Wallace.

Ellen R. Van Valkenburg
v.
Albert Brown. } No 3091.

The plaintiff applied to the Court below for a writ of mandamus against the defendant who is the County Clerk of the County of Santa Cruz to compel him to inscribe her name in the Great Register and enroll her as a legal voter of said County. Judgment having been rendered refusing the writ she brings this appeal.

It appears that she is "a white female resident and citizen "of the United States and of the State of California over the age of "twenty-one years and for more than one year last past a resident "of Santa Cruz County" and was born within the limits and subject to the jurisdiction of the United States.

The Court below held that by reason of her sex she was disqualified to exercise the elective franchise and it is admitted that if her claim in that respect is to be determined alone by the Constitution and Laws of this State excluding as they do, persons of her sex from the exercise of the elective franchise the judgment below is correct and should be affirmed here.

But it is claimed that she is entitled to registration as a voter by reason of the first section of the recent amendment to the Federal Constitution of July 20. 1868 known as the fourteenth amendment. That Section is in the following words:

"Art 14. §.1. 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."

It is claimed that the plaintiff is a citizen of the United States and of this State. Undoubtedly she is. It is argued that she became such by force of the first Section of the

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fourteenth amendment already recited. This however is a mistake— it could as well be claimed that she became free by the effect of the thirteenth amendment by which slavery was abolished for she was no less a citizen than she was free before the adoption of either of these amendments. No white person born within the limits of the United States and subject to their jurisdiction, or born without those limits and subsequently naturalized under their laws owes the Status of citizenship to the recent amendments to the Federal Constitution. The history and aim of the fourteenth amendment is well known and the purpose had in view in its adoption well understood. That purpose was to confer the Status of citizenship upon a numerous class of persons domiciled within the limits of the United States who could not be brought within the operation of the naturalization laws because native born and whose birth, though native, had at the same time left them without the Status of citizenship. These persons were not white persons but were, in the main, persons of African descent who had been held in slavery in this Country, or if having themselves never been held in slavery were the native born descendants of slaves. Prior to the adoption of the fourteenth Amendment it was settled that neither slaves, nor those who had been such, nor the descendants of these, though native and free-born, were capable of becoming citizens of the United States. (Dred Scott v Sanford 19 How. p. 393) The thirteenth Amendment though conferring the boon of freedom upon native born persons of African blood had yet left them under an insuperable bar as to citizenship and it was mainly to remedy this condition that the fourteenth amendment was adopted.

This is recent history familiar to all.

2., It is next claimed that by whatever means the plaintiff became a citizen of the United States, her privileges and immunities as such citizen cannot be abridged by State laws—

and this is true. The purpose and the effect of the amendment, in this respect, is to place the privileges and immunities of citizens of the United States beyond the operation of State legislation. Those immunities and privileges, whatever they may be, are guaranteed and protected in every State by this Clause in the Federal Constitution.

3., It is argued that among these privileges and immunities is included the privilege of the plaintiff to exercise the elective franchise within the limits of this State Even in disregard of the Constitution and Laws of the State which unquestionably exclude persons of her sex. And this brings us to enquire what is meant by the phrase "privileges or "immunities of Citizens of the United States" as used in this amendment?

This phraseology was known in our history anterior to the formation of the present Federal Union. In the articles of Confederation between the American States it was provided "that the free inhabitants of each of these States (paupers, vagabonds "and fugitives from justice Excepted) shall be entitled to all "privileges and immunities of free citizens of the several States "and the People of each State shall, in every other, enjoy all "the privileges of trade and commerce subject to the same "duties, impositions, and restrictions as the inhabitants "thereof respectively etc. (Art. 4). The term "privileges "and immunities" was therefore not a new one when in the second section of the fourth Article of the Federal Constitution as originally ratified it was declared that "the Citizens "of each State shall be entitled to all privileges and immu- "nities of citizens in the several States". The words "privileges and immunities" had at that time acquired a distinctive meaning and a well known signification. They comprehended the enjoyment of life and liberty and the right to acquire and possess property and to demand and receive the protection of the Government in and of these. They included the right to sue

and defend in the Courts, to have the benefit of the writ of habeas corpus and an exemption from higher taxes or heavier impositions than were to be borne by other persons under like conditions and circumstances.

The Federal Constitution went into operation in March 1789 and within a few years thereafter – in 1797 – a question came before the General Court in Maryland in respect to the meaning of the words "privileges and immunities" as thus employed in that Instrument. The question was argued by the most Eminent Counsel in the State and among them was the celebrated Luther Martin then Attorney General. Upon this point the Court said: "Privilege "and immunity are synonymous, or nearly so. Privilege signifies a pe- "culiar advantage, exemption, immunity: immunity signifies exemp- "tion, privilege. The peculiar advantages and exemptions contemplated "under this part of the Constitution may be ascertained if not with pre- "cision and accuracy, yet satisfactorily. By taking a retrospective "view of our situation antecedent to the formation of the first "General Government or the Confederation in which the same "clause is used verbatim, one of the great objects must occur "to every person which was the Enabling of the Citizens of the "several States to acquire and hold real property in any of the "States, and deemed necessary as each State was a Sovereign "and independent State and the States had confederated only "for the purposes of general defense and security and to "promote the general welfare. It seems agreed from the "manner of expounding or defining the words 'immunities and "privileges' by the Counsel on both sides that a particular and "limited operation is to be given to these words and not a "full and comprehensive one. It is agreed it does not mean "the right of election, the right of holding Office, the right of "being elected. The Court are of opinion it means that the "citizens of all the States shall have the peculiar advantage

of acquiring and holding real as well as personal property and "that such property shall be protected and secured by the laws of the State "in the same manner as the property of the citizens of the State is pro- "tected" etc. (Campbell v Morris 3. Harr. & McH. 554.)

The expression "privileges and immunities" had been found in the Constitution for a period of near eighty years prior to the adoption of the fourteenth amendment and had never been supposed to include the right to the exercise of the elective franchise. Notwithstanding the citizens of each State were during all that time entitled to all the privileges and immunities of citizens in the several states it was never supposed that the citizen of any State might, upon his removal into any other State, lawfully claim to vote there because he had exercised that privilege in the State from which he had just emigrated.

In point of fact the States have generally conferred the privilege of the elective franchise upon such of their male inhabitants as had become citizens of the United States, if of the requisite age etc. This circumstance has given rise to a notion in some quarters that the privilege of voting and the status of citizenship are mistakenly connected in some way - so that the existence of the one argues that of the other. But the history of the Country shows that there was never any foundation for such a view. Thus citizens of the United States resident in the State of Virginia were prevented by State Law from voting there unless seized of a freehold estate and citizens of the United States resident in Massachusetts were by the laws of that State denied the privileges of the elective franchise unless owners of personal property to a designated amount. While the privilege of voting was thus by State Laws withheld in those States from persons who were citizens of the United States,

the elective franchise was in other States of the Union conferred by State laws upon persons who were not citizens. In New York and North Carolina for instance at an early day the privilege of voting was conferred upon negroes, persons of African descent, under certain conditions — these were not citizens of the United States nor then even capable of becoming such. In Wisconsin and Michigan though negroes were excluded persons of the Indian blood were admitted, and in Indiana, Illinois, Minnesota and other States unnaturalized foreigners were by State laws allowed to vote — following in this respect the early policy of the Federal Government who in the Ordinance of 1787 for the Government of the North Western Territory had permitted the elective franchise to the unnaturalized French and Canadians of whom the population of that territory was then largely composed. It will be found that from the earliest periods of our history the State laws regulated the privilege of the elective franchise within their respective limits and that these laws were exactly such as local interests, peculiar conditions, or supposed policy dictated and that it was never supposed that the exclusion of any class of inhabitants from the privilege of voting amounted to an interference with the privileges of the excluded class as citizens. As was well said by Judge Mills of the Court of Appeals of Kentucky:—

"The mistake on the subject arises from not attending to a sensible
"distinction between political and civil rights. The latter con-
"stitute the citizen while the former are not necessary ingre-
"dients. A State may deny all her political rights to an in-
"dividual and yet he may be a citizen. The rights of office
"and suffrage are political purely and are denied by some or
"all the States to part of their population who are still citizens.
"A citizen then is one who owes the government allegiance, service,
"and money by way of taxation and to whom the Government in
"turn grants and guarantees liberty of person and of conscience,
"the right of acquiring and possessing property, of marriage

"and the social relations, of suit and defense, and security in person
"estate and reputation. These with some others which might be enu-
"merated being guaranteed and secured by Government, constitute
"a citizen. To aliens we extend these privileges by Courtesy: to
"others we secure them, to male as well as female, to the infant
"as well as the person of hoary hairs." (1. Litt. R. 342.)

4. But the language of the second Section of the fourteenth amend-ment itself demonstrates that the elective franchise is not one of the "privileges or immunities" mentioned in the first Section and as such not to be abridged or taken away by State laws.

The second section of the amendment (so far as material upon this point) is in the following words:

"S. 2. Representatives shall be ~~appointed~~ apportioned among the several
"States according to their respective numbers. But when the right
"to vote x x x is denied to any of the male inhabitants of such
"State being twenty-one years of age and citizens of the United
"States x x x the basis of representation ~~therein~~ therein, shall be reduced
"x x x" etc.

It will thus be seen that by this second section of the fourteenth amendment it is ~~xxxxx~~ expressly provided that if the State law shall deny the elective franchise to the citizens of the United States therein mentioned, the basis of federal representation to which such State would otherwise be entitled shall be thereupon and in consequence of such denial readjusted and reduced in a designated ratio. If the power of the State to deny the franchise to a citizen of the United States has been absolutely taken away by the first section then a State law enacted for that purpose would necessarily be absolutely void — as a bill of attainder passed, or ex post facto law enacted, would be void as being in contravention of the inhibitions of Art. 1. S. 10. of the Federal Constitution. But by the second section of the amendment under consideration it is provided

that the action of the State authority denying the right of citizens of the United States to vote, so far from being null and void, shall furnish a new basis of federal numbers in the State upon which a new apportionment of representation in Congress is to follow. It is inconceivable that such constitutional consequences are to follow the doing of an act which the constitution had just forbidden to be done at all.

5 It, The fifteenth amendment to the Constitution was adopted nearly two years after the fourteenth. It provides that the right of a citizen of the United States to vote shall not be denied on account of race, color, or previous condition of servitude. If under the fourteenth amendment already adopted the right of a citizen to vote was not to be denied upon any ground whatsoever what necessity or propriety in this subsequently providing that it should not be denied upon either of three enumerated grounds? It will be seen that the construction claimed for the fourteenth amendment by the Counsel for the plaintiff would leave nothing for the fifteenth to operate upon.

Many other, and hardly less cogent, reasons might be mentioned going to shew that the Elective franchise is not one of the immunities or privileges intended in the first section of the fourteenth amendment. The mere power of the State to determine the class of inhabitants who may vote within her limits was not curtailed in the fourteenth amendment.

The fifteenth amendment took away her authority to discriminate against Citizens of the United States on account of either race, color or previous condition of servitude – but the power of exclusion upon all other grounds – including that of sex – remains intact.

Judgment affirmed

Wallace J.

We concur

Miles J.

Crockett J.

Rhodes J.