. *Pennsylvania,* 125 U. S. 181, 188.

In *Yick Wo* v. *Hopkins,* 118 U. S. 370, the court used language which is peculiarly appropriate here:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are

delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.

The Fifteenth Amendment is, in itself, self executing and any law or statute of any state which at-

tempts to take away or to abridge the right of suffrage to the negro, or which denies him the privilege of voting at any election wherein state or Federal officers are to be chosen, is in conflict with the Fifteenth Amendment.

Davis v. *Burke,* 179 U. S. 399, 45 L. Ed. 251.
Guinn v. *U. S.,* 238 U. S. 347-363, 59 L. Ed. 1340-1347.
McPherson v. *Blacker,* 146 U. S. 1, 36 L. Ed. 869.

In the case of *Davis* v. *Burke, supra,* Justice Brown in defining what is meant by the self-executing provision of a constitution, says:

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; * * * When a constitutional provision is complete in itself it needs no further legislation to put it in force. * * * But where a a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself."

In the Guinn case, *supra,* Chief Justice White in passing on the question of the operation and effect of the Fifteenth Amendment, says:

> "But it is equally beyond the possibility of question that the amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The

restriction is coincident with the power and prevents its exertion in disregard to the command of the amendment. * * * Thus the authority over suffrage which the states possess and the limitation which the amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both."

POINT No. 5.

That Article 3107, Revised Statutes of Texas (1925), violates Article Six of the Constitution of the State of Texas.

Article Six of Texas Constitution.
Cooley Const. Lim., Sec. 599.
Black Const. Law, p. 648.
Koy v. *Schneider,* 218 S. W. 487.
People v. *Stressheim,* 240 Ill. 278.
Ashford v. *Goodwin,* 103 Tex. 491, 131 S. W. 537.
Anderson v. *Ashe,* 130 S. W. 1046.

Argument.

We submit that Article 3107, Revised Statutes 1925, is necessarily in conflict with Sections 1 and 2, Article Six, of our Constitution, and being in conflict is therefore unconstitutional. In *Koy* v. *Schneider, supra,* Chief Justice Phillips, in discussing this very question (Primary Elections), said:

> "Is it not fair and reasonable, therefore, to assume that the Constitution was meant to include such an election and to govern it?"
>
> "When the broad purpose of the Constitution in Sections 1 and 2 of Article Six is looked to, in my opinion no other conclusion is possible" (p. 488). "What use it is to enforce the Constitution only in general elections, when, in fact,

> the primary elections are the decisive elections in this state in the choosing of public officers?'' (p. 487).

While the above is found in the dissenting opinion, it is nevertheless the language and opinion of the chief justice of our supreme court, and if the direct question at bar had been under consideration, we feel the court would without doubt have held Article 3107 in conflict with the Fourteenth and Fifteenth Amendments, as well as Sections 1 and 2 of Article Six of our own constitution.

This thought and opinion of ours is fully borne out by the opinion of Justice Brown in the Goodwin case, *supra,* where our supreme court held ''Primary Elections'' were ''Elections'' within the meaning of our constitution. Moreover, Chief Justice Pleasants in *Anderson* v. *Ashe, supra,* where the direct question was under consideration, said:

> ''We are of opinion that the word 'Election,' as used in the section of our constitution above quoted should be construed to include any election in which the public or a large portion thereof participate, and which is held under and regulated by the statutes of this state.''

In view of the above cited cases from our supreme court we think we are fully justified in our contention that a primary election is an election authorized by our constitution, and being an election lawful and legal, each and every elector who is a qualified voter under the Constitution of the State of Texas, regardless of race or color, is entitled to cast his ballot.

The Texas Legislature frankly ignores every fundamental requirement of valid police regulation. It destroys the express and implied inhibition of class legislation; the recognized existence and inviolability of inherent rights; the underlying purpose of government to maintain equality under the law; and the express guaranty of the right to vote.

State v. *Phelps,* 144 Wis. 1.

The classification made by the legislature is arbitrary and despotic; contrary to reason and justice; is not designed in good faith to promote the public good; and is adopted to attain an end which itself is illegitimate. If this classification be sustained and this act upheld, there is nothing to prevent a state legislature from excluding from a Democratic or Republican primary, or from both, a Gentile, or a Jew, a Catholic or a Protestant, a farmer or a blacksmith, a blonde or a brunette.

And, it must be remembered, this is not the effusion of an assembly of ward politicians; it is the solemn enactment of the legislative body of a sovereign state, sanctioned by its governor, made to control the selection of every officer who enacts, construes or administers the laws governing four million citizens of these United States.

The Democratic party primary in Texas is the only real election in that state, and the general election in November is nothing more than a formal ratification of the results of the Democratic primary. The same is true to a greater or less extent in a number of other states. If such an enactment under such

conditions be valid, "government of the people, for the people and by the people," was an idle dream, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States were adopted in vain.

In the primary from which Dr. Nixon was excluded, no race or color was barred except his. In El Paso thousands of Whites and of Mexicans and numbers of Chinese could, and did, legally cast their ballots; but Nixon, because of remote Ethiopian ancestry, was only a spectator. Think of a primary held, as in some states, for both Republicans and Democrats at the same time and place and by the same officials. All voters, Whites, Browns, Reds and Yellows, together with mongrels of varying intermediate tints, walk in and demand and receive the ticket they prefer to vote; while the voter who happens to be black can only ask for the Republican ticket. Such a situation would be inconceivable but for the act of the Texas Legislature; however, if this act is to stand, such a situation is not a dream but a reality.

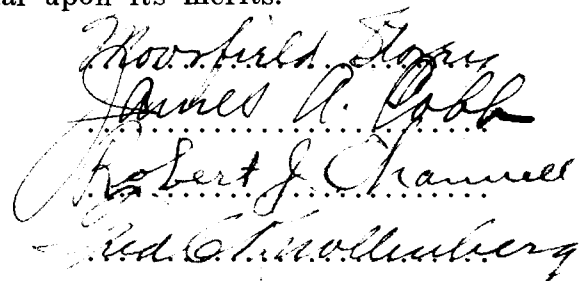
We have attempted to confine ourselves to the provisions of the Constitution and statutes and to the expressions of the courts construing them. No useful purpose could be served by a prolonged elaboration of our individual opinions. We are not in a position to say, as Mr. Justice Miller did, speaking for the court in the Yarborough case, with reference to the laws protecting negroes in their exercise of franchise: "But it is a waste of time to seek for specific sources of the power to pass these laws."

We may, however, be pardoned for saying that the act of the legislature in question is such a flagrant, unjust discrimination against a citizen solely on account of his race and color; such a brazen attempt to banish him from a party of his choice and brand him with a mark of inferiority, as an outcast unfit to exercise the privilege which other citizens enjoy of affiliating with the party of his choice and exercising the freedom of judgment in selection of officers under whom he shall serve, that we are constrained to believe this court in the exercise of the high powers reposed in it by the constitution and laws, will find some means of protecting this class of citizens against such ignominy and shame even though we may have failed in our efforts properly to point the way.

In closing allow us to further suggest that, regardless of the view of the majority of this court that a primary election is not an election as suggested in *Newberry et al.* v. *U. S.,* 266 U. S. 232; 65 L. Ed. 913: we feel that the prohibition placed upon the states by the Fifteenth Amendment is not confined to general elections but prohibits a discrimination which denies or abridges the right *to VOTE* on account of race, color, etc., and we feel this court will say that even in Democratic primaries, "you vote," and we are further encouraged in this view by the comment of Mr. Justice Holmes in *Love* v. *Griffith,* 266 U. S. 32, where in refusing to pass upon the validity of this same statute because the question at the time it reached him had become moot, suggest that if the case stood before the supreme court as it stood before the court of first in-

stance, a grave question of constitutional law would be presented. We hope the facts are here presented so this court can take full cognizance of this question and fix so definitely the rights of the negro that the step taken by the Texas Legislature will not be followed by any other state.

We therefore request that this case be reversed and remanded for trial upon its merits.



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