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CITATIONS.

No. 117.

In the Supreme Court of the United States

OCTOBER TERM, 1926.

L. A. NIXON, PLAINTIFF IN ERROR,

vs.

C. C. HERNDON AND CHAS. PORRAS, DEFENDANTS IN ERROR.

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

BRIEF FOR THE STATE OF TEXAS, BY SPECIAL LEAVE OF COURT.

PRELIMINARY STATEMENT.

In this case an attack is made upon the constitutionality of an act passed by the Legislature of Texas. This brief is filed on behalf of the State of Texas under special leave of this court, granted on January 4, 1927, to Dan Moody, former Attorney General of Texas.

STATEMENT OF THE CASE.

The statement of the case made in the brief for plaintiff in error is subject to some minor objections, and we therefore make this further brief statement.

This is a suit in law by L. A. Nixon, a negro, plaintiff, filed against C. C. Herndon and Chas. Porras, who were designated by the Democratic Executive Committee as election judges in the Democratic nominating primary held in El Paso County on July 26, 1924. The plaintiff, L. A. Nixon, is suing for $5000 damages for the reason that the defendants in error refused to allow said L. A. Nixon, a negro, to vote in said Democratic nominating primary.

The refusal to allow said plaintiff in error to vote was for the reason that he was a negro, and the defendants in error as agents of the Democratic party in El Paso County, Texas, had been instructed by the Chairman of the Executive Committee of the Democratic party in that county not to permit any negroes to vote at the said nominating primary. (R. 3.) The plaintiff in error further alleges in his petition that he was not permitted to vote in said Democratic primary because of an 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 was designated as Article 3093a, a law reading as follows:

> "Article 3093a. 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 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."

The plaintiff in error on page 4 of his printed brief sets forth the basis of the refusal of the Democratic nominating primary officials to permit him to vote, towit:

"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."

This instruction number 26 was issued by E. M. Whitaker,

Chairman of the Executive Committee of the Democratic party in El Paso County, Texas. (R. 3.)

Plaintiff in error on page 2, printed brief, in his statement of the case asserts he was a bona fide Democrat with all the qualifications of a voter, in possession of his poll tax receipt, and that on July 26, 1924, a general primary election was held in El Paso county, Texas, at which his vote was refused because of the act of the Legislature hereinabove set forth.

There was no general election, but the facts shown by the petition indicates that the plaintiff in error, by calling himself a bona fide Democrat, tried to participate in a nominating primary of the Democratic party and his participation therein was denied under the rules issued by the governing body of the Democratic party in that county.

We submit the following as counter propositions to the five points urged by the plaintiff in error:

1. The right to inject oneself into the nominating primary of a political party is not a right which can be enforced in the district court of the United States.

2. A nominating primary of the Democratic party in Texas is not a public election under the Constitution of that State.

3. Participation in a nominating primary of a political party is not protected nor guaranteed by the Fifteenth Amendment to the Constitution of the United States.

4. The refusal by local officers of a political party to permit a negro to participate in the nominating primary of that party because the rules of the party in that county do not recognize negroes as members thereof, does not abridge the right to vote under the Fifteenth Amendment, nor does it deny the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. Article 3107 of the Revised Civil Statutes of Texas of 1925 does not violate the Constitution of Texas.

ARGUMENT.

The counter propositions advanced are so closely akin that, as a matter of convenience, we treat them together.

The plaintiff in error directs his main attack on the constitutionality of Article 3093a of the Acts of the Legislature hereinbefore quoted.

As we understand it, laws attacked as unconstitutional when passed by the Legislature of a State are clothed with a different presumption than those passed by Congress. Congress has no authority to pass any laws except such as the Constitution either expressly or by necessary implication grants. Hence, when an act of Congress is attacked as unconstitutional for contravening any right, unless the act is under the specified authority of the Constitution of the United States, it is unconstitutional. On the other hand, the people of the States, including the State of Texas, in formulating their Constitutions gave the legislative body of the State government unreserved authority to pass any legislation which was not expressly prohibited by the Constitution of the State, or in violation of the Constitution of the United States. Wherefore, when a law of the State of Texas is attacked as unconstitutional, it is presumed to be constitutional until it is declared otherwise by a court of competent jurisdiction as being in contravention of the State Constitution or the Constitution of the United States. See Riter vs. Douglass, 32 Nev., 400, 109 Pac., 444.

We think it is perfectly clear that the nominating primary of a political party is not an election in which anyone may vote. There are many organized groups of persons, voluntary in character, in the several States of the Union. In many of these the election of officers and the purposes and objects of the organization depend upon the votes of the

individual members. Some of these are maintained for charitable purposes, some for the support of religious worship, some for the diffusion of knowledge and the extension of education, some for the promotion of peace, and some for the advancement of political ideas. It clearly appears, therefore, that the right to vote referred to in constitutions and elections mentioned therein do not include within their scope all elections and all voting by persons in the United States.

The act of the Legislature of Texas and the nominating primary in which the vote of plaintiff in error was refused dealt only with voting within a designated political party, which is but the instrumentality of a group of individuals for the furtherance of their own political ideas.

It must be remembered that "nominating primaries" were unknown at the time of the adoption of the Constitution of the United States and of the Constitution of Texas in 1876.

The nominating primary, like the nominating convention and its predecessors, the caucus, is not the "election." Nomination is distinct from election and has been so differentiated from the beginning of our government.

Nominations in early times were made at the caucus, which was usually an informal gathering. It was not regulated by law and no one regarded it as an "election." Later the caucus gave way to the nominating convention, but no one considered this an "election." More recently the nominating conventions have been subject to legal regulations in the States. The introduction of the so-called "primary system" is but another phase of the nominating process.

The question of parties and their regulation is a political one rather than legal. If the plaintiff in error, or any other person, is dissatisfied with the regulation adopted by the Legislature, the proper, and we believe the only remedy, is

an appeal to the Legislature to repeal or modify it rather than to the courts for judicial annulment.

Nor do we believe the District Court of the United States has any jurisdiction in a case of this character. It is well settled that political questions are not within the province of the judiciary. 12 Corpus Juris, 878; Chandler v. Neff, 298 Fed., 515.

As stated by the Supreme Court of Texas in the case of Waples vs. Marrast, 108 Texas, 11, 184 S. W., 183:

> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general election for the control of the agencies of the government as the means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and they only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. * * * To provide nominees of political parties for the people to vote upon in the general elections is not the business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. * * * Political parties are political instrumentalities. They are in no sense governmental instrumentalities."

The nominating primary of the Democratic party is regulated by its Executive Committee. Though the plaintiff in error asserts that he is a Democrat, under the law attacked herein, which it should be understood is but an affirmation of the well understood restriction of the Democratic party in Texas, the plaintiff in error is not a Democrat insofar as that term applies to an accepted member of the Democratic party at his place of residence. He has the right in all general elections, where political issues and candidates are submitted for election, to vote the Democratic ticket, the Republican ticket, or any other which he so desires. Because the Democratic party in Texas and in El Paso county holds a nominating primary, can it be contended that outsiders can be forced upon the party over its expressed dissent. If the party should abandon the primary and go back to the convention or the caucus system, could it be consistently maintained that the courts could force upon the convention or upon the caucus the plaintiff in error if the membership of the party, the convention or the caucus was restricted against negroes? We contend that a nominating primary is purely a political matter and outsiders denied participation by the party councils cannot demand a redress at the hands of the courts.

Nor can the plaintiff in error attack the act of the Legislature which declares that negroes shall not participate in the Democratic primaries. If the act is but an affirmation of the policy of the Democratic party in Texas and in El Paso County, then certainly the plaintiff in error must abide thereby. If the act of the Legislature does not coincide with the policy of the Democratic party, then it is for the Executive Committee of that party, or it is for the duly authorized representatives of that party to take the necessary steps to combat the enactment.

The plaintiff in error on page 31 of his brief cites the case of Love vs. Griffith, 226 U. S., 32. That case is but ad-

ditional evidence that negroes were not recognized by the Democratic party in Texas as qualified members of that party. But the exclusion of Love in that case and of Nixon in this in no way interfered with the right of either of them to vote their choice in the general election.

The crux of the whole case is the question as to whether the nominating primary of a political party is an election within the meaning of the Constitution of the United States, and whether it is an election within the meaning of the Constitution of Texas. Plaintiff in error on page 27 of his printed brief quotes from Koy vs. Schneider, 110 Texas, 369, 218 S. W., 487, and on page 28 of his brief from the case of Anderson vs. Ashe, 130 S. W., 1046, by the Court of Civil Appeals at Galveston, Texas. If these two citations were the law in Texas, the plaintiff in error would be in a better position before this court. Unfortunately for him as he notes the quotation from Koy v. Schneider is in the dissenting opinion by Judge Phillips. Distinguished as that jurist is in Texas, it is still but his opinion, while the statement of the majortty of the court is the law of Texas. And in that case, the Supreme Court of Texas holds emphatically that a primary election is not an election within the meaning of the Constitution of Texas, and the Legislature in regulating and controlling primaries is not limited by the provisions of the Constitution of Texas respecting elections. In this same case, the Supreme Court of Texas refuses to follow Anderson v. Ashe. There can be no doubt so far as the law of Texas is concerned that the Democratic nominating primary held in El Paso in July, 1924, was not an election in which the plaintiff in error had a constitutional right to vote. In the case of Chandler v. Neff, 298 Fed., 515, Judge West of the United States District Court for the Western District of Texas disposed of a case almost identical with this one, and holds with the Supreme Court of Texas that a primary of a political party is not an election,

and the right of a citizen to vote therein is not within the protection of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Nor is this doctrine limited in Texas.

In the case of Riter v. Douglass, 32 Nev., 400, 109 Pac., 444, the Supreme Court of Nevada says:

> "There is a substantial distinction in the law between the nomination of a candidate and the election of a public officer."
>
> "Counsel for the appellant seemingly fail to appreciate that the electoral test of an elector spoken of in the Constitution is for the election of public officers and not for the election at which party nominees are selected."
>
> "Again we find the position of counsel fallacious in failing to keep in mind the substantial distinction which exists between a primary election, which is election simply for the nomination of candidates of the various parties, and the election of public officers, when the voters of all parties at the polls determine from among the candidates selected at the primary elections and independent candidates who are to be the officers to administer their affairs of state. Primary election at which nominees of the various parties are selected is not to be confounded with the election of officers within the meaning of the constitutional right of electors; 'To vote for all officers that are now or hereafter may be elected by the people.' "

In the case of State ex rel., Gulden v. Johnson, 87 Minn., 223, 91 N. W., 841, the Supreme Court of Minnesota says:

> "If the election of candidates to the position of nominees is an election within the meaning of Article 7, of the Constitution, then the primary law, as above construed, is unconstitutional. It would in certain cases deprive the voter of his privilege to exercise the elective franchise. * * * But it is very clear that the election of nominees provided for in the primary law is not

> the election referred to in the Constitution. The language of Article 7 bearing upon the subject is as follows: 'Every male person of the age of twenty-one years or upward, belonging to either of the following classes, who shall have resided in the United States one year and in this State four months next preceding any election shall be entitled to vote at such election in the election district of which he shall at the time have been for ten days a resident for all officers that now are or hereafter may be elective by the people.' By 'officers' is meant the executive or administrative agents of the State or the governmental subdivisions thereof, and the election mentioned has reference only to the selection of persons to fill such offices. The election thus defined cannot reasonably be given so broad an interpretation as to include the selection of nominees for such offices."

The Supreme Court of Ohio in the case of State ex rel., Webber vs. Felton, 77 Ohio St., 554, 84 N. E., 85, says:

> "If the election is one at which merely the candidates of a party are to be selected, it cannot be an objection that electors who do not belong to that party are not permitted to take part. That was one of the evils that the legislation was intended to prevent; and, as to the test prescribed for determining an elector's partisanship, it is impossible to conceive of a political party without the possession, by its members, of some qualifications, and the test prescribed by the statute is the usual one, and is not unreasonable. But a primary election held merely to name the candidate of a political party is not an election within the meaning of this section of the Constitution. That section refers to an election of officers, and not to the nomination of candidates."

This is the situation presented by the pending case. The Democratic party in Texas and in El Paso County by rule, resolution, custom and instruction to its election agents ex-

cluded negroes from its party. The act of the Legislature merely recognized that which was known of all men and in the interest of the public peace, we think it was well within the police powers for the Legislature to enact the statute attacked herein.

In the case of Baer vs. Gore, 79 W. Va., 50, 90 S. E., 530, 533, the Supreme Court of Appeals of W. Va., reiterates the same law:

> "The adherents of each organization participating in a primary may join in selecting the candidates of his party for offices to be filled by the electors of all political parties at the succeeding general election; and while he may finally determine to vote therein for one or more of the nominees of any other party, he cannot, with propriety, participate in nominating them. That is a privilege he has no right to exercise and of a denial thereof he cannot justly complain. These propositions are so fundamental as to be axiomatic. None but unreasonable partisans will contravert them."
>
> "By many text books and decisions an important distinction is noted between a general and a primary election. They treat a primary election merely as a substitute for a nominating caucus convention, not as an 'election' within the meaning of that term as used in constitutions. So treated, it is a mere matter of statutory regulation within a reasonable exercise of police power of the State predicated on rights reserved by the people when not forbidden by the organic law of the municipality. This principle is specially emphasized with reference to the qualifications of electors and tests of party membership prescribed by primary laws."

To the same effect are Dooley vs. Jackson, 104 Mo. App., 21, 78 S. W., 330; Morrow vs. Wipf, 22 S. D., 146, 115 N. W., 1124, and Montgomery vs. Chelf, 118 Ky., 766, 82 S. W., 388, 390.

In the case of State vs. Michel, Secretary of State, 121

Louisiana, 374, 46 So., 435, the Louisiana primary law was assailed. The court in upholding the law, said among other things:

> "It is the very essence of a primary that none should have the right to participate in it but those who are in sympathy with the ideas of the political party by which it is being held. Otherwise, the party holding the primary would be at the mercy of its enemies who could participate for the sole purpose of its destruction by capturing its machinery or foisting upon it obnoxious candidates or doctrines. It stands to reason that none but Democrats should have the right to participate in a Democratic primary, and none but Republicans in a Republican primary. A primary is nothing but a means of expressing party preference and it would cease to be that, if by the admission of outsiders its result might be the very reverse of the party preference. If therefore, there could not be a primary under our Constitution without the admission of outsiders the consequence would be that under our Constitution such a thing as a primary would be impossible."

See also Socialist Party vs. Uhl, 155 Cal., 776, 103 Pac., 181; People vs. Democratic Committee, 164 N. Y., 335, 58 N. E., 124.

This court in the case of Newberry v. United States, 256 U. S., 232, 350, 41 Sup. Ct., 469, 65 L. Ed., 13, in the majority opinion by Mr. Justice McReynolds holds:

> "The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. Hawe v. Smith, 253 U. S., 221. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for

ultimate choice by all qualified electors. General provisions touching elections in constitutions or statues are not necessarily applicable to primaries—the two things are radically different. And this view has been declared by many State courts.

"If it be practically true that under present conditions a designated party candidate is necessary for an election—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Birth must precede but it is no part of either funeral or apotheosis." P. 257.

We believe that the definition of "primary election" as given in Article 3100 of the Revised Civil Statutes of Texas of 1925 is good both in law and in fact.

"Article 3100. 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."

The plaintiff in error in his printed brief goes at some length to assert that the Democratic nominating primary in Texas is the only real election and that it is the party of his choice and he should be permitted to participate in its affairs. The Democratic Party is dominant in Texas today, it is true, but the mere fact of party dominance in a particular State at the moment could not change the legal questions or the political questions involved in the case. Neither can the fact that the plaintiff in error wishes to participate in the councils of the Democratic party change the question. To use his own figure, he might wish to participate or be a

"Gentile or a Jew, a Catholic or a Protestant, a farmer or a blacksmith, a blonde or a brunette," but the fact remains that differences of race, of nature and of belief might prevent the fulfillment of his wish in certain of those particulars.

Negroes indeed are not allowed to vote in Democratic primaries, but the Democratic primary is conducted by a private organization of men and women, financed by that private organization, and its function is solely to name candidates on whom those men and women may concentrate at the general elections. To deny any group of men or women, or both, the right to form such associations as they please, and to lay down such qualifications for membership as they please, would certainly be to deny a fundamental right of American citizens. White people have just as much right to organize their own private political party as either whites or negroes have to vote at the general elections.

The plaintiff in error has a right under the law of Texas to organize a party of his own and if he can get others to join with him to nominate candidates for office. This right is given to all and constitutes equality before the law.

The Legislature of a State is presumed to know, and can take cognizance of any existing fact within its border and pass such laws as may be necessary to promote the safety, peace and good order of the people. It is an "ancient and accepted doctrine," to use the words of the Democratic platform, and it is well known in Texas that the Democratic party of the State is a white man's party. Certainly the Legislature of Texas knows and can take cognizance of such fact, and having made equal provision under the law for parties admitting negroes to membership, to have their own candidates to be voted upon in the general election, certainly the Legislature can pass a declaratory measure in the light of existing facts, announcing what is known to all men.

CONCLUSION.

It is respectfully submitted that the judgment rendered in this case by the United States District Court for the Western District of Texas should be affirmed because:

1. The question involved is political and the court is without jurisdiction.

2. The plaintiff in error is not a proper party to attack the constitutionality of the act in question.

3. Plaintiff in error was excluded from the Democratic nominating primary by instructions issued by the governoring body of that party and his petition so shows.

4. The act of the Legislature of Texas attacked is not void as being in conflict with the 14th and 15th Amendments to the Constitution of the United States.

Respectfully submitted,

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