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many other states maintain that the remedies are based on radically inconsistent theories of law and of the relation of the facts and that hence the seller must elect which right he will exercise.⁶⁶ Unfortunately there is hopeless conflict as to what is a binding election.⁶⁷ Missouri seems to have adopted the more liberal, and probably better, rule that the mere bringing of an action on which the seller was forced to take a nonsuit is not an election.⁶⁸ It is possible that even where there is not a binding election the seller may be estopped from asserting some of his rights.

Although the present Missouri law on the remedies of the conditional vendor seems to be largely satisfactory, certain statutory changes would be wise. The Statute as to retaking should be amended so as to apply to retakings from a person claiming under the vendee as well as from the vendee and so as to allow a reasonable deduction for obsolescence of the goods as well as for their actual depreciation. The seller should probably be allowed to continue to sue in equity to foreclose a lien, but the greatest care should be used in the appointment of receivers, and they should not be appointed merely because the property is subject to greater depreciation and obsolescence while being used than if it were stored. If this were done, the Missouri law would be far superior to the more cumbersome system set up by the Uniform Conditional Sales Act with its periods of redemption and forced resales.

GEORGE W. SIMPKINS, '33.

POLITICAL DISCRIMINATION BY PARTY CONTROL OVER PRIMARY ELECTIONS—*Nixon v. Condon*

The Fifteenth Amendment provides:

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.

⁶⁶ *Twentieth Century Machinery Co. v. Excelsior Springs Bottling Co.* (Mo. App. 1914) 171 S. W. 940. Good case comment in (1915) 7 Mo. L. BULL. 44.

⁶⁷ Cf. A. L. R. notes cited in n. 65.

⁶⁸ *Twentieth Century Machinery Co. v. Excelsior Springs Bottling Co.*, above. Sec. 24 of the Uniform Conditional Sales Act provides: "Neither the bringing of an action by the seller for the recovery of the whole or any part of the purchase price, nor the recovery of a judgment in such action, nor the collection of a portion of the price shall be deemed inconsistent with a later retaking of the goods . . . But such right of retaking shall not be exercised after he has collected the entire price, or after he has claimed a lien on the good, or attached them, or levied upon them as the goods of the buyer."

The Fourteenth Amendment contains the following provision:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

These Amendments were passed for the purpose of guaranteeing to the newly emancipated negro race equality of rights, certainly so far as political matters were concerned; it was realized that the former masters would not be satisfied to permit the newly emancipated slaves to have equal voice in the control of the government. To guard against any possible discrimination against the negroes, the people incorporated their will into the Constitution.

No sooner had these Amendments been passed than the white people in the South began to devise methods to evade the prescriptions of the Amendments. Statutes requiring literacy tests for voters were passed in many states. But such tests are required also by many Northern states,¹ and there is nothing unconstitutional or even undesirable in these tests. That very few of the slaves or their children were literate was no ground for attacking such a law, even though this fact may have been a reason that prompted the Southern legislatures to enact a measure requiring such a test.

Another device used widely by the Southern states from an early date is that of requiring the payment of poll taxes.² Failure of the officials of a state to collect this tax from white people does not render the taxing law itself discriminatory, since the tax is assessed equally against every person, whether white or black. The action of the administrative official may be attacked, but not the law under which he acts.³

Mississippi devised the so-called "good understanding" clause. Under this provision a voter must be able to read any part of the state constitution or show that he has a good understanding of it when read to him. Such a statute was attacked in the case of *Williams v. Mississippi*⁴ on the ground that too broad a discretion was delegated to the administrative officials, who were to be the judges of whether the voter read or understood the constitution satisfactorily, and also on the ground that the very purpose in passing this constitutional provision was to enable the election

¹ Magruder, *AMERICAN GOVERNMENT* (rev. ed. 1926) 407; Ogg & Ray, *INTRODUCTION TO AMERICAN GOVERNMENT* (4th ed. 1931) 189; Munro, *THE GOVERNMENT OF THE UNITED STATES* (3rd ed. 1931) 136.

² Ogg & Ray, *op. cit.* 189; Munro, *op. cit.* 138; Kimball, *STATE AND MUNICIPAL GOVERNMENT IN THE UNITED STATES* (1922) 42. For examples see: Const. Ala. 1901, Sec. 194; Const. Miss. 1890, Sec. 244; Const. Va. 1902, Sec. 38.

³ *Williams v. Mississippi* (1897) 170 U. S. 212.

⁴ *Ibid.*

officials to discriminate against the negroes. The Supreme Court decided that the clause did not delegate too broad a discretion to an administrative official, and added that so long as a law is not itself an unconstitutional delegation of authority, it does not become unconstitutional simply because the officials acting under its authority can and do administer it arbitrarily and in a discriminatory way. As to this latter proposition of law the Court no doubt was correct.

In 1915 the Supreme Court came to consider the famous "grandfather clause." Many of the white people in the South did not feel satisfied that white voters should be disqualified because of illiteracy; clauses were then enacted providing that any person who was eligible to vote in this country or under any other government before 1866 and any descendant of any such person shall not be required to pass the literacy test. On behalf of its constitutionality it was vigorously contended that the provision did not violate the Fifteenth Amendment because it did not disqualify any person from voting because of race, color or previous servitude; the qualification demanded of all voters, regardless of race, was that they pass a literacy test, or in the alternative, show that they or their ancestors were qualified voters on a certain date. The Supreme Court, however, brushed aside this syllogistic argument with the answer that as a practical matter the purpose and effect of the clause was to prevent a large number of people from voting because of their color and therefore was contrary to the spirit of the Fifteenth Amendment.⁵

Such was the status of the law until Texas, in 1923, passed an act providing that no negroes shall be allowed to vote in a Democratic primary. A negro, being refused the right to vote by reason of this statute, contested its constitutionality. The Federal District Court held that since a primary is different from an election the law was constitutional.⁶ This case was considered authority for the point⁷ until the same statute was again attacked nearly two years later in *Nixon v. Herndon*. The same District Court again held the statute constitutional. But the Supreme Court, in an opinion written by Justice Holmes, said that it was not necessary to consider whether the law violated the Fifteenth Amendment because it was clearly in conflict with the equal protection clause of the Fourteenth Amendment.⁸

A very similar situation arose in Virginia. There the Assembly, instead of directly forbidding negroes from voting in the

⁵ *Guinn and Beal v. United States* (1915) 238 U. S. 347.

⁶ *Chandler v. Neff* (D. C. W. D. Tex. 1924) 298 F. 515.

⁷ See Black, *AMERICAN CONSTITUTIONAL LAW* (4th ed. 1927) 643.

⁸ *Nixon v. Herndon* (1926) 273 U. S. 536.

Democratic primary, passed an act, in 1924, providing that each party was to determine the qualifications of its own members. Thereupon the executive committee of the Democratic party passed a resolution that no negroes might be a member of its party so as to participate as such in the primaries. The Federal District Court in *West v. Biley*⁹ held this unconstitutional, saying that the State could not do indirectly what it could not do directly. It pointed out that the State had regulated primaries extensively and paid for them, and since primary elections had so far become identified as an activity or function of the state, it could not permit a political party to do anything in the conduct of a primary which the State itself could not do directly under the Federal Constitution. The Court observed that even though the laws of Virginia did not require a political party to nominate its candidates by the direct primary, yet if it chose to use this method, the conduct of a primary had become so far regulated and controlled by the State that any discrimination in allowing people to vote must be looked upon more as the act of the State than as the private affair of a voluntary association. The Circuit Court of Appeals affirmed the decision, approving the reasons advanced, and added, "If all the political parties in the state of Virginia incorporated the same qualifications in their rules and regulations as did the Democratic party, nobody could participate in the primary, except white persons, and other races would thereby be deprived of a material right guaranteed to them under the Constitution as amended, that is, the right to participate in the selection of candidates to be voted for in the election."¹⁰

The earlier decision of the Supreme Court in *Nixon v. Herndon* had been unfavorably received by the people of Texas. The Legislature immediately repealed the law which had been held unconstitutional and passed a new act similar to the Virginia statute above. Then, just as in Virginia, the Democratic state executive committee passed a resolution to the effect that no negroes were to vote in the Democratic primary. This statute and the action of the Democratic party were held not to violate the Federal Constitution by the District Court for the Western District of Texas in the case of *Nixon v. Condon*.¹¹ This Court, it will be recalled, was the same Court that sustained the statute which the Supreme Court held to be unconstitutional in *Nixon v. Herndon*. The *Condon* case was appealed to the Circuit Court of Appeals, Fifth Circuit. Appellant called the court's attention to the prior case of *West v. Biley* decided by the Virginia

⁹ *West v. Biley* (D. C. E. D. Va. 1929) 33 F. (2d) 177.

¹⁰ *West v. Biley* (C. C. A. 4, 1930) 42 F. (2d) 101.

¹¹ *Nixon v. Condon* (D. C. W. D. Tex. 1929) 34 F. (2d) 464.

District Court and affirmed by the Circuit Court of Appeals, Fourth Circuit. The court attempted to distinguish this case from that one decided by the Fourth Circuit Court on the ground that in Virginia the expense of conducting primaries is paid by the State and not by parties, as in Texas, and affirmed the decision below.¹² The case on which the Court based its distinction was the Texas decision of *Waples v. Marrast*¹³ holding that a statute providing for payment for primaries by the State was unconstitutional as a tax imposed for a non-public purpose. The expense of holding a primary is generally paid by the states, not by the parties,¹⁴ and this Texas decision was out of line with the decided weight of authority to the effect that the conduct of a primary is so much a public task or quasi-public task that such an expenditure by the commonwealth is proper.¹⁵ The result reached in the *Waples* case was not only out of line with that reached in other jurisdictions but seems to be inconsistent with the general attitude of that State toward political parties and primaries. The State of Texas has taken over the control of primaries to the extent of requiring all parties having polled over one hundred thousand votes in the last previous election to nominate by primary,¹⁶ and of prescribing the time¹⁷ and place¹⁸ of holding them, as well as the type of ballot to be used.¹⁹ The State also dictates what the organic structure of parties shall be; and such regulation has been approved by the courts of that State.²⁰ So the two cases can hardly be distinguished on the ground that now in Texas, as a result of the *Waples* case, primaries are paid for by the political parties rather than by the State, as is done in Virginia and generally in other states. The proposition on which the Circuit Court of Appeals passing on this *Nixon* case has based its decision is that a political party is a voluntary association, not in any respect a governmental agency, and therefore its action in prescribing the qualifications for voters at primaries cannot come under the ban of the Fourteenth and Fifteenth Amendments. The realistic answer of the Virginia District Court and the Fourth Circuit Court of Appeals is that since states have so far taken over primaries in regulat-

¹² *Nixon v. Condon* (C. C. A. 5, 1930) 49 F. (2d) 1012.

¹³ (1916) 108 Tex. 5, 184 S. W. 180.

¹⁴ *Ogg & Ray, op. cit.* 850; Beard, AMERICAN GOVERNMENT AND POLITICS (6th ed. 1931) 545; *Kimball, op. cit.* 66.

¹⁵ *State v. Felton* (1908) 77 Ohio St. 554, 84 N. E. 85; *State v. Michel* (1908) 121 La. 374, 46 So. 430.

¹⁶ *Tex. Rev. Civ. Stat.* (1925) art. 3101.

¹⁷ *Tex. Rev. Civ. Stat.* (1925) art. 3102.

¹⁸ *Tex. Rev. Civ. Stat.* (1925) art. 3103.

¹⁹ *Tex. Rev. Civ. Stat.* (1925) art. 3109.

²⁰ *Briscoe v. Boyle* (Tex. Civ. App. 1926) 286 S. W. 275.

ing them in various aspects, the primary has become assimilated to a function of the state and the state may not permit a political party under its supervision to discriminate improperly to effectuate a result indirectly which it could not reach directly. That the statement of the court in the Virginia case, that the plan was an attempt to do indirectly what could not be done directly, is true is easily shown by the fact that this plan was devised in Texas as soon as the Supreme Court had held the statute directly disqualifying negroes void. Should the distinction perceived by the Circuit Court which decided the Texas case between the situation of a state in which primaries are paid for by parties and one in which the expense is borne by the state be considered a true one, it would be a simple matter for those Southern states whose desire of disfranchising the negro is great enough, to pass laws that primaries shall be paid for by the political parties, and then effectuate the disqualification of negroes by action of the party committees. In many Southern states where nomination on the Democratic ticket practically means election, at least so far as state offices are concerned, the undeniable result would be a disfranchisement of millions of people because of their color.

That the action of a political party in disqualifying a person as a voter at a primary election because of his color falls directly within the prohibitions of the Fifteenth Amendment and the "equal protection" clause of the Fourteenth Amendment is a view supported by sound legal basis cannot be doubted. The main reasons advanced by the Texas District Court and the Fifth Circuit Court of Appeals, which affirmed the judgment, resolve themselves into two main arguments, one applicable to both the Fourteenth and Fifteenth Amendments, and the other to the Fifteenth Amendment alone.

The only theory on which it is contended that the Fourteenth Amendment as well as the Fifteenth is not violated is that both Amendments enjoin action by a state, while a political party is for all purposes simply a voluntary association, an entirely non-governmental agency. To illustrate the fallacy of this, it is necessary only to refer to a simple illustration. If an association organized, let us say, for the betterment of child welfare should refuse a person membership because he is a negro, the state is not concerned. On the other hand, if judges in a primary election refuse to let a person vote, that is a matter of a governmental nature. The opinion of the Court in the *Condon* case drew a sharp line and placed the state and its directly governmental agencies on one side and all other bodies, agencies or individuals on the other; and the distinction is preserved regardless of the nature or function of the latter. To dispose of the problem by describing the political party as a "voluntary asso-

ciation" is no more than a statement of the result reached; legal dogma is asserted, not to promote the intended result of the Amendments, but to defeat their aim. In any event, to meet the legal dogma, it may be asserted that a political party is not an ordinary voluntary association removed from the sphere of state action. It would be more accurate to describe it as a quasi-governmental agency, though in a number of respects it has the attributes of a voluntary association. Though in its organization and choice of views it is relatively unrestricted and free in its action, yet when it undertakes the control of the primary election its action becomes of the utmost public significance as a device of representative government. Ultimately there is little difference between the function of the direct primary election and that performed by the secondary or final election, except as to proximity to the result. Both are regulated to about the same extent, indicating at least a tacit acceptance of the primary as a substantial governmental institution. At the present time primaries are controlled by the states in regard to the limit of campaign expenses, the type of ballot used, voters' qualifications, the time and place for holding such primary elections, and in other respects.²¹ They are generally held at the expense of the government, as would have been the case in Texas except for the questionable decision by the Texas court that this was a tax levied for a non-public purpose. It may be said fairly that primary elections are now conducted by the state in virtually the same manner as final elections, and any part that the political party may play in them may be considered a governmental function. This view is strengthened by the fact that today the political party is regulated by the state in regard to its organization or make-up, its activities in campaigns, the amount of money it spends and in other matters to the most minute degree.²² In a recent text on political parties²³ a compilation of the cases by the authors indicated a tendency of the courts in the early cases to look dubiously upon the supervisory regulation of parties attempted by the legislatures, because of the courts' concept of a political party as a private voluntary association. But the tendency was soon reversed toward a liberal view point in the later cases, until in the past few years, practically every kind of regulation of the most supervisory character has been sustained.²⁴ No better statement can be found describing the

²¹ Ogg & Ray, *op. cit.* 850; Beard, *op. cit.* 541, 543-549; Merriam & Gosnell, *THE AMERICAN PARTY SYSTEM* (rev. ed. 1929) 244-245.

²² Ogg & Ray, *op. cit.* 853-4; Beard, *op. cit.* 538-543; Merriam & Gosnell, *op. cit.* 244.

²³ Merriam & Gosnell, *op. cit.*

²⁴ *Ibid.* 266-270.

present attitude of the courts toward political parties, at least in regard to their activity in primary elections, than in the following conclusion of the authors:

The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency, subject to legal regulation and control.²⁵

But the acts complained of in this *Nixon* case seem to violate not only the Fourteenth Amendment, but the Fifteenth as well. To avoid the proscription of the Fifteenth Amendment, the District Court advanced, in addition to the proposition that a party is a voluntary association, the further argument that the Fifteenth Amendment guarantees the right to vote at a final election, not at a primary election. It rested this argument primarily on the case of *Newberry v. United States*.²⁶ In that case Congress, under the authority conferred on it by Article 1 Section 4, of the Constitution, dealing with elections to Congress, passed a law regulating primaries. Although the effect of the decision was to exclude the primary from an "election" yet this proposition of law was never asserted by a majority of the Supreme Court. Four justices based their decision on this point, while four dissented; the ninth, while concurring in the result in the particular case, never concurred in this principle of law announced by the other four majority judges. However, even if a majority had concurred in this view, construction of the Fifteenth Amendment would not be free from doubt. The language of the constitutional provision then under consideration was, "The Times, Places and Manner of holding Elections for Senators and Representatives . . ." The Fifteenth Amendment provides, "The right of citizens of the United States to *vote*²⁷ shall not be denied or abridged . . ." The argument that the word "vote" means the right to vote at final elections only must rest on the argument that the right to vote guaranteed by this Amendment was the right to vote as it then existed, there being no primaries at that time. But if this were true, a negro could not claim that the Fifteenth Amendment guarantees to him the right to vote for a United States Senator, because at the time when the Fifteenth Amendment was passed United States Senators were elected by the state legislatures, not by vote of the

²⁵ *Ibid.* 269. "Primary election statutes are based on a recognition of political parties as governmental agencies . . ." *Baer v. Gore* (1916) 79 W. Va. 50, at 58, 90 S. E. 530, at 533. See also: *Ogg & Ray, op. cit.* 853; *Kimball, op. cit.* 46-47.

²⁶ (1921) 256 U. S. 232.

²⁷ *Writer's italics.*

people. To say that the framers of the Fifteenth Amendment intended to guarantee the right to vote only in final elections is just as much a matter of conjecture as to say that they intended to protect the right to vote in primary elections as well as final elections. At the time that the Amendment was ratified the only election by the people was the general election. As the population grew and the number of officials to be chosen by the voters increased, the election machinery changed by necessity to consist of two steps, the first, a primary election in which the minor candidates are eliminated, and the second a final elimination or election between the major candidates. In many states nomination on the Democratic ticket means practically election. In other states the same is true of nomination on the Republican ticket. The framers of the Amendment used as broad and general terms as were possible. It does not seem probable that it was their intention that the right of a negro to participate in the actual election of public officials should be restricted by the unforeseen development in the later elective process.

Certiorari has been granted in this case by the Supreme Court. In view of the foregoing consideration, it is by no means certain that the decision will be affirmed.

JOSEPH FEIGENBAUM, '32.

Smyth v. Ames IN THE SUPREME COURT

The rugged and to a great extent the ruthless individualism of this country received a decided shock by the opinion of the Supreme Court in *Munn v. Illinois*,¹ upholding the right of the state legislature to regulate the rates of a company whose business was such as to be affected with a public interest. The legislature of Illinois prescribed the maximum rates which certain grain elevator companies could charge. In addition to the attack on the validity of state regulation, the company attacked the constitutionality of the rate, insisting, among other things, that it was the duty of the Supreme Court to decide whether the prescribed rates would amount to a taking of property without due process of law. To this the court answered:

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law rule prevails, it has been customary from time immemorial for the legisla-

¹ (1876) 94 U. S. 113.