No. 531.

Brief of Jones for P. C. on Pet.n for rehearing.

Distributed May 17, 1897.

IN THE

Supreme Court of the United States,

APPLICATION FOR REHEARING

IN THE CASE OF

HENRY WILLIAMS

No. 531. VS.

THE STATE OF MISSISSIPPI.

Brief of Plaintiff in Error.

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HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

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Plaintiff informs the Court, that under the laws of Mississippi, no person is eligible to jury service unless he is duly registered. The Supreme Court of Mississippi (unintentionally), did the accused a striking injustice in the rendition of the opinion, by stating a certain matter as charged in the motion to quash the indictment, which (we beg leave to say) is not charged; and the statement that it is charged, materially changes plaintiff's position in the principles contended for: (page 41 Rec.—first sentence) (page 41 of Record). "He" (plaintiff) "did not intend to charge by the motion, that the officers by whom the grand jury was selected violated the law, but that they were by the law, under which they acted, required to select jurors from certain lists furnished them by the officers charged with the duty of holding elections in the State, and that these election officers in making such lists discriminated against the race of appellant. In this view the motion was properly denied, for the reason that jurors are not selected from or with reference to any list furnished by such election officers."

This Court will see, that from the opinion of the State Court, the judgment of affirmance is based upon only one fact; that is, that the motion to quash was properly overruled upon what the Court said; "In this view the motion was properly denied." We are free to admit that no such law exists, and plaintiff states, with the greatest consideration for our Honorable State Supreme Court, that no such charge is apparent upon plaintiff's motion to quash the indictment. The State Court was misled in this assertion, the plaintiff's position was mistaken, and this being "the view" taken by the State Court, influenced it to affirm the judgment of the trial court. It is seen from the language of this Court (on page 7 of the opinion), that the same misapprehension prevailed with this Court at the former consideration of this case. The State Court erred in its conception of the allegation of plaintiff's motion to quash the indictment, and this Court labored under a serious misapprehension as to that feature of the motion. And if plaintiff can convince this Court (which it be from the Record), that it was mistaken in a material fact upon which the judgment was rendered, out of judicial magnanimity, the error will be corrected.

Now as to the correctness of plaintiff's position as to this allegation in the motion, we must take the record. It must be conceded that it is upon this one point the State Court affirmed the trial Court. The Record shows that that Court declared, that as to the other questions it had no jurisdiction, by the following language (page 40 of Record.) "At this point in the investigation it is sufficient to say, that we have no power to investigate or decide upon the private individual purposes of those who framed the Constitution, the political or social complexion of the body of the Convention, and have no concern with the representation of the State in Congress." The State Court arrived at this conclusion after having considered every allegation of the motion, and petition for removal. The Court did not question the sufficiency of the pleadings nor the proof supporting the same. The Supreme Court did not go behind the record of the pleadings and proof, which were admitted in the trial Court. That Court indorsed the pleadings as consistent with the practice in the

State in the following words, (page 44 of Record:) "we have dealt with the case upon the assumption that the facts set out in the motion are true. No objection was made in the Court below because the proof was made by affidavits instead of witnesses, and it is common practice in our Courts, in the absence of objection, to hear affidavits on motions." This admission of the State Court must bind this Court upon matters which were not put in issue in trial Court, as effectual as the State Supreme Court felt itself bound thereby. Plaintiff has searched in vain for a single case where this Court has ever gone behind the admissions of the parties in the State Courts and questioned the sufficiency of pleading and proof which were admitted to be true by the parties charged.

This fact settled, we find that the Court affirmed the judgment of the State Court, upon alleged statement of the accused in motion to quash the indictment. As to the jury list furnished by the election officers, plaintiff asks the Court to read his motion (page 3 of Record) in the light of the following facts: Section 3644 of Code 1892 makes the managers of election at the various precincts, judges of the qualifications of electors, even though said electors are duly registered. Therefore, although there is a registration roll in the county, it is not a *prima facia* roll of voters in the county. The reason is, because after persons are duly registered, they must pass the judgment of the election managers before they can vote, as provided in Section 3644, Code 92.

The Court will see from Section 2358 of Code 1892, that the legislature provided that at a certain time there mentioned, the Board of Supervisors should select a list of persons to serve as jurors for each respective term of Court. And that in selecting the list of persons to serve as jurors, the Board of Supervisors should use as a guide the Registration book of voters. The point aimed at by plaintiff's motion is, that as the election officers are by the law made judges of qualifications of electors, though such electors are duly registered, that the law (Section 2358) providing that the Board of Supervisors should use as a guide in selecting jurors, the registration book of voters, that thereby the registration books of

the county were not the *prima facia* registration books of *voters*. And that as there was no law providing the mode of procuring a list of such as had been passed upon by the election managers, as such adjudged, the list selected by the Board of Supervisors from the registration book of the county was not valid. The Statutes of the State are ambiguous on this subject and plaintiff sought the advantage of attacking the list of jurors selected from the registration books simply, while the law had provided no mode of preparing registration books of voters, yet at the same time required the list to be taken from that source. The motion does not show any such charge as influenced the State Court page 41 of Record (for the motion shows the following:) "That there is no registration book of voters prepared for the guidance of said officers at the time said grand jury was drawn, *That there is no Statute providing for the procurement of any registration book of voters.*" That Court erroneously assumed a fact to be of Record in the motion, which did not exist. Yet from the very language of the Court, that fact is the one upon which it affirmed the judgment of the trial Court, because after stating what it assumed to be the allegation, and announced its conclusion thereupon, the Court said: "*In this view* the motion was properly denied." Under what view? Under the view that the motion alleged that the officers charged with listing jurors at that term of the Court, by the law under which they acted, were required to select such jurors from certain lists furnished to them by the officers charged with the duty of holding elections in the State; and that these election officers in making such lists discriminated against the race of appellant. That Court was in error in considering any such statement, for no such appears anywhere upon the whole Record. But we find that this Court was misled and affirmed the judgment of the Supreme Court upon the same misconception of a fact, (page 7 of opinion.) "We gather from statements of the motion that certain officers are invested with discretion in making up list of electors; and that this discretion can be, and has been exercised against the colored race, and from these lists jurors are selected. The Supreme Court of Mississippi however decided

in a case presenting the same questions as the one at bar, that jurors are not selected with reference to any lists furnished by such election officers."

This is a great injustice to both this Court and to the accused. We beg ~~leave~~ therefore but must state that, he made no such allegation in the motion to quash. Yet this Court was unsuspectingly misled by the statement made in the opinion of the State Court. Plaintiff cannot dare suggest what influenced the Honorable State Court to state such to be a fact, but there is one positive declaration that no such fact exists. And the judgment of affirmance is erroneous because based upon erroneous grounds, which a review of the motion will clearly show.

The next error plaintiff respectfully calls attention of the Court to is, that on page 6 of the opinion, this Honorable Court states that the *only* allegation of any discriminative acts of the administrative officers, is the allegation quoted on that page in second paragraph. Of course it is conceded that that is the only allegation the Court considered; and thereupon declared it insufficient to establish the fact of discrimination by the administrative officers. Plaintiff insists now as formerly stated in this brief, that as the State Courts admitted the sufficiency of the allegations of the motion, and under the proof offered, the facts therein alleged were assumed to be true, and in harmony with the practice in the State Courts, the questions of sufficiency and proof were not in issue in the State Courts, and it is against the policy of this Court to question the sufficiency of pleadings and proof which are admitted by the parties. In Neal vs. Delaware this Court held, that as the motion to quash the indictment was not supported by separate affidavits the proof was not sufficient; but as there was an agreement between the attorney for the accused and the Attorney General, that the motion should be considered as if proper affidavits were attached, this Court considered itself bound by the agreement of the parties in the trial Court, and did not inquire into the question of proof sufficiency.

In the case of Gibson vs. Mississippi, 162 U. S., this Court held that the plaintiff's allegations were sufficient, but

as no separate affidavits supported the motion, and unlike the Delaware case, in, that no agreement was had in the trial Court between the State's counsel and the accused, therefore the motion could not be considered as if the necessary affidavits were attached: the case was affirmed for the want of proof. In the case at ~~the~~ bar, we have the pleadings supported by just that character of proof which this Court said was wanting in the Gibson case which proof is admitted by the trial and Supreme Court of the State to be true, and in accordance with the State practice; still this Court goes behind the admisssions of the parties below, behind the common practice in the State Courts generally, and declares pleadings and proof in this cause insufficient, although, according to the State practice, such allegations and proof are sufficient. In proceeding in the State Courts the parties are required to adhere to that practice, and when this Court practically reverses the State practice by overruling pleadings and proof which according to the State practice are admitted by the party charged, there will be no substantial practice in the State upon which parties can rely; and each case will have to be determined upon its own exigency; but if the Court will insist upon this ruling, with respect to the allegation quoted in the opinion as the only allegation, and that that allegation is insufficient, we feel certain that if we call attention to other more precise allegations in the motion which were unintentionally overlooked, the Court out of a spirit of substantial justice will correct the injury which its present judgement is certain to inflict upon the accused. The Court overlooked the further allegation of the motion, which reads as follows: "it is the enforcement of all these laws, for the reasons aforesaid, that the defendant has been by this proceeding deprived of the immumity prescribed by the letter and spirit of the Federal Constitution, 14th ammendment thereof, and the discretion purposely provided therein to be exercised by certain officers therein mentioned, abridges the rights of defendant, and the rights of 190,000 negroes of the State, citizens of the United States to vote." "That the said laws were so framed and enacted as complained of, for the specific purposes of depriving the majority of citizens and electors, of the State, of the full, free

and impartial enjoyment of the right of elective franchise, because of their previous condition of servitude," etc. Further alleged; "The use of which discretion can be, has been and is being used by certain officers of the County and State to the end designed and intended by the makers of the said laws at the time of said enactment thereof, and as here complained of to wit: abridgement of the elective franchise of the colored voters of the State and County aforesaid, thereby denying to the colored citizens of the State aforesaid the opportunity of being impartially listed and selected to serve as jurors in the circuit and other courts of the County. That this denial to them of equal protection of the laws of the State of Mississippi is on account of their race and color and the said discretion is not used *with equal rigor against the white applicants for registration and voting by the officers of the law.*"

Further, "That by virtue of the exercise of such discretion as provided in the Constitution and Statutes aforesaid, which discretion is to be exercised by certain officers, therein named, was purposely provided in the organic law, which other than the use of said discretionary power by the said officers, with the intent aforesaid, said colored citizens would satisfy the other requirements even of the new Constitution of 1890 and statutes enacted thereunder. The accused is by force of the laws and acts of the officers in the enforcement thereof, deprived of that equal protection of the laws of the State to which he is entitled under the 14th amendment to the Federal Constitution. Relator cannot enforce his right to a full, fair, legal trial in said State courts."

The Court will find that the allegations quoted were overlooked. Plaintiff urges the Court to give him the benefit of a rehearing, that these material charges shall be considered as well as the one allegation upon which the Court based its former judment. We judge from the opinion that this Court is impressed that it is the nonpayment of taxes by the colored citizens which largely marks the disfranchisement so bitterly complained of; But when the Court considers, the additional averments of the pleadings, it will be seen that the accused alleged that other than the unjust discrimination against his

race by virtue of the evil exercise of the vested discretion by the officers of the law, the colored citizens would satisfy the requirements even of the present Constitution. This Court cannot question this allegation, especially when it is admitted by the State court to be true.

The next point is, that it is the refusal to register the colored electors which keeps their names off the registration books; and under the custom, the list of jurors are taken from the registration roll of the County at a certain time, by the Board of Supervisors. And the complaint is made against the registrar in wrongfully refusing these people registration. This registrar is under the law the chief jury commission in preparing the jury box with names and drawing the names therefrom, for each term of court.

The next erroneous impression is, that the applicant for registration must have paid all taxes due as provided before he can be registered. This is an error. The State Supreme Court has long decided that the Section of the Code requiring the prepayment of taxes for registration, was unconstitutional; therefore the tax feature of the law would operate against one offering to cast his vote on election day, but not at the registrar's office, when he applies for registration: and as it is the registration book used for jury selection, it is clearly shown, that the jury manipulators are not required to exclude the colored race from their selection of jurors, for the registrar has done that job long beforehand by simply refusing to register its members. And it is the unlimited discretion imposed in this officer by the laws, which vests in him the power to discriminate against the colored race. The scheme works in two ways: The refusal to register the colored electors denies them the right to jury service also the privilege of voting.

Plaintiff informs the Court, that under section 242 of the Constitution, the registrar of the several counties is the principal agent by whom the scheme of restricting the negro suffrage of the respectives counties is to be accomplished. That section prescribes that the applicant for registration must first, make oath that he possesses all the specific qualifications mentioned in section 241; that is, that he has not been

convicted of the crimes mentioned, has effected the desired residence, and other specifications.

The applicant must also swear to answer all questions propounded to him concerning his antecedents so far as they relate to his right to vote. What are the antecedents, about which the administrative officer is here empowered to interrogate the applicant! If the applicant has sworn to all the qualifications specially required of him by the Constitution, and if the framers of the Constitution meant that this discretionary examination by the registrar, should (as this Court declared) "reach weak and vicious white men as well as weak and vicious black men." Why is it that the specific facts as touch the applicant's antecedents, were not specified upon the face of the law; that the such applicant might know where the end of the ordeal was, as well as he is informed by the law, of the qualifications required? It is admitted that the specific qualifications as required of the voter, do apply in terms to the "weak and vicious" of both races: but by the averements of plaintiff's motion, it will be seen that the specific qualifications are not complained of.

If the exercise of suffrage by all persons who could come up to the specified qualifications were all that the framers intended, the examination should terminate after the oath concerning them was made by the applicant. But no; even after the gauntlet has been thus run by the dusky applicant for registration, the Constitution provides that he must swear to answer all questions pertaining to (the unkown of course) his antecedents so far as they relate to his right to vote. This Court does not undertake to say that the registrar does not vary the examination of applicants for registration so as to carry out the intention of the framers of the law; especially when the contrary is charged in the pleadings and judicially declared by the State court, just what were the intentions of the framers of the law at the time of enactment. This honorable Court however, has held that "there is nothing tangible" in the fact that the Supreme Court held, that assuming to act "within the circles of permissible action under the limitation of the Federal Constitution" the convention sought to effect a means of obstructing

the exercise of suffrage by the negro race: not "the weak and vicious white men and the weak and vicious black men," but in the language of the Court of last resort in the State, the purpose was to obstruct the exercise of a right by one race, and not of the other race. The question presents itself just at this point as to whether limitations placed upon the negro race because of its race and color by any character of State legislation is "permissible under the limitations of the Federal constitution."

Having briefly called the notice of the Court, to the important contentions unintentionly overlooked by this honorable Court, and the mistake as to the charge made in plaintiff's motion, and the erroneous conclusions, based upon the erroneous assumption of a fact, that the motion contained the charge as to the jury list, as noted in this brief, it is hoped, and plaintiff prays, that the Court will grant a rehearing in this matter, that substantial justice may be done the accused.

Respectfully submitted,

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