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No. 3091

IN THE SUPREME COURT

OF THE

State of California,

ELLEN R. VAN VALKENBURG,

Plaintiff and Appellant,

VS.

ALBERT BROWN.

Defendant and Respondent.

Brief of Appellant.

ALBERT HAGAN, Attorney for Appellant.

[Sentinel print, Santa Cruz, Cal.]

IN THE

Supreme Court,

OF THE

STATE OF CALIFORNIA,

ON APPEAL

FROM THE

THIRD DISTRICT COURT,

IN AND FOR THE

County of Santa Cruz.

ELLEN R. VAN VALKENBURG

VS.

ALBERT BROWN.

This is an application for an order of Mandamus compelling the Defendant, as Clerk of Santa Cruz County, to enter the name of Plaintiff upon the Great Register of said County, in order that she be placed in a condition to exercise the right of voting. The Registry Act of the State of Califor-

nia is an act to *regulate* the *manner* in which *all* citizens must exercise the elective franchise, and Plaintiff, herein desiring to comply with this wise State regulation, demands to have her name enrolled among the qualified voters of the County wherein she resides.

The only question involved in this application, and one that the Court must meet, is, "Have women the right of suffrage under the Constitution of the United States?"

We do not wish or intend to argue the *policy* or *expedieney* of the measure, but ask the Court to meet the question in that fair, generous and liberal spirit with which the American Courts have so long been characterized, and which the dignity of the question demands. It is a question that involves the Constitutional rights of nearly one-half of the citizens of this Union, and the Plaintiff seeking, in her own State and her own native land, through the Courts of her country, a judicial determination of her rights, privileges and immunities, under the Constitution as it exists, knows and feels, with that pride peculiar to the American citizen, that an issue, fraught with such importance not only to herself but to all of her sex, will be met and decided by this Court upon principles of justice, of right and of law. In the past political history of this country there has been much discussion as to what constitutes citizenship of the United States, and the question has also called forth in times past a judicial determination. It is useless now to go back into the history of political parties or of judicial definitions, for we claim that the question

has now been definitely settled by the people of the United States, who have determined the same by the Fourteenth Amendment to the Constitution, which declares that—

"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 en- "force 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 his jurisdiction the equal "protection of the law."

The Court will observe that the evident intention of the Amendment was, and is, to prevent *any State* from controlling or abridging, by any unfriendly legislation, any *right*, *privilege* or *immunity* of any citizen of the United States. It goes further, for, by its terms, "all persons born or naturalized in "the United States, etc.," are declared not only to be "citizens of the United States," but also "of "the State wherein they reside." Then the dictum in the Dred Scott case, that there could be a "citizenship of the State" as distinguished from the "citizenship of the United States" ceases to be of any force in the face of the provisions of the Fourteenth Amendment. Nor does the amendment propose to confer *civil* rights alone to all citizens, as distinguished from *political* rights, for by its terms it disposes of *all* rights, privileges and immunities in the first clause, and then as if also protecting the citizen in all rights, it continues its

provisions as to the life, liberty or property of the citizen, and guaranteeing to each one "the equal "protection of the laws."

We submit that the highest, grandest and most potent *civil* right with which a citizen is invested is the *right to vote.* When mankind surrendered so many rules and laws of his natural life and liberty, and so far modified others, for the purpose of creating, moulding and establishing a civil liberty which would conduce to the benefit of society, it was an innate principle within him that he should have a voice in making the laws which governed such society, and of selecting the agents through whom these laws could be administered. It is the first, highest and dearest right of the governed to determine who shall govern, and the highest standard of civil liberty is attained when those who govern society feel and know that suffrage is one of the civil rights of the governed.

The office of the Fourteenth Amendment is not to simply secure to all persons equal capacities before the law, but in our opinion it grants to all persons who are citizens the broadest rights which attach themselves to every citizen of the Republic.

Live Stock Association

vs.

Crescent City. 1 *Abbott* 396.

In the case just referred to Justice Bradley says:

"The new prohibition that 'no State shall make "or enforce any law which shall abridge the privi- "leges or immunities of citizens of the United "States' is not identical with the clause in the "Constitution which declared that 'the citizens of

"each State shall be entitled to all the privileges "and immunities of citizens in the several States.' "It embraces much more. * * * * The "'privileges and immunities' secured by the orig- "inal Constitution were only such as each State "gave to its own citizens. * * * * But the "Fourteenth Amendment prohibits any State from "abridging the privileges or immunities of citizens "of the United States, whether its own citizens or "any others. It not merely requires equality of "privileges, but it demands that the privileges and "immunities of all citizens shall be absolutely un- "abridged and unimpaired. * * * * These "privileges cannot be invaded without sapping the "very foundation of Republican Government. A "Republican Government is not merely a govern- "ment of the people, but it is a free government. " . . . . It was very ably contended on the "part of the defendants that the Fourteenth "Amendment was intended only to secure to all "citizens equal capacities before the law. That "was at first our view of it. But it does not so "read. The language is, 'No State shall abridge "the privileges or immunities of citizens of the "United States.' What are the privileges and im- "munities of the citizens of the United States? "Are they capacities merely? Are they not also "rights?"

Suffrage is a fundamental right, one of the privileges of the citizen, by virtue of this citizenship in a free government. As soon as one is raised to the dignity of a citizen he can claim the right of suffrage, as one inherent in a Republic, and funda-

mental in its nature.

2 *Kent, sec.* 72, Abbott *vs.* Bayley;
6 *Pick.*, 42, Corfield *vs.* Correll.

California yet retains the word "white" in her organic law prescribing the qualifications of electors. Still the negro votes here by virtue of the Constitution of the United States. If the right of suffrage belongs to every citizen, by virtue of the organic law of the Union, then no State can prohibit any citizen from voting. It needs no prohibition in the Constitution of the United States to prevent States from disfranchising any citizen, for if once invested with the fundamental right to vote no State can destroy, no Legislature can abolish it. It has been often claimed that the Fifteenth Amendment by implication admits that the States have power to deny the right of suffrage to citizens. Our answer would be that the Fourteenth Amendment by its terms would at least *imply* that for the future *no privilege* of the citizen can be abridged. How much more powerful is the implication of the Fourteenth Amendment that *no State* shall abridge the right of suffrage, than the Fifteenth Amendment that only refers to a certain class of citizens and whose sole office is a "declaratory act" as to the rights of the negro? Permit us on this point to quote the language of the Minority Report of the Judiciary Committee of Congress, dated February 1st, 1871. Report No. 5, part 2.

"It is claimed by the majority of the Committee "that the adoption of the Fifteenth Amendment "was by necessary implication a declaration that

"the States had the power to deny the right of "suffrage to citizens for any other reasons than "those of race, color, or previous condition of ser- "vitude.

"We deny that the fundamental rights of the "American citizen can be taken away by 'implica- "tion.'

"There is no such law for the construction of "the Constitution of our country. The law is the "reverse—that the fundamental rights of citizens "are not to be taken away by implication, and a "constitutional provision for the protection of one "class can certainly not be used to destroy or im- "pair the same rights in another class.

"It is too violent a construction of an amend- "ment, which prohibits States from, or the United "States from, abridging the right of a citizen to "vote, by reason of race, color, or previous condition "of servitude, to say that by implication it conceded "to the States the power to deny that right for any "other reason. On that theory the States could "confine the right of suffrage to a small minority, "and make the State government aristocratic, "overthrowing their republican form.

"The fifteenth article of amendment to the "Constitution clearly recognizes the right to vote "as one of the rights of a citizen of the United "States. This is the language:

"'The right 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.'

"Here is stated, first, the existence of a *right*.

"Second, its nature. Whose right is it? The "right of citizens of the United States. What is "the right? The right to vote. And this right of "citizens of the United States, States are forbidden "to abridge. Can there be a more direct recogni-
210 "tion of a right? Can that be *abridged* which "does not *exist?* The denial of the power to "abridge the right, recognizes the existence of the "right. It is said that this right exists by virtue "of State citizenship, and State laws and Constitu-"tions. Mark the language: 'The right of citizens "of the *United States* to vote;' not citizens of *States.* "The right is recognized as existing independent "of State citizenship.

"But it may be said, if the States had no power
220 "to abridge the right of suffrage, why the necessity "of prohibiting them?

"There may not have been a necessity; it may "have been done through caution, and because the "peculiar condition of the colored citizens at that "time rendered it necessary to place their rights "beyond doubt or cavil.

"It is laid down as a rule of construction by "Judge Story that the natural import of a single "clause is not to be narrowed so as to exclude im-
230 "plied powers resulting from its character simply "because there is another clause which enumerates "certain powers which might otherwise be deemed "implied powers within its scope, for in such cases "we are not to assume that the affirmative specifi-"cation excludes all other implications. (2d Story "on Constitution, sec. 449.)"

In this connection we would most respectfully

recommend to the Court a perusal of the entire Report of the minority of the Judiciary Committee of Congress upon the interpretation to be given to the Fourteenth Amendment, signed by B. F. Butler and Wm. Loughbridge.

To say that the Fifteenth Amendment goes far to interpret the Fourteenth Amendment and to thereby grant or imply that the States may restrict the right of suffrage as to other than male citizens, is an admission that the Fourteenth Amendment by its terms does away with the right of the several States to any restriction over *the right* to vote. States may *regulate the manner* of voting, but cannot take away the *right* to vote, if the latter is conceded to be a fundamental right guaranteed by the Constitution of the United States.

In conclusion we would say that the oft-repeated argument that as political rights are still denied to woman citizens, notwithstanding the adoption of the Fourteenth Amendment, and as there seems to be a general acquiescence in such denial by both the States and the people, that the construction of the Constitution should be against this application. A Government may long be right in theory and wrong in practice. "General understanding" ought not to be allowed to deny any right that exists in law or by the Constitution. Slavery existed for long years in England by custom and general consent, but the Court of the King's Bench, in 1771, after a full hearing of the Sommersett case, decided that there was no law in England authorizing slavery, and the negro was discharged. It was then judicially declared and determined that no

slave could breathe upon the soil of England, although it was then in existence there under the law.

We submit our case to the careful and just determination of this Court feeling an abiding faith, that in any event, it will be as it has always been, in the Courts of this Union, that they are open to patiently hear and determine alike the petitions of the proudest and the humblest citizen in the land.

In conclusion, we respectfully claim that the petition of Plaintiff should be granted.

ALBERT HAGAN,
Attorney for Plaintiff.

State of California
County of Santa Cruz } ss

I hereby accept
service of the within Brief of Appellant
by getting a true Copy thereof — & waive
any other or further service of the same.
Santa Cruz Sept 26th 1871 —

Allen & Catlin
Atty for Defendant
Brown,