Filed Oct. 27 1864

36 Pages

IN THE COURT OF APPEALS.

JUNE TERM 1864.

SAMUEL G. MILES,

vs.

AUGUSTUS W. BRADFORD, Governor, &c.

Appellant's Statement and Points.

Samuel G. Miles,
vs.
Aug. W. Bradford,
Governor, &c.

COURT OF APPEALS,

June Term, 1864.

This appeal is taken from an order of the Superior Court of Baltimore city, dismissing a petition of the present appellant, asking that a Rule be laid on the Governor to show cause why a writ of mandamus should not be issued against him. The object of the proceedings is to obtain an exposition of the Rule of Law which ought to guide the discretion of the Governor in his ascertainment of the result of the late election had for the adoption or rejection of the New Cons itution.

The petitioner resides in the city of Baltimore and according to the form and effect of the present Constitution is enti-

tled to vote at all elections held therein. At the recent election held in said city, he tendered his ballot "Against the Constitution," which was received by the Judges; but they determined it was not a legal vote, and deposited it in another Box, procured and prepared for the deposit therein and safe keeping of rejected ballots. The ground of rejection was the refusal of the petitioner to take the oath prescribed by Art. XII, sec. 8, of the New Constitution.

It is alleged that other ballots were received from other legal and qualified voters—but were rejected on the same ground and, in like manner, deposited in Boxes for rejected Ballots. The Boxes, for rejected ballots, were sealed up after the election, and are now at the disposal of the Governor. It is averred that the votes thus rejected and disposed of are sufficient in number to change the result of the election, and should therefore be counted. But the Governor has declared his purpose to disregard them and to limit himself to the ascertainment of the result, as shown by the returns made by Judges of election.

It is averred that upon the returns of the "Home vote," the majority is largely against the New Constitution. But that returns have been made of votes cast beyond the limits of the State of Maryland by persons claiming to be in the military service of the United States, and that the Governor avows his determination to include the votes thus cast in his enumeration and that, if those votes are counted it may be adjudged that the New Constitution has been adopted, *whereas*, if they are rejected, as it is insisted they should be the New Constitution will have been rejected. It is further averred that the oath prescribed by the New Constitution was not tendered to or taken by the soldiers as the New Constitution required that it should be.

Other objections to the conduct of the election, and to the returns are to be found in the application. They will not be relied on in the course of the present argument.

Upon the letter of the Code, it may be insisted that the Rule ought to have been laid without reference to the merits disclosed by the petition. But as no such ground was taken

in the Superior Court, and as clearly by the antecedent law, the applicant, for a mandamus, was bound to show a probable cause, it is deemed right and respectful to the court below that any objection which might otherwise be taken on this ground should be expressly waived.

In support of the present appeal it will be insisted:

1. That the New Constitution can have no legal effect and operation until *after* and *in virtue* of the ratification and adoption thereof by the People of this State. And by the People of the State are intended the constituency in whom resided the Elective Franchise at the moment of submitting the New Constitution to the popular vote.

   7 Md. 147 Manly *vs.* the State.
   Constitution of 1776, Art. LIX.
   Acts 1809, ch. 83, 1810, ch. 33.
   1840, ch. 346.
   Constitution of 1851, Art. X. 10.
   Act 1864, ch. 5.

2. As a corollary from the foregoing position, the New Constitution ought to have been submitted to the votes of the persons in whom the elective franchise franchise resides by Art. I, of the present Constitutionand that franchise ought to have been exercised in manner and form as prescribed by the same article. The practical consequences, resulting from this carollary, are:

3. That the Convention of 1864, had no authority to exact the oath prescribed by Art. XII, of the New Constitution to be taken by all persons offering to vote at the election for adoption or rejection of the New Constitution. It may be fairly argued that, by reason of this unwarrantable effort to exclude from the exercise of the elective franchise, a portion of the constituency in whom it unquestionably resided, the entire instrument called the New Constitution is a nullity. But the present applicant contents himself with asking that the ballots actually tendered by persons duly

qualified by the present Constitution, and received by the Judges, but excluded from the returns on the ground only that the persons so tendering their ballots had refused to take the obnoxious oath—so far as said ballots are, at this moment, accessible shall be counted by the Governor, in his ascertainment of the result of the election.

4. That the votes cast by persons at places other than the election districts or precincts or places within the State herein those persons respectively have their residences and were duly qualified to vote by the present Constitution on the day of election, are to be excluded by the Governor. This point if maintained will exclude the entire vote cast by persons in the military service of the United States.

It may be argued that the popular vote in favor of the call of a Convention, and the election of delegates to the Convention amounted to a ratification and adoption of all the provisions contained in the act of 1864c h. 5, by which the Convention was called. And it must conf ssed thatas a general proposition this view may derive support from 6 Cush. 573. But there is a clean distinction between the effect of an act submitted for the adoption of the entire body in whom resides the elective franchise, and the effect of an act submitted to the votes of a part only of that constituency. And it may be fairly argued that if the act of 1864 in its provisions in regard to the election for taking the sense of the people upon the expediency of calling a Convention, or in regard to the election for the approval or rejection of the New Constitution excluded from the election any portion of the constituency in whom the elective franchise is reposed by the existing Constitution, or provided for the taking of said elections, or either of them, at places other than is prescribed by the present Constitution, the entire act is void of legal effect. But it will not be necessary to press this argument. The hypothesis which we are to consider assumes as its basis that the act of 1864 in all its provisions has been adopted by the people, and gives law to the Convention, and defines the limits within which the Convention may fairly act and beyond which its authority may not extend. Hence:

6. The Convention had no authority to provide for the holding of any election beyond the limits of the State, or at any places within the State, other than those provided by the present Constitution and laws made pursuant thereto: since the 6th section of the act of 1864 ch. 5, whilst it gives power to the Convention to submit the question of ratification or rejection of the New Constitution "at such *time*, in such *manner*, and subject to such *rules* and *regulations* as the said Convention may prescribe," is entirely silent with reference to the *places* for holding said election and the same section also enacts that the provisions thereinbefore contained for the holding of the elections provided in the *previous* sections of the act shall be applicable to the election to be held under *this* section; and by Sec. 1, it is provided that the *previous elections* shall be held at the same places where the polls are by law held, in the several counties and the city of Baltimore, for the election of delegates to the General Assembly.

And in like manner the Convention had no authority to add new disqualifications unknown to the present Constitution, as it has affected to do by imposing a new oath to be taken by the person offering to vote, and directing his ballot to be rejected on his refusal to take said oath; since the same section of the act of 1864, provides that the New Constitution "shall be submitted to the *legal and qualified voters of the State* for *their* adoption or rejection;" and that the provisions thereinbefore contained for the qualification of voters shall be applicable to said election. Now the only provision of this class is to be found in the second proviso of the first section of the act. The Judges are here required "to administer the oath to every person offering to vote, whose vote shall be challenged on the ground that such person has served in the rebel army or has either directly or indirectly given aid, comfort or encouragement to those in armed rebellion against the government of the United States, or is for any other reason not a legal voter, in the manner and form provided by Sec. 21, of Art. XXXV, of the Code of Public Laws, relating to elections;" and by the Code "the Judges of election *may* administer an oath in any inquiry they may deem necessary to be made, touching the right of any person offering to vote."

These provisions of the act of 1864, ch. 5, and of the Code do not justify the Convention in directing the Judges of election to administer *to every person offering to vote* the oath prescribed by Art. I. 4, of the New Constitution, *to wit*: "I do swear that I am a citizen of the United States, that I have never given any aid, countenance or support to those in armed hostility to the United States—that I have never expressed a desire for the triumph of said enemies over the arms of the United States; and that I will bear true faith and allegiance to the United States, and support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will in all respects demean myself as a loyal citizen of the United States; and I make this oath without any reservation or evasion, and believe it to be binding on me."

8. By the provisions of the New Constitution, the oath is directed to be administered to all persons offering to vote without exception. Assuming it to be validly imposed, it ought to have been taken by persons in the military service as well as others, and their votes must be excluded unless it shall appear affirmatively that the persons so voting did take the oath prescribed.

9. In reference to the remedy:

The duty of counting the votes cast at the late election and ascertaining the result is purely ministerial and such as could be performed by any matron of any high school of the city of Baltimore, as well as by the Governor of Maryland.

It is not a duty peculiarly appropriate to the office of Governor; but might have been delegated to the President or Secretary of the Convention or to the Secretary of State—all of whom may be restrained or controlled in the exercise of a ministerial duty by the Judiciary, and by its process of mandamus. And if it is assumed that a mandamus will not lie to the Governor to assist or to control him in the exercise of a ministerial duty, then it will be insisted that the effort to delegate to such an irresponsible personage, an office so purely ministerial, but accompanied with the conditions which, if observed, may be attended with most disastrous consequences to the political rights, and rights of property of the people of this State must be abortive, and the exercise of any such delegated authority by the Governor must be a nulity. But it will be further insisted as the conclusion from all the cases, and as the dictate of principle, that the Judical department may, by mandamus, assist the Governor in the exercise of a ministerial function, so far as to state the legal principles by which, in such case, he is to be governed. Within the limits of the authority conferred on him by the Constitution, or laws passed pursuant to the Constitution, the Governor acts without restraint. But if a General Assembly or a Convention affects to delegate to him an authority which it cannot lawfully delegate, then such delegation in so far as it exceeds the legal competency of the constituent body is inofficious and void. And it is a fallacy to affirm that the Governor, in the attempt to exercise such unlawfal delegation, acts *vistuto officii*, or that the Judicial power, in defining the line between the power which is lawfully delegated and the excess, trenches upon the independent exercise of the Executive power.

1 Crauch, 145, Marbury *vs.* Madison.

12 Peter, 595, Kendall's case.

5 Geo., 379, Low *vs.* Tower.
5 Ohio N. S., 528.
1 Dutch. 331, State *vs.* Governor.
32 Maine, 508.
19 Ill., 229.
1 Pike, 570.
1 Kent Com. 288.

10. The more appropriate tribunal for the commencement of this proceeding is the Circuit Court of Anne Arundel county—within whose jurisdiction is to be found the seat of government and the constitutional residence of the Governor. But at the moment of making the application in the case the office of Judge of that Court was vacant by the death of the late incumbent. And it is averred that the Governor is frequently in Baltimore and has in that city a public office wherein he transacts much of his official business. It becomes necessary therefore in order to pre-

vent a failure of justice that the application should be made to the Superior Court of that city.

It will be insisted that under the circumstances the Superior Court had jurisdiction and ought to have granted the rule as asked. It will be observed that the Court places its dismissal of the petition on the absense of merits and not on the ground of defect in jurisdiction. At the same time it must in justice to that learned Court be state l that nothing whatever was said aboui jurssdiction, and that the counsel pressed for a decision, avowing his willingness to accept the judgment suggested by the first impression made by his caso on the judgment of the Court.

THOS. S. ALEXANDER,
for Appellant.