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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON AND C. H. KOLLE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON THE MERITS, AND BRIEF ATTACHED THERETO, IN SUPPORT OF THE PETITIONER, L. A. NIXON

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

C. N. Love, Julius White, The Houston Informer and Texas Freeman, and their attorneys herein, individually and on behalf of all other Negroes in the City of Houston, in Harris County, and the State of Texas, who are not otherwise represented, hereby respectfully move this Honorable Court for leave to file, as amici curiae, the brief hereto attached, as a brief upon the merits in the above styled and numbered cause, in support of the petitioner, L. A. Nixon.

In support of this motion movants respectfully show that there are in their opinion important arguments and matters, pertinent to the issues involved in this case, which have not heretofore or otherwise been called to the attention of this Court, but which movants feel that this Court should have before it in deciding this case upon the merits. As evidence thereof, without asking the Court to read the

entire brief for this purpose, movants call attention to Point No. 1 in said brief, which is hereby incorporated into this motion by reference.

WHEREFORE, premises considered, movants pray that this Honorable Court may grant them leave to file the brief attached hereto as a brief upon the merits, in support of the petitioner, L. A. Nixon.

Dated November 18, A. D., 1931.

C. N. LOVE
JULIUS WHITE
THE HOUSTON INFORMER AND TEXAS FREEMAN
By G. H. WEBSTER, President
J. ALSTON ATKINS
One of Attorneys for Movants
Office and Post Office Address
409 Smith Street, Houston, Texas.

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared C. N. Love, Julius White, G. H. Webster, and J. Alston Atkins, who, having been by me first duly sworn, on their oaths depose and say:

That they are the identical persons who executed the within and foregoing motion, and that the allegations therein set forth are true, according to their best knowledge and belief.

Subscribed and sworn to before me this the 18th day of November, A. D., 1931.

LELAND D. EWING
Notary Public in and for Harris County, Texas.

(SEAL)
My commission expires June 1, 1933.

CERTIFICATE OF COUNSEL

I hereby certify that in my opinion the foregoing motion for leave to file brief is well founded in law, and is filed in good faith and not for delay.

J. ALSTON ATKINS

One of Attorneys for Movants.

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON AND C. H. KOLLE,

Respondents.

BRIEF ON THE MERITS IN SUPPORT OF THE PETITIONER, L. A. NIXON

DECISIONS BELOW

The decisions in the courts below, which are sought to be reversed here, are: Nixon v. Condon et al., 34 Fed. (2nd) 464, and Nixon v. Condon et al., 49 Fed (2nd) 1012.

JURISDICTION

There are at least three grounds upon which jurisdiction may be sustained in this case:

> 1. That the matter in controversy exceeds in value the sum of $3,000 and involves a substantial Federal question. Sec. 24 (1) of the Judicial Code; Chicago v. Kendall, 266 U. S. 94; Green v. Ry. 244 U. S. 499; Columbus R. Co. v. Columbus 249 U. S. 399.

That there is at least a substantial Federal question involved is indicated by the fact that the Circuit Court of Appeals for the Fourth Circuit has held to be unconstitutional a state statute similar to the one alleged in this case to be unconstitutional. Bliley v. West, 42 Fed (2nd) 101.

> 2. That the controversy involves rights created by the Constitution and laws of the United States, and is, therefore, in its "essence Federal," "however

> much wanting in merit may be the averments which it is claimed establish the violation of the Federal right." Swafford v. Templeton, 185 U. S. 487.

The right to vote for senator and representatives in Congress is created by the Constitution and laws of the United States. Wiley v. Sinkler, 179 U. S. 58; Swafford v. Templeton, supra.

The right to "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude" is also created by such Constitution and laws. United States v. Reese, 92 U. S. 214.

These two Federal rights are the foundation of this controversy.

> 3. That this is a suit to recover damages for the deprivation of one of the civil rights, namely, the right to vote. Judicial Code, Sec. 24 (11) (12) (14); Secs. 31, 43, Title 8, United States Code; Nixon v. Herndon, 273 U. S. 536.

Even the Circuit Court of Appeals in the instant case concedes that plaintiff had a legal right to vote in the primary election involved in this case.

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections." Nixon v. Condon et al., 49 Fed. (2nd) 1012, 1013.

STATEMENT OF THE CASE

By the Election Laws of Texas, Title 50, Chapter 13, Articles 3100 to 3153, Revised Civil Statutes, the State required that there be held on July 28, 1928, an election for the purpose of nominating candidates for representatives in the United States Congress, for United States senator, and for state, county, district, and precinct officers in the State of Texas. With great particularity, these statutes set

forth the time, place, and method of holding such election, and the requirements for participation therein.

The defendants were election judges of said election, their offices being created by said Election Laws (Article 3104); and as such judges, they were clothed by statute (Articles 3002 and 3105 of said Election Laws) with, among others, the following sovereign powers of the state of Texas: To administer oaths; to act with the same power as a district judge to enforce order and keep the peace; to appoint special peace officers; to issue warrants of arrest for felony, misdemeanor or breach of peace; to authorize confinement of persons arrested to jail; to compel observance of law against loitering or electioneering within 100 feet of polling places; to arrest or cause to be arrested anyone carrying voters to polls contrary to law.

No private individual or organization has any such powers as these.

The plaintiff was a member of the Democratic Party and a duly qualified elector and voter under the laws of the State of Texas, except that he was a Negro, and he attempted to vote in said election.

The defendants denied plaintiff the right to vote in said election, defending their action under the following statute and resolution:

Chapter 67 of the Laws of 1927, passed by 1st called session of 40th Legislature of Texas, which is now Article 3107 of the Revised Civil Statutes of Texas:

"AUTHORIZING POLITICAL PARTIES THROUGH STATE EXECUTIVE COMMITTEES TO PRESCRIBE QUALIFICATIONS OF THEIR MEMBERS

(H. B. No. 57)

Chapter 67

"An act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substitut-

ing in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party, and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

"Sec. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Aproved June 7, 1927

"Effective 90 days after adjournment."

Resolution passed by the State Democratic Executive Committee of Texas pursuant to the power either conferred or recognized by the above quoted statute:

"Resolved: That all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in

> the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and Secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

Thereupon, plaintiff brought this suit for damages in the sum of five thousand dollars ($5,000) for the legal wrong done to him by defendants in depriving him of his legal right to vote in said election; the plaintiff alleging that the above statute and resolution were no defense and that they violated his rights under the 14th and 15th Amendments to the Constitution of the United States.

The District Court sustained a motion to dismiss, 34 Fed (2nd) 464, and the Circuit Court of Appeals sustained the decision of the District Court, 49 Fed (2nd) 1012.

Questions:

1. Is the above statute constitutional?
2. Is the above resolution a valid defense to this action?
3. Does the disfranchisement of plaintiff and the other Negroes disclosed by the record violate the 15th Amendment?

ARGUMENT

SUMMARY:

1. The statute is unconstitutional because,
   (a) On its face it creates an arbitrary, unreasonable, and unfair classification, which denies to plaintiff and all other qualified Negroes the equal protection of the laws.
   (b) As interpreted by the state courts and the lower Federal Courts in Texas, it recognizes and enforces an unconstitutional discrimination against plaintiff and all other qualifed Negroes.
   (c) The purpose and intent of the Legislature in passing

the statute was to accomplish by indirect action that which the Supreme Court of the United States had held in Nixon v. Herndon, 273 U. S. 536, it was without power to do by direct enactment.

(d) In operation the statute is used as one of the instrumentalities, with the approval of the State of Texas, by which the plaintiff and all other qualified Negroes are deprived of their legal right to vote in the statutory primary election involved in this case.

2. The resolution is no defense to this action.

(a) Plaintiff had a legal right to vote in said election, and defendants' action in depriving him of that right was a legal wrong.

(b) The State of Texas could not by statute grant immunity to defendants from the consequences of that wrong and, a fortiori, the State Democratic Executive Committee, whether it be a creature of the State, or merely a body of private individuals, could not grant such immunity.

(c) The jurisdictional power of Federal Courts to grant relief in any case is not limited to the enforcement of Federal rights or to acts done either by State officers, or in the execution of State power.

3. The disfranchisement of plaintiff and other qualified Negroes disclosed by the record, violates the 15th Amendment because citizens of one race were guaranteed by law the right to vote in the statutory election involved in this case, while plaintiff and other qualified Negroes were not.

4. This Court should decide all of the questions involved in this case, especially those pertaining to the "inherent power" and "private individuals" arguments, in order to prevent a multiplicity of suits and to prevent undue

hardship upon plaintiff and all other qualified Negroes in Texas.

DETAILED ARGUMENT:

POINT I

The statute is unconstitutional because, on its face, it creates an arbitrary, unreasonable, and unfair classification, which denies to plaintiff the equal protection of the laws.

It provides:

> "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

The excepting provision "that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party" has been sustained by the Supreme Court of Texas as forbidding the exclusion of a person who neither had supported the Democratic Candidates in toto in the past nor would promise absolutely to do so in the future. Love v. Wilcox et al., —Tex.—, 28 S. W. (2nd) 515.

Likewise the power to exclude Negroes under the general power either conferred or recognized by the statute has been sustained by the Court of Civil Appeals of Texas, at Galveston, in a case in which it was the court of last resort.

White v. Lubbock et al.
—Tex—, 30 S. W. (2nd) 722

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, an anti-trust statute was held invalid under the equal

protection clause because it contained the excepting provision that it should "not apply to agricultural products or live stock while in the hands of the producer or raiser."

In the Connolly Case this court said at page 558:

> "But upon this general question we have said that that the guarantee of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.' Missouri v. Lewis, 101 U. S. 22, 31."

The denial of equal protection is clear.

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against a larger class." Truax v. Corrigan, 257 U. S. 312, 333.
>
> "The equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U. S. 356, 369.
>
> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."
>
> Southern Ry. Co. v. Greene
> 216 U. S. 400, 417.

What could be more unfair, arbitrary, unreasonable, and unjust than the exemption in this case which forbids the exclusion of disloyal white Democrats, while permitting the exclusion of Negro Democrats on the ground of race and color alone?

POINT II

The statute is unconstitutional because, as interpreted

by the state courts and the lower Federal courts, it recognizes an unconstitutional discrimination against plaintiff and all other qualified Negroes.

That the state law sought to be declared unconstitutional in this case does recognize and protect the power of the State Democratic Executive Committee to deprive Negroes of their legal rights upon the ground of color alone is clear. In the case of White v. Lubbock, —Tex.—, 30 S. W. (2nd) 722, it is held that the resolution involved in this case was a "valid exercise through its proper officers of such party's inherent power, (recognized, but not created by R. S. Article 3107) * * * " In that case the Court of Civil Appeals was the court of last resort in Texas.

In the instant case, the Circuit Court of Appeals held "The act of 1927 was not needed to confer such power, it merely recognized a power that already existed."

As to the power of the State of Texas, thus to recognize and protect the State Democratic Executive Committee in depriving Negroes of their legal right to vote in the Texas statutory primary the holding of Judge Groner in West v. Bliley, 33 Fed (2nd) 177, 180, which was adopted by the Circuit Court of Appeals for the Fourth Circuit in Bliley v. West, 42 Fed (2nd) 101, is pertinent:

> "That a law which recognizes or which authorizes a discrimatory test or standard does curtail and subvert them ("the provisions of the Constitution and the rights of voters") there can be no doubt, and such a law is therefore in conflict with the Fourteenth and Fifteenth Amendments to the Constitution of the United States."

POINT III

The purpose and intent of the Legislature in passing the statute was to accomplish by indirect action that which the Supreme Court of the United States had held in Nixon v.

Herndon, 273 U. S. 536, it was without power to do by direct enactment.

The statute was passed as an emergency measure, and the reason therefor is stated in Section 2 of the Act as follows:

> "The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted."

Judicial Knowledge

In the first place we mention the fact that the Supreme Court of the United States has held that a statute's or law's "invalidity may be shown by things which will be judicially noticed." Weaver v. Palmer Bros. Co., 270 U. S. 402, 410, but it has also been held that, unless these matters and things to be judicially noticed are called by counsel to the attention of the court, it will not notice them. "There are many things that courts would notice if brought before them that beforehand they do not know." Mr. Justice Holmes in Quong Wing v. Kirkendall, 223 U. S. 59, 64.

The Federal Courts will take judicial notice of the laws of every state. Mills v. Green, 159 U. S. 651; Lamar v. Micou, 114 U. S. 218.

The Federal Courts take judicial notice of those laws created by statute or judicial decisions. Faris v. Hope, 298 Fed 727; Kaye v. May, 296 Fed 450; Knower v. Haines, 31 Fed 513.

Federal Courts will take judicial notice of legislative journals. Connole v. Norfolk, etc., 216 Fed 823.

Federal Courts take judicial notice of historical facts.

Simpson v. United States, 252 U. S. 547; United States v. Wallace, 279 Fed 401; Ex Parte Davidson, 57 Fed 883. Texas cases to the same effect are: Blethen v. Bonner, 52 S. W. 571; Williams v. Castelman, 247 S. W. 263.

Federal Courts take judicial notice of matters of common knowledge. Muller v. Oregon, 208 U. S. 412; United States v. Sanders, 290 Fed 428. Texas cases to same effect are: State v. Meharg, 287 S. W. 670; M. K. T. Ry. v. McIlhaney, 129 S. W. 153; Rose Mfg. Co. v. Western Union Tel. Co., 251 S. W. 337.

Intent Shown By Emergency Clause

Prior to the decision in Nixon v. Herndon, supra, old Article 3107 of the Revised Civil Statutes of Texas read as follows, and contained no other provision:

"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 shall not count the same."

This old Article 3107 dealt with only one subject, namely, the exclusion of Negroes from voting in the Texas Democratic primaries.

The said case of Nixon v. Herndon dealt with only one subject, namely, the legal right of Negroes to vote in the Texas Democratic primaries and the validity under the 14th Amendment to the Constitution of the United States of said old Article 3107, which sought to deprive Negroes of that right.

Upon the decision by the Supreme Court in said case of Nixon v. Herndon that Negroes had a legal right to vote in the Texas Democratic primaries and that old Article 3107, which sought to deprive them of that right, was a violation

of the equal protection clause of the 14th Amendment to the Constitution of the United States, the 1st Called Session of the 40th Legislature of Texas passed new Article 3107, which is in controversy in this suit, stating in the face of the new Artcle 3107 that the reason for its prompt passage was that the Supreme Court of the United States had created, by the said case of Nixon v. Herndon, "an emergency and an imperative public necessity"; which, we believe, shows on its face that the intent of the Legislature was nothing more than to circumvent, if possible, the decision of the Supreme Court of the United States in the said case of Nixon v. Herndon, and, if our belief is well founded, said new Article 3107, under Quinn v. United States, 238 U. S. 347, is just as unconstitutional as if the intent to exclude Negroes had been in words stated on the face of the Article itself.

Intent Shown By Legislative Debate

The debate in the Texas House of Representatives upon the passage of said new Article 3107, which was House Bill No. 57, we believe, shows that the purpose of passing said Article was to circumvent, if possible, the decision of the Supreme Court of the United States in said case of Nixon v. Herndon.

The House Journal of the 1st called Session of the 40th Legislature of Texas shows the following:

At page 302, Representative Faulk said: "I voted against House Bill No. 57 because it confers too much authority on thirty-one members. I sought to amend the bill by providing that these thirty-one men shall never prescribe property holding as a qualification of voting. As passed, the act empowers the State Executive Committee to prescribe without limit the qualifications of a voter, and they have ample power under the act to say that a man must be a Methodist,

a Mason, and a millionaire. This savors of autocracy and I will not sanction it by my vote. I will support any reasonable bill to curb the negro vote."

On the same page, Representative Stout said: "I voted 'nay' on House Bill No. 57 for the following reasons:

"In the first place, it is doubtful if the bill will accomplish its purpose, in view of the recent holding of the Supreme Court of the Unted States.

"On the other hand, admitting for the sake of argument that it would do so, then I am not willing to turn my government over to a small number of men who compose the State Executive Committee.

"The South has always handled the 'nigger' in a satisfactory manner, and I believe that it will continue to do so.

"In my humble judgment, it is far more dangerous to entrust our whole political destiny to a few men than the scare of the negro question would ever be. It is a matter of common knowledge that we, the people of Texas, have always voted our prejudices too often in the past. I fear that the pendulum might swing too far one way or the other, and that the day might come back when a few clicks and klans might run out the unterrified Democrats, or that the unterrified Democrats might get in the saddle and oust the kluckers, as they came close to doing in the past.

"I believe the whole affair makes a mountain out of nothingness, and that it is un-American and un-Democratic. I had rather take my chances on handling the 'nigger' than I would on thirty-one men who would have final authority to determine who should vote and who should not vote, and who should be a Democrat or not be a Democrat.

"The Constitution of Texas prescribes the qualifications of a voter—about that there can be no doubt. The Supreme Court has held a 'nigger' can vote under the present primary law. About that there can be no doubt. If the

primary election is an 'election' in the proper and legal sense, then a 'nigger' can vote, and no law can stop him.

"If a primary is not an election, as our Texas courts have said in the past, the State Executive Committee would have the same blanket authority to judge the qualifications of its own members, as does the Baptist Church. It could ostracise a man at will and set up a standard to suit itself. In that respect and to that extent we would be going back to the days of crowns and jeweled baubles of Bolsheviki Russia.

"It was Abraham Lincoln who said, 'The heart of the American people has never failed in a great crisis, and it never will.' To that philosophy I conform, when the whole people have a chance to record their sentiments. But I am not willing to trust my government and politics to what could very easily become an oligarchy."

Intent Shown By Historical Facts

Senator Thomas B. Love, who was a member of the Texas Senate when said Article 3107 was passed, filed a brief, signed by himself, in the Supreme Court of Texas, in the case of Love v. Wilcox, 28 S. W. (2nd) 515, upon which the Supreme Court granted him relief in that case, in which he set out, in the following historical statement, the fact, that said new Article 3107 had "no other purpose whatsoever" than "to provide, if possible, other means by which negroes could be barred from participation, both as candidates and as voters, in the primary elections of the Democratic party, which would stand the test of the courts":

"HISTORY OF EFFORT TO BAR NEGROES FROM DEMOCRATIC PRIMARIES"

"Prior to 1903, there was no law in Texas regulating primary elections or party nominations, and such elections and nominations, and the control and regulations of all af-

fairs of political parties was vested entirely in party conventions and executive committees. In that year, 1903, the Texas Legislature, for the first time, provided for regulating party primary elections and conventions, and party affairs, by law, through the passage of the first Terrell Election Law, which completely divested party conventions and committees of the control theretofore exercised by them.

"From the beginning of election legislation, the questions of barring or admitting negroes in Democratic primary elections was an important one, some counties, through their representatives, desiring that negroes be allowed to vote in Democratic primaries, while others strenuously insisted that they should be barred by statewide law. The first Terrell election law relegated this subject to the party executive committees of the various counties by the following provision:

> 'The County Executive Committee of the party holding any primary election may prescribe additional qualifications necessary to participate therein;' (see Section 94, p. 150, Acts of the First Called Session, 28th Legislature, 1903.)

"When the Terrell Election Law was generally revised by the Twenty-ninth Legislature in 1905, this same provision was re-enacted in the following language:

> 'The Executive Committee of any party for any county may prescribe additional qualifications for voters in such primary not inconsistent with this Act.'

"This same provision, in the same words, was re-enacted in the codification of the Revised Statutes of 1911, (see Art. 3093, R. C. S. 1911) and remained in force until 1923.

"Thus, from 1903 until 1923, just twenty years, the election laws of Texas provided that all qualified voters should be qualified to vote in any party primary, upon taking the prescribed party test, and provided no other statewide quali-

fications whatever for primary election voters, but, in effect, enabled a political party in any county to bar negroes if it saw fit to do so by prescribing 'additional qualfications.'

"Original Enactment of Article 3107"

"The Second Called Session of the Texas Legislature, in 1923, enacted a Statute amending Art. 3093, R. C. S. 1911, designed specifically to bar Negroes from participating in primary elections of the Democratic party in every county in Texas, which afterward was codified as Art. 3107, R. C. S. of 1925, and which read as follows:

> 'Art. 3107: In no event shall a negro be eligible to participate in a Democratic 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 officers shall not count the same.'

"Article 3107 Held Unconstitutional"

"It was the obvious purpose of this enactment to bar negroes not only from voting, but from participating in any way, either as voters or as candidates, in Democratic primaries.

"This Statute passed in 1923 was declared to be unconstitutional and void by the Supreme Court of the United States, in 1927, in the case of Nixon v. Herndon, et al, Volume 47, Supreme Court Reporter, page 446.

"Article 3107 Amended in 1927 so as to Give the State Executive Committee Whatever Power It Now Possesses"

"The Fortieth Legislature in its First Called Session held in 1927, having in mind that, this Statute of 1923 had been invalidated by the Courts, and desiring to provide, if possible, other means by which negroes could be barred from participation, both as candidates and as voters, in the primary elections of the Democratic party, which would stand

the test of the Courts, and having no other purpose whatsoever, passed a statute amending said Article 3107 so as to read as follows:

> 'Art. 3107: Every political party in this State, through its State Executive Committee shall have the power to prescribe the qualifications of its own members, and shall in its own way, determine who shall be qualified to vote or otherwise participate in such political party; provided, that no person shall ever be denied the right to participate in a primary in this State because of former political views or affliations, or because of membership or non-membership in organizations other than the political party'."

We close this point with the following quotation from a decision by this Court:

> "What the State may not do directly, it may not do indirectly." Bailey v. Alabama 219 U. S. 219.

POINT IV

The statute is unconstitutional because in its operation, it is used as one of the instrumentalities by which, with the approval of the State of Texas, the plaintiff and all other qualified Negroes are deprived of their legal right to vote in the statutory primary election involved in this case.

> "Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (Henderson v. Mayor, 92 U. S. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid." Bailey v. Alabama, supra.

It is a matter of common and historical knowledge in Texas that, under this statute and its predecessors, nobody has been excluded from participation in the statutory primary elections except Negroes.

It is also a fact that this practice has been sustained by the Appellate Courts of Texas.

Love v. Wilcox et al, supra
White v. Lubbock et al, supra

In Clancy v. Clough, —Tex.— 30 S. W. (2nd) 569, the Court of Civil Appeals at Galveston held that the party committee was without power to place upon the statutory primary ballot "any pledge other than that prescribed by the statute or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute."

This Court has held that:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constituton." Yick Wo v. Hopkins, 118 U. S. 356.

POINT V

The resolution is no defense to this suit because plaintiff had a legal right to vote in said election, and defendants' action in depriving him of that legal right was a legal wrong.

This was determined by this Court in Nixon v. Herndon, 273 U. S. 536, and is conceded by the Circuit Court of Appeals in the instant case. On this point, the Court said:

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections." Nixon v. Condon, et al. 49 Fed (2nd) 1012, 1013.

POINT VI

The State of Texas could not by statute grant immunity to defendants from the consequences of that wrong (Nixon v. Herndon, supra), and, a fortiori, the State Democratic

Executive Committee, whether it be a creature of the State or merely a body of private individuals, has no power to grant such immunity.

If a creature of the State, Nixon v. Herndon, supra, definitely denies power to grant such immunity.

The Circuit Court of Appeals in this case based its decision upon these grounds:

> "The distinction between appellants' cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied the permission to vote in the former by state statute, and in the latter by resolution of the State Democratic Executive Committee."
>
> "A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed."

(a) The "private individuals" argument.

The following quotation from the opinion of this court in the Civil Rights Cases, 109 U. S. 3, is a conclusive answer to this argument:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindi-

cated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the Courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

(b) The "inherent power" argument.

An analysis of Nixon v. Herndon, supra, is a complete answer to this argument.

After this court had stricken down the state statute held unconstitutional in Nixon v. Herndon, supra, the defendants were left with the same power that they have in this case. The statute disposed of, if the defendants had "inherent power" beyond statutory control to exclude plaintiff, this Court would not have granted relief. The fact that this Court did not recognize any such power shows that none existed. Defendants in this case being identical in capacity with defendants in Nixon v. Herndon, they have no greater powers than were there recognized.

POINT VII

The jurisdictional power of Federal Courts to grant relief in any case is not limited to the enforcement of Federal rights or to acts done either by State officers or in the execution of state power.

This proposition has become almost axiomatic; and it is

settled that, once the jurisdiction of the Federal Court attaches, it has jurisdictional power to grant whatever relief, whether State or Federal, may be disclosed by the record.

Siles v. L. and N. Railway
213 U. S. 175, 191
L. and N. Ry. v. Garrett
231 U. S. 298, 304

The assumption by the lower courts in this case that they could not grant relief against the deprivation of the right, which the Circuit Court of Appeals said existed, simply because the deprivation was not by the State, is, therefore, clearly unfounded. Indeed, inquiry into the capacity of the defendants is immaterial, there being other grounds of jurisdiction than that they are state officers. That the defendants in this case are also identical in capacity with the defendants in Nixon v. Herndon, supra, would also seem to settle this matter.

POINT VIII

The disfranchisement of plaintiff and other qualified Negroes disclosed by the record violates the 15th Amendment, because citizens of one race were guaranteed by law the right to vote in the statutory election involved in this case, while plaintiff and other qualified Negroes were not.

That these are the facts is clear from the decisions of the Texas appellate courts in Love v. Wilcox and White v. Lubbock, supra, and from the facts within the judicial knowledge of this Court.

Construing the 15th Amendment, this Court has held:

> "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be."
>
> United States v. Reese
> 92 U. S. 214

POINT IX

This Court should decide all of the questions involved in this case, especially those pertaining to the "inherent power" and "private individuals" arguments, in order to prevent a multiplicity of suits and to prevent undue hardship upon plaintiff and all other qualified Negroes in Texas.

It took plaintiff about three years to get a decision from this Court in Nixon v. Herndon, supra, and it has taken him about an equal period to get this case before this court. The expense involved in getting cases before this Court is no easy thing for Negroes to raise, who, as a matter of common knowledge, are generally poor. The delay causes irreparable damage, in that more than one election goes by before a decision can be had.

The reluctance of the Texas State Courts and of the lower Federal Courts to go beyond the compelling literal language of this court in granting relief to Negroes from the deprivation of their franchise rights seems clear from a careful study of the cases deciding the question, all of which have uniformly denied relief. In addition to the cases already referred to, the following may be cited:

Grigsby v. Harris
27 Fed (2nd) 942
Wiley v. Weber, et al
No. 432 in Equity, U. S. Dist. Ct. at San Antonio.
Love v. The City Democratic Committee
No. 438 in Equity, U. S. Dist.
Ct. at Houston.

"I am not disturbed as to what the Supreme Court of the United States in the omnipotence of its judicial power may hold on the question in some future opinion, but I am not disposed to lead the way to a change in its present views upon this question by anticipating that they will be changed or modified in some future opinion."

Chief Justice Pleasants, Concurring in
White v. Lubbock, supra

It is clear, we submit, that, if this court merely strikes down the statute in this case, as it did in Nixon v. Herndon, supra, and does not say in specific words that relief is granted because neither defendants nor the State Democratic Executive Committee, whether viewed as state officers or private individuals, have "inherent power" to destroy the legal rights of plaintiff to vote in the statutory election here involved, then plaintiff and all other qualified Negro voters will be faced with these "private individuals" and "inherent power" arguments anew, and will be forced at great expense and delay, and with a multiplicity of suits, to try these questions out all over again.

We trust that this Court may see fit to so decide these questions as to prevent this undue hardship.

Conclusion

In State v. Meharg, 287 S. W. 670, a Texas Court of Civil Appeals said:

> "Indeed, it is a matter of common knowledge in this State that a Democratic primary election held in accordance with our statutes is virtually decisive of the question as to who shall be elected at the general election. In other words, barring certain exceptions, a primary election is equivalent to a general election."

Those to whom are entrusted legislative powers in the State of Texas, therefore, feel that they owe no allegiance or duty to the Negroes of the State, in that they have been effectively excluded from participation in the primary elections "held in accordance wth our statutes."

As typical of what the fruits are, we mention what attitude these legislators have taken toward providing educational opportunities for the Negro citizens of Texas. See Title 49, Chapters 1 to 9, inclusive, of the Texas Revised Civil Statutes.

Exclusively for the white youths of the State, the following educational institutions are provided:

1. A State University, which must and does have "the departments of a first-class university."
2. An Agricultural and Mechanical College "for instruction in agriculture, the mechanical arts, and the natural sciences connected therewith."
3. John Tarleton Agricultural College, which "shall rank as a Junior Agricultural College."
4. North Texas Junior Agricultural College.
5. College of Industrial Arts.
6. Texas Technological College.
7. School of Mines and Metallurgy.
8. Sam Houston State Teachers' College.
9. North Texas State Teachers' College.
10. Southwest Texas State Teachers' College.
11. Texas College of Arts and Industries.

For Negro youth, there is provided the Prairie View State Normal and Industrial College, and nothing more. In the words of the statute (Art. 2642), it is limited to a "four-year college course of classical and scientific studies." This is the typical attitude of legislators whose election may not be affected by the votes of the Negroes of the State, who constitute about one-sixth of the total population.

WHEREFORE, premises considered, we pray that this Honorable Court may here reverse the decisions of the Circuit Court of Appeals and the District Court.

Respectfully submitted,

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