Plessy

v.

Ferguson

163 U.S. 537

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 210

H. A. PLESSY, *Plaintiff in Error,*

—VS.—

J. H. FERGUSON, JUDGE, ETC.,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR

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This writ of error brings up a judgment rendered in the supreme court of Louisiana, denying to the plaintiff in error writs of prohibition, etc., asked for against the defendant in error as judge of a certain criminal court of that State; as to which writs the following extract from the opinion of the court below will be a sufficient introduction:

"When a party is prosecuted for crime under a law alleged to be unconstitutional, in a case which is unappealable, and where a proper plea setting up the unconstitutionality has been overruled by the judge, a proper case arises for an exercise of our supervisory jurisdiction in determining whether the judge is exceeding the bounds of judicial power by entertaining a prosecution for a crime not created by law. * * *

"Relator's application conforms to all the requirements of this rule. He alleges that he is being prosecuted for a violation of act No. 111 of 1890; that said act is unconstitutional; that his plea of its unconstitutionality has been presented, and overruled by the respondent judge, and that the case is unappealable.

"He therefore applies for writs of certiorari and prohibition in order that we may determine the validity of the proceedings, and in case we find him entitled to such relief may restrain further proceedings against him in the cause." (Record, p. 24.)

Thereupon, after consideration, the court held the act in question to be constitutional, and ordered that the relief sought be denied (p. 30).

In Weston *vs.* City Council, 2 Peters, 449, 464, it is held that an application for a writ of prohibition is of itself a "suit," so that a writ of error may lie to this Court from any judgment which puts an end to such application, no matter whether the suit in connection with which it is asked for be thereby ended or not.

The petition below for writs of prohibition and certiorari appears at pages 1, etc., of the record, and the return to a provisional order thereupon at pages 12, etc.

Supposing that the rule under which this case is to be heard may be that laid down in *Ex parte* Easton, 95 U. S., 68, 74, and therefore that nothing material to the determination of the cause can be looked for except in the record of the criminal court, this brief will be confined to that record.

The scope of the grave questions involved in this case is large and very interesting. These are accordingly treated with great research and freedom by the learned and able counsel with whom the undersigned are associated. Nothing has occurred to us by way of addition to what has been submitted from that point of view. Leaving those matters, therefore, in the effective position in which they have been thus placed, we ask attention to a more narrow line of suggestion.

The information in question, omitting formalities, alleged that the present plaintiff in error, Homer Adolph Plessy, upon the 7th of June, 1892, "being then a passenger traveling wholly within the limits of the State of Louisiana on a passenger train belonging to a railway company carrying passengers in their coaches within that State, and whose officers had power and were required to assign and did assign the said Plessy to the coach used for the race to which he belonged, unlawfully did then and there insist on going into a coach to which by race he did not belong, contrary to the form of the statute," &c. (p. 14).

To this information Plessy pleaded, with other matter, as follows (p. 16):

"1. That he is a citizen of the United States and a resident of the State of Louisiana.

"2. That the railroad company referred to in the said information is a corporation duly incorporated and organized by the laws of the State of Louisiana as a common carrier, &c.

"4. That said defendant bought and paid for a ticket from said company entitling him to one first-class passage from said city of New Orleans, in the State of Louisiana, to the city of Covington, in the State of Louisiana, and had the same in his possession and unused at the time alleged in

the information aforesaid as the basis thereof, and that the coach or car which he went into and occupied was a first-class one, as called for by said ticket, and defendant was being conveyed therein as a passenger of the said railway company from the city of New Orleans to the city of Covington, and the said ticket is still in defendant's possession, unused, up to the present time.

"5. And the defendant was guilty of no breach of the peace, no unusual or obstreperous conduct, and uttered no profane or vulgar language in said car; that he was respectably and plainly dressed; that he was not intoxicated or affected by any noxious disease, and that no objection was made to his personal appearance, conduct, or condition by any one in said coach or car, nor could such objection have been truthfully made.

"6. That the information herein is based on an act of the legislature of the State of Louisiana designated as act 111 of the sessions act of the General Assembly of this State, approved July 10, 1890, and the said act in its several parts is in conflict with the Constitution of the United States."

The other paragraphs in the plea are immaterial to the purposes of this brief.

To that plea the State demurred; and thereupon issue was joined (p. 19).

Thereupon the criminal court dismissed the plea, and ordered the defendant to plead over (pp. 19, &c.).

The statute in question may be found at page 6 of the Record, and is as follows:

"SEC. 1. All railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition, so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches

other than the ones assigned to them on account of the race they belong to.

"SEC. 2. The officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passengers belong. Any passenger insisting on going into a coach or a compartment to which by race he does not belong shall be liable to a fine of $25, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison. Any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which that passenger belongs shall be liable to a fine of $25, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable to damages in any of the courts of this State.

"SEC. 3. All officers and directors of railway companies that shall refuse or neglect to comply with the provisions and requirements of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court of competent jurisdiction, be fined not less than $100 nor more than $500; and any conductor or other employé of such passenger train having charge of the same who shall refuse or neglect to carry out the provisions of this act shall, on conviction, be fined not less than $25 nor more than $50 for each offense. All railroad corporations carrying passengers in this State, other than street railroads, shall keep this law posted up in a conspicuous place in each passenger coach and ticket office: *Provided*, That nothing in this act shall be construed as applying to nurses attending children of the other race."

SEC. 4. [Repeals inconsistent laws, &c.]

As already said, the proceedings on the part of the defendant in the information for a prohibition were unsuccessful, the supreme court of the State holding that the statute above is constitutional.

Pursuing our suggestion above, we submit, under the first assignment of error (Record, p. 38), that—

The provisions of the above statute violate The XIVth Amendment, by abridging the privileges and immunities of Plessy in his character as a citizen of the United States—one such privilege being that of making use of the accommodations of even mere intra-state common carriers of passengers without being amenable to police on account of Color. At all events, when such carriers do business to or from places at which the United States has permanent public offices for transacting business with its citizens.

The record of the information does not show whether Plessy is *White* or *Colored;* so that it may be that at the time alleged he was a White man insisting upon a seat in the car for Colored men; or, *vice versa,* a Colored man insisting upon a seat in the White car.

But, if it appear upon the face of the statute, taken in connection with those matters of history of which a court will take notice, that the expression in question does necessarily attempt to enforce by law an inequality betwixt White and Colored citizens that otherwise is *at most* only a social matter, if one at all; and, moreover, that it is not competent for a statute to give *force of law* to mere social inequalities turning upon Color, *then it is as much a constitutional privilege and duty of a White citizen to resist any attempt to make him an instrument for enforcing such legal inequality as it is for a Colored citizen to resist being made a victim thereof.* The constitutional liberty of the party so acted upon is as much offended in the first case as in the second. Indeed, an offer

of *the douceur* of an upper seat to a White man might to a properly constituted mind have the effect of rendering a matter so utterly disloyal to the spirit of fundamental law only the more offensive.

This point requires no elaboration. The draughtsman *of the information* below was well advised in leaving out an averment as to the particular Color of the person charged. And this omission was approved of by both of the State tribunals before which it came. Equally, whether he be White or Colored, Plessy has sustained injury, if the statute of 1890 be unconstitutional, as creating a legal inequality betwixt citizens, based upon Color.

That it does attempt to create such legal inequality is another proposition, as we submit, that may well be treated *briefly* under the light of those public matters of which a court takes notice.

Inasmuch as the policy of the statute appears to be only to separate *White* and *Colored* persons, it will make no difference whether in effecting it conductors or other employés in charge of passenger trains shall conclude that all persons who are not *Colored* (*i. e.*, in the American definition of that word) are *Whites;* or are either *Whites*, or statutory *non-descripts*, outside of the policy of the statute.

In either such case it is submitted as quite certain that the discrimination in question is along the line of the late institution of slavery, and is a distinct disparagement of those persons who thereby are statutorily separated from

others because of a Color which a few years before, with so small exception, had placed them within that *line*. It therefore amounts to a *taunt by law* of that previous condition of their class—a taunt by the State, to be administered with perpetually repeated like taunts *in word* by railroad employés, in places of public business resort within Louisiana.

It is also submitted that in such a case it is not of the smallest consequence that the car or compartment set apart for the Colored is "equal" *in those incidents which affect physical comfort to that set apart for the Whites.* These might even be *superior*, without such consequence! Such considerations are not at all of the order of those now in question. Whatever legally disparages and whatever is incident to legal disparagement is offensive to a properly constituted mind. The White man's *wooden* railway benches, if the case were such, would be preferred to any *velvet cushions* in the Colored car. If Mr. Plessy be Colored, and has *tasted of* the advantages of free American citizenship, and has responded to its inspirations, he abhorred the equal accommodations of the car to which he was compulsorily assigned!

This is an ancient common-place, and need not be extended. It will not be treated as declamation. It is founded upon the most unchanging and most honorable principles of human nature, such as must be taken into serious account in all wise legislation. These agitate and, when occasion arises, *determine* all bosoms, from Saxon to Sepoy. We submit that there are opinions in some courts which go utterly astray in reckoning the "conveniences" of Colored cars as compensation for injury to that spirit of the free citizen which "THE PEOPLE OF THE UNITED STATES" must have anticipated as to arise and to be fostered in the breasts

of those whom they generously associated with themselves by the late Amendments—*generously*, indeed, but not wisely, unless that anticipation be realized. In the meantime loyalty to the common country requires all persons, whether in authority or not, to further that experiment by all means within their power.

Sir Walter Scott reports *Rob Roy* as announcing proudly that *wherever he sate, was the head of the table.* Everybody must concede that this is true socially of the White man in this country, as a class. Nor does anybody complain of that. It is only when social usage is confirmed by statute that exception ought or legally can be taken thereto. The venom to free institutions comes in just there. A spirit of independence is even nourished in the poor man by observing the exclusive airs of good society. He can return its indifference or its disgust with interest, leaning upon his sense of the impartiality of THE LAW to both. But when law itself pronounces against his humble privileges the case becomes specifically different. What was mere *fact* yesterday,—to adopt the fine language of Junius, becomes *precedent* today. A pernicious *down-grade* is established. A *class* of citizens becomes depressed, and either gives way, so as to make a *reductio ad absurdum* of constitutional "AMENDMENTS;" or it awaits sullenly some one of those recurring opportunities for association, revolution, and vengeance which human affairs have afforded in the past, and more in the future will afford, to justly discontented classes. As a touchstone to the equality of statutes like the present, let us suppose that this one had required all persons of Celtic race to be associated with the Colored in one car or compartment, and White persons other than those of Celtic race to be placed in another; would not such a division have been explosively

resented and effectively redressed at once by the Celts, and that with loud applause from everybody? And *Why?* except for reasons which under free institutions apply to one citizen as well as to another. The above hypothesis is only an illustration of a suggestion which we submit, that in discussing, whether in or out of office, the place and rights of Colored citizens, White citizens are apt, sometimes insensibly, to fall into a lower tone of thought and discussion than for other citizens.

Color is of itself no ground for discipline or for police. *Police*, like "Fraud," is not susceptible of exact definition. Each of these things, however, has a specific character, well understood by courts for all practical purposes and safely to be left to future determination amid the changing affairs of men; but it is certain that Color no more brings men within the operation of the laws of *police* than of those of *fraud*. And, such is the animating principle of the Constitution of the United States that it is not competent for a State so to change its common law as to affect this immunity.

The institution of *Marriage*, including the *Family* and the rearing of the young, has, on the contrary, always been amenable to the laws of police. That branch of police which looks to the interest of future generations and of the republic to come, punishes bigamy; and refuses certain privileges to children born out of marriage; and entrusts the discipline and education of minors to the parents. These are a mere sample of that constant policing which marriage, with its incidents, has always received. Whether therefore two races shall intermarry, and thus destroy both, is a question of police, and, being such, the *bona fide* details

thereof must be left to the legislature. In the meanwhile it cannot be thought that any race is interested on behalf of its own destruction! And if, instead of the old plan of allowing parents to educate children as they choose, government steps in and takes the matter into its own hands, no constitutional objection upon mere general grounds can be made to provisions by law which respect, so far as may be, a prevailing parental sentiment of the community upon this interesting and delicate subject. In educating the young government steps "*in loco parentis*," and may therefore in many things well conform to the will of natural parents. This is all a part of *Marriage* and *The Family*, and should be treated conformably therewith.

Separate cars, and *separate schools*, therefore, come under different orders of consideration. A conclusion as to one of these does not control determinations as to the other any more than the gift heretofore of *a common freedom and citizenship* "concluded to" *intermarriage*.

Lord Chatham said with great force that the poor Englishman's cottage was a place into which no man could come without being asked; that the cottage might be in such ruin that every wind of heaven careered through it at every point, but that nevertheless the King himself could not enter without permission. The reason of this, in the last analysis of the matter, is because man requires to be nursed by the advantages of retirement and a sentiment of independence as well as by those of society and intercourse. He can, therefore, absolutely control his home as above for himself and its other inmates; but when he goes abroad upon business or other occasion the case is different. Then—and this is in the interest of the community as well as of himself—

he becomes, in a more special or active sense, a social being. And so accordingly is the law of common carriers: All men who comply with reasonable police and certain conditions arising from more or less expensive accommodations travel together: "The poor and the rich meet together,"—in the wholesome atmosphere of an impression that "God has made them both." To turn the old institution of common carriers into an instrument for the application of a novel law of police turning upon Color, is, therefore, in the nature of *a debauch* of a wise, wholesome, and long-standing institution.

We will assume that no more need be said upon the question whether the necessary operation of the Louisiana statute "No. 111 of 1890," is to injure Colored citizens in matters of great public as well as private importance, and proceed to discuss the other vital question in this proceeding, viz., *The existence of a Federal question in the record.*

In the first place, we submit that the *separation* required by the statute is necessarily in the nature of *mayhem* of a right to move about this country quite inseparable from any proper definition of the term "citizen of the United States," or from any proper catalogue of his privileges. No statute can be constitutional which requires a citizen of the United States to undergo policing founded upon Color at every time that *intra-state* occasions require him to use a railroad—a policing, that is, which reminds him that by law (?) he is of either a superior or an inferior class of citizens. As already suggested, either classification is *per se* offensive, and technically an injury to any citizen of the United States as *such.*

We have no cause to quarrel with the general proposition that there are two classes of civil rights within the United States; for the administration of one of which citizens even of the United States must ordinarily resort to the States. Whether the line of distinction betwixt these classes, as heretofore sometimes indicated, may not cede territory that is really Federal, may be left to future consideration. What we now submit is that for citizens of the United States any State statute is unconstitutional that attempts, because of personal Color to hinder, even if by insult alone, travel along highways, between any points whatever. The facts of the present case, as will be seen hereafter, may not need a proposition quite so broad as the above; but it seems that upon principle the law of the matter leads up to a definition so worded.

With all deference to what may possibly have heretofore been suggested to the contrary *arguendo*, a perpetually recurring injury done by statute upon the ground of Color alone,—*Color* referable distinctly to that slavery which but a few years ago so generally attended upon it,—creates a status of American "*servitude*" within the XIIIth amendment.

We beg leave, most respectfully, to enter this protest in passing, recollecting at the same time that the emphasis of our brief is upon the XIVth Amendment.

Right of transit under interstate trade is *ratione rei*, and *secundum quid*; the present claim of right of transit is *ratione personæ*, and *absolute*. Any person, whether a foreigner or a citizen of the United States, may claim the former right as incidental to some temporary business in which he is en-

gaged. In that case the business is the primary element, and confers some passing Federal quality upon any person or anything therein engaged, whether a citizen of the United States or a bale of goods.

The present question, however, requires consideration of what the expression, "*We, the People of the United States,*" signifies, for all persons therein included, who are not under question or discipline because of crime or police. In other words, this is a case in which certain high officers of the Government created by the "People of the United States" are required to "*sight back,*" as it were, upon such creators, and determine judicially their position within *the survey:* their "privileges and immunities," one or both.

It is hardly too much to say that in executing such a function the court occupies a sort of *holy ground,* and must act under the influence of certain *favorable* presumptions.

Nor will it be questioned that by force of the recent amendments the "Citizens of the United States" are by contemplation of law that very People who created the Constitution, and upon whose will and force it rests and is to rest. This consideration may not formally advance the present argument, but nevertheless it seems to be a fit attendant thereupon.

The record shows that Plessy was a perfectly innocent citizen of the United States at the time of the transaction, arrest, and other proceedings in question. The matter which brought about his arrest by the State officials was not one as to which, upon one hand, a State and, upon the other hand, the United States might well differ in regard to its being punishable or not: that is, one as to which the

United States are indifferent, such indifference at the same time manifesting no opposition upon its part to any contrary determination thereupon which any State may reach for *intrastate* affairs. For, the United States cannot allow the matter of the Color of its citizens to become a ground of legal disparagement, or legal offense within the States, unless with a disparagement of itself. A social point of honor that was vindicated with great spirit by England as to *habeas corpus* in the person of a poor tailor's apprentice, *Jenks*, and as to general warrants, in that of the scamp and outlaw, *Wilkes*, may in this country by like inspiration be responded to on behalf of a Colored man. *Noblesse oblige!* The people of England of all grades regarded both of those cases as touching the very apple of its eye; and here may the people of the United States as well.

Amongst the constitutional principles that have been sanctioned by this Court, those that perhaps come nearest to the one now in question are to be found in the cases of Railroad *vs.* Brown, 17 Wall., 445, and Crandall *vs.* Nevada, 6 Wall., 35.

[At the same time it is not forgotten that in Civil Rights Cases, 109 U. S., 3, the opinion of the majority of the Court, after putting the present *case* by way of hypothesis, very carefully and expressly reserved it for future consideration.]

(1.) In Brown's case the facts were that the plaintiff in error was a railroad company doing business betwixt Alexandria and Washington city, which, by act of Congress of 1863, was under an obligation "that no person shall be ex-

cluded from the cars on account of color." Thereupon, in February of 1868, before the adoption of either the XIVth or XVth amendment, the defendant in error, Catherine Brown, a colored woman, bought a ticket from Alexandria to Washington. On going to take her place she found two cars in the train alike comfortable; the one set apart for colored persons and the other for white ladies and gentlemen accompanying them, the regulation being that upon the *return* trip the latter became the colored car, and the former that for whites. Thereupon she was told not to go into the car for whites; and when she refused and persisted in entering, she was put out. After that she went into the other car and was safely carried to Washington. Subsequently she sued the company for having *excluded* her from its cars on account of color; and having recovered $1,500 damages, one question upon the writ of error was whether what had been done to her amounted to an *exclusion*.

Upon this point the Court, through Mr. Justice Davis, said:

"The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but, on the contrary, has always provided accommodations for them.

"This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true that the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion in legislating for the railroad corporation to annex a condition to a grant of power that the company should allow Colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of any one an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—south as well as north—to transport, if paid for it, all persons, whether white or black, who should desire transportation. It was the discrimination in the use

of the cars on account of Color, where slavery obtained, which was the subject of discussion at the time and not the fact that the Colored race could not ride in the cars at all. Congress acted in the belief that this discrimination was unjust. It told this company in substance that it could extend its road within the District as desired, but that this discrimination must cease and the Colored and White races in the use of the cars be placed on an equality " (pp. 452–'3).

In the above case, therefore, there could not possibly be a charge of inequality betwixt the accommodations for the two races, inasmuch as the car that, when going from Alexandria to Washington, was assigned to Colored persons, upon the return trip from Washington to Alexandria an hour or so later was assigned to Whites, and *vice versa.* So that in going towards Washington Mrs. Brown has resisted an assignment to the very car which, upon the same principle, she would persist in occupying when leaving Washington.

The allusion by the Court (p. 423) to " the temper of Congress " in 1863 was not more in the interest of the contention by the defendant in error in that case than a like allusion to the temper of the Congress of 1866, which drafted the Fourteenth Amendment, or to that of the people who in 1868 ratified this Amendment, is for Plessy in the present case.

And as to any special meaning of the word " excluded " properly derivable in Brown's case from the presumption that the money interest of common carriers had already, *i. e.*, before March 3, 1863, impelled them to carry all Colored persons—at all events, *in some way or other,* it appears that if the Court had been disposed to treat the matter before them in a plodding way, and had administered justice upon minor grounds, it would have adverted in that connection to those numerous statutes within the United States which in 1863, and for many years before, laid heavy pen-

alties upon railroad companies for transporting the great mass of Colored persons, unless upon certain stringent conditions—*ex gr.*, the Virginia statute of 1836: Code of 1860, pp. 635, 791, 793—which had operated upon the railroad company in question. Under such reference it might reasonably, as reason sometimes goes, have held that the purpose of the act of 1863 was to relieve the railroad from that liability.

We submit that the grounds upon which the Court discussed and determined the matter in Brown's case were in accordance with the general American temper upon such topics, and with the celebrated aphorism of Mr. Burke, when taking an American part in Parliament, in 1775, viz: "A great empire and little minds go ill together."

Brown's case is cited here merely as authority for the position that the discrimination now in question is, in legal phrase, *an injury;* the language of the amendments which, since 1863, have embodied and rendered permanent the public temper of that day, in the meanwhile amply replacing that "temper of Congress" discernible, as the Court said, in the statute of 1863.

(2.) In Crandall *vs.* Nevada, which presents a case of taxation by a State of *inter-state* travel, Mr. Justice Miller, speaking for the large majority of the Court, placed the decision upon higher grounds than those which are as valid for a bale of goods as for a citizen; and vindicated the right of free transit to the latter to and from national court-houses, post-offices, custom-houses, etc., even when within the same State, as follows:

"The citizen has a right to come to the seat of government to assert any claim he may have upon that govern-

ment, or to transact any business with it; to seek its protection, to share its offices, or to engage in administering its functions. He has a right of free access to its ports to which all the operations of foreign trade and commerce so conduct him, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States; and this right is in its nature independent of the will of any State over whose soil he must pass in its exercise."

That these words were intended to apply to *intra-state* transit, post-offices, etc., appears *upon its face;* and also, *secondly,* because Mr. Justice Clifford, who dissented, limited his dissent to the *opinion* and not the judgment, and that for the reason that the majority went beyond the bounds of inter-state commerce for principles upon which to base its judgment; and, *lastly,* because it is impossible to hold that the United States protects (*ex. gr.,*) a citizen of the United States resident in Mississippi during transit to their court-house, post-office, etc., in New Orleans, but does not protect a like citizen resident in Louisiana during similar transit. A Federal right in behalf of these cases is that of an unmolested approach to public offices of the United States; and this exists for citizens during *intra-state* travel as well as that betwixt the States.

In the meantime the Court will take judicial notice that New Orleans is the seat of a number of United States offices; and likewise that Covington, since at least 1842, has been a post-office. (5 Stats., 575, top.)

And if it be true that Plessy could successfully resist this prosecution in case he had alleged and shown that at the time when he *insisted,* etc., he was upon his way to the post-office at Covington upon business therewith, we submit that he must succeed even in the absence of such allegation and proof.

For, if the very general provisions and words of the statute in question be not valid, constitutiona lly, for all intrastate railroad travel it is not valid for any.

In Trade-mark Cases, 100 U. S., 82, Congress had inflicted a penalty upon counterfeiters of trade-marks registered pursuant to other statutes of the United States, which latter had allowed any persons entitled to the use of any trademark to register the same. It was objected that such penal statute was unconstitutional, because the registering statute had not confined its allowance to tra de-marks in inter-state commerce. One answer to this, upon the part of the Government, was that those general words were by fundamental principles of construction to be limited to matters within national jurisdiction. However, the Court said, through Mr. Justice Miller:

"The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question to be determined is whether we can introduce words of limitation into a penal sta ute so as to make it specific when, as expressed, it is general only * * * To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. If in the case before us we should undertake to make by judicial construction a law which Congress did not make, it is quite probable that we should do what, if the matter were now before that body, it would be unwilling to do, viz., make a trade-mark law, which is only partial in its operation and which would complicate the rights which parties would hold—in some instances under the act of Congress and in others under State law."

To the same effect is the subsequent case, Baldwin *vs.* Franks, 120 U. S., 678, 685.

We submit again that it is plain that the statute now in question is intended to operate upon all intra-

state railroad travel for any purpose. For, all intra-state trains are obliged thereby to have the two cars or compartments; and the conductors of these trains are in turn obliged completely to separate White travellers therein from Colored accordingly, and that without regard to any consideration but the one of Color. Whether Louisiana, which excepts *street cars* from the Color separation in question—perhaps because of the impracticability thereof—would have been willing to compel an introduction of the two car system in case it had been known that notwithstanding this there would be found in both cars persons *of the other color*, travelling upon Federal business as parties, jurors, witnesses, etc., of the United States courts, or to the office of a United States commissioner or revenue officer, internal or customs, or to a post-office, may be more than doubtful.

And besides, questions as to Color, difficult though these may be in some cases, are upon the whole much less unreasonably intrusted to conductors for determination upon bare inspection than questions as to the purposes of intended travel, etc. The legislature would hardly have placed the latter at the mercy of a like peremptory decision.

However, it is enough to say here that there is no authority or machinery therefor.

Upon the whole, therefore, this case is for the present topic a converse of that of *Reese* (92 U. S., 214, 220), in which Colored citizens failed to receive a certain virtual protection to political rights because the act of Congress relied upon for

that had employed therefor only certain general terms which also covered other offenses than those to *Color*, etc. When asked to interpret the statute so as to confine its operation to matters within the jurisdiction of the United States, the Court replied that by its structure, as above, the statute was not susceptible of being so dealt with; and that a court is not competent to add to a statute words (*ex. gr.*,) needed to confine its provisions within constitutional limits.

In the present case, upon the special view now under discussion, a like addition of words is needed in order to prevent the statute from covering certain cases of *intra-state* travel as to which its application would be unconstitutional. The statute must therefore fail *for all cases.*

And so it makes no difference here whether Plessy did or did not allege that at the time in question he was traveling upon business with or for the United States—*i. e.*, to a post-office or to serve process, etc.

However, in concluding we submit that the better solution of a question which is so like to recur under many different guises is to place it upon the broadest ground of which it is susceptible—*i. e.*, the ground of a general right of all "citizens of the United States" to immunity from the statutory annoyance under consideration. Petty *diversities* in respect to constitutional rights are not valid in common sense, and do not tend to "insure domestic tranquillity." Since the time of Edward the Confessor, "The Peace of the King's Highway," (Cowell; titles, *Peace of the King, Watling Street*) has been a separate topic of law from that of "The Peace of the King:"—more particular than that, and more

jealously protected against "molestation and annoyance." The corresponding "peace" in this country is not in general intrusted to the care of the United States. It is enough, however, for the present case that it shall be guarded by them from adverse State legislation.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 210.

HOMER ADOLPH PLESSY,
Plaintiff in Error,

—vs.—

J. H. FERGUSON, JUDGE, ETC.,
Defendant in Error.

ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES C. WALKER,
Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

HOMER ADOLPH PLESSY, Plaintiff in Error,

VS.

J. H. FERGUSON, Judge of Section "A" Criminal District Court for the Parish of New Orleans.

Error to the Supreme Court of Louisiana.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

The Plaintiff in Error was arrested on the affidavit of two witnesses charging him with violation of Act No. 111, of the Laws of Louisiana, session of 1890, averring that he was "a colored passenger on a train of the East Louisiana Railroad Company," who did "insist upon going into and remaining in a compartment of a coach of said train which had been assigned to white passengers." (See pp 4-5 of printed record.)

On this affidavit, a warrant issued and he was brought before A. R. Moulin, Recorder, by whom, examination being waived, he was bound over to section A of the Criminal Court of the Parish of New Orleans, giving bond in the sum of $500 for his appearance to answer said charge. (Printed Record, p. 5.)

On the 22d November, 1892, an information was duly filed in said Court based on said proceedings before said Recorder, charging said Plessy with violation of said statute, 111, Acts of 1890, of the State of Louisiana. (See pages 5-6 of printed record.)

To this information, the said Plessy upon arraignment, filed a plea in bar of the jurisdiction of the Court, based on the averment that said Act, No. 111, of 1890, was null and void, being in conflict with the Constitution of the United States. (Printed Record, pp 8-10 and 16-18.)

To this plea the District Attorney demurred. (Printed Record pp. 18-19.) And on this the defendant joined issue. (Printed Record p. 19.) On the issue joined, respondent in error, the Judge of said Court, over-ruled the plea of the defendant Plessy and ordered that he plead over to said presentment. (Printed Record pp. 19-23.)

Thereupon, the said Plessy, by his counsel made application to the Supreme Court of the State of Louisiana for a writ of Prohibition and Certiorari, based upon his plea in the court below. On the hearing, the

court denied the application. (Printed record gives opinion of court in full, pp. 23-31.)

Thereupon, the defendant Plessy, filed a petition for a re-hearing of the same by said Supreme Court, setting forth errors assigned in the opinion of the Court. (Printed Record, pp. 31-32.) This petition the court refused. (Printed Record, p. 33.)

Thereupon, the defendant filed a petition for a writ of error to this Court, (Printed Record, pp. 33-37,) which petition was allowed, and upon filing the assignment of errors, (Printed Record pp. 38-41,) the writ issued to the Respondent herein out of the Circuit Court for the Fifth Circuit.

The case turns wholly upon the question of the constitutionality of Act No. 111, of the legislature of the State of Louisiana, session of 1890, which is given in full in the printed Record, pages 6-7. The first section enacts that all railways in the state shall provide "equal but separate accommodations for the white and colored races, by providing separate coaches or compartments on all passenger trains," and declares that "no person shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to."

Section 2, provides (1) that "the officers of such passenger trains shall have power and are required to assign each passenger to the coach or compartment used for the race to which such passenger belongs." (2) That "any passenger insisting on going into a coach or compartment to which by race he does not belong," shall be liable to a fine of twenty-five dollars or twenty days imprisonment. (3) That if any passenger "shall refuse to occupy the coach or compartment to which he may be assigned by the railway official, such officer "shall have power to refuse to carry such passenger on his train," and (4) that for such refusal "neither the officer nor the railway company shall be liable for damages in any of the courts of the state."

Section 3 provides that any railway company and the officers of any railway company, which shall neglect or refuse to carry out this act, shall be liable to fine therefor.

The Plaintiff in Error was a passenger on the East Louisiana railroad as charged in the affidavit on which the warrant of arrest was based, (printed record, p. 4,) from New Orleans to Covington, both points in the state of Louisiana, and was the holder of a first-class ticket. The affidavit states that he is a colored man and that he insisted on entering a white compartment, in violation of this Act. The presentment (Printed Record, pp. 5-6) does not aver anything as to the race of the plaintiff but merely that he insisted on entering a compartment to which by race he did not belong. In his plea in bar, the

plaintiff in Error avers that he held a first-class ticket—was orderly and cleanly, which, is admitted by the state's demurrer, (Printed Record pp. 16-18.) In his petition for re-hearing, he describes himself as "of mixed Caucasian and African blood, in the proportion of one-eighth African and seven-eighths Caucasian," the African admixture not being perceptible. (Printed Record, p. 31.) By his plea the Plaintiff in Error put in issue the Constitutionality of this Act, the Court sustained its validity, and he brought the question here by his Writ of Error.

ASSIGNMENT OF ERRORS.

The following assignment of errors in the judgment of the court below was filed with the application for the writ, (Printed Record pp. 48-51,) and sets out particularly each error asserted and intended to be urged.

FIRST. The court erred in its opinion and decree maintaining the constitutional validity of the Act of the General Assembly of the State of Louisiana, No. 111, approved July 10th, 1890, entitled An act to promote the comfort of passengers on railroad trains, &c., &c., and that the same is not in conflict with nor a violation of any right under the XIIIth and XIVth amendments of the Constitution of the United States: that the same is the lawful exercise of the police power of the State; that the subject-matter thereof is a regulation of domestic commerce, and therefore exclusively a State function; enforces substantial equality of accommodation supplied to passengers of both races on railroad trains operated within the limits of the State of Louisiana; that the same is in the interest of public order, peace and comfort, and impairs no right of passengers of either race.

This was error (1) for the reason that the statute imports a badge of servitude imposed by the State law; perpetuates the distinction of race and caste among citizens of the United States of both races, and observances of a servile character coincident with the institution of slavery, heretofore enacted by the white race and compulsorily submitted to by the colored race. The said statute discriminates between citizens of the white race and those of the colored race, and does not apply to all white persons and all colored persons alike, and the same abridges the rights, privileges, and immunities of citizens on account of race and color.

(2) The said statute does not enforce substantial equality of accommodation to be furnished to passengers of both races on railroad trains, but authorizes the officrs thereof to assign passengers to separate coaches without reference thereto.

(3) The statute impairs the right of passengers of the class to which relator belongs, to wit, octoroons, to be classed among white persons, although color be not disernable in their complexion, and makes penal their refusal to abide by the decision of a railroad conductor in this respect.

(4) The said statute does not extend to all citizens alike the equal protection of the laws, and provides for the punishment of passengers on railroad trains without due process of law, by authorizing the

officers of railroad trains to refuse to carry such persons as refuse to abide by their decision as to the race to which said passengers belong, and by making said refusal a penal offence.

(5) The statute is not in the interest of public order, peace, and comfort, but is manifestly directed against citizens of the colored race.

(6) The statute exempts individuals of a certain class, to wit, nurses attending children of the other race, from the operation of the law, and is therefore amenable to the charge of class legislation.

(7) The said statute is an invasion and deprivation of the natural and absolute rights of citizens of the United States to the society and protection of their wives and children traveling in railroad trains when said citizens are married to persons of the other race under the law and sacrament of the church—marital unions between persons of both races, which are not forbidden by the laws of Louisiana.

(8) The statute deprives the citizen of remedy for wrong, and is unconstitutional for that reason.

(9) Neither the said statute, nor the laws of the state of Louisiana, nor the decisions of its courts have defined the terms "colored race" and "persons of color," and the law in question has delegated to conductors of railway trains the right to make such classification and made penal a refusal to submit to their decision.

(10) The East Louisiana Railroad and other railroads to which said statute applies are organized by the laws of the State of Louisiana as common carriers, acting by virtue of public charters and carrying passengers for hire, and cannot be authorized to distinguish between citizens according to race.

(11) Race is a question of law and fact which an officer of a railroad corporation cannot be authorized to determine.

(12) The state had no power to authorize the officers of railway trains to determine the question of race without testimony, and to make the rights and privileges of citizens to depend on such decision, or to compel the citizen to accept and submit to such decision.

SECOND. The court erred in its opinion and decree that the statute in question explicitly requires that the accommodation shall be equal and does not authorize the officers of the railway trains to assign passengers according to their own judgment and without reference as to whether the accommodations are equal or not.

This was error, because criminal statutes are construed *stricti juris* and not by implication, and the literal text of the law terminating the second section of the statute is as follows:

"And should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

THIRD. The court erred in its opinion and decree that the statute does not authorize the conductor or other officer to assign a passenger to a coach to which by race he does not belong; that it obviously means that the coach to which the passenger is assigned shall be, according to the requirements of the act, to the coach to which the passenger by race belongs.

This was error for the same reason. The aid of implication is required to help out the construction of a criminal statute—that the coach to which the passenger is assigned must be the coach to which by race he belongs—when the text of the law subjects the passenger to fine and imprisonment if he "should refuse to occupy the coach or compartment to which he or she is assigned."

FOURTH. The Court erred in its opinion and decree that the said statute does not exempt the officer or conductor from damages for refusing to carry a passenger who refuses to obey an assignment to a coach to which his race did not belong.

This was error, because the text of the statute is plain: "Said officer shall have power to refuse to carry such passenger on his train and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state."

FIFTH. The Court erred in its opinion and decree that the discretion vested in the officer to decide primarily the coach to which by race each passenger belongs is only that necessary discretion attending any imposition of a duty to be exercised at his peril and at the peril of his employer and that the statute utterly repels the charge that it vests the officers of the company with a judicial power to determine the race to which the passenger belongs.

This was error, because the 2nd section of the act expressly provides "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs," and terminates with the provision that in case of refusal on the part of the passenger to occupy the coach to which he is assigned "said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state."

Wherefore, for these and other errors apparent on the record, the said Homer A. Plessy prays that the said judgment of the Honl. the supreme court of the State of Louisiana be reversed, and that the said writ of prohibition prayed for and provisionally issued in these proceedings be made peremptory.

ALBION W. TOURGEE,
JAS. C. WALKER,
Att'ys for Pl'ff in Error.

QUESTIONS ARISING.

Some of the questions arising on this statement of facts and the decision of the court below, as we conceive, are as follows: Has the State the power under the provisions of the Constitution of the United States, to make a distinction based on color in the enjoyment of chartered privileges within the state?

Has it the power to require the officers of a railroad to assort its citizens by race, before permitting them to enjoy privileges dependent on public charter?

Is the officer of a railroad competent to decide the question of race?

Is it a question that *can* be determined in the absence of statutory definition and without evidence?

May not such decision reasonably result in serious pecuniary damage to a person compelled to ride in a car set apart for one particular race?

Has a State power to compel husband and wife, to ride in separate coaches, because they happen the one to be colored and the other white?

Has the State the power to exempt the railroad and its officers from an action for damages on the part of any person injured by the mistake of such officer?

Has the State the power under the Constitution to authorize any officer of a railroad to put a passenger off the train and refuse to carry him *because* he happens to differ with the officer as to the race to which he properly belongs?

Has the State the power under the Constitution, to declare a man guilty of misdemeanor and subject to fine and imprisonment, *because* he may differ with the officer of a railroad as to "the race to which he belongs?"

Has the State a right to declare a citizen of the United States guilty of a crime because he peacefully continues to occupy a seat in a car after being told by the conductor that it is not the one set apart for the race to which he belongs?

Is not the question of race, scientifically considered, very often impossible of determination?

Is not the question of race, legally considered, one impossible to be determined, in the absence of statutory definition?

Would any railway company venture to execute such a law unless secured against action for damage by having the courts of the state closed against such action?

Is not the provision exempting railway companies and their servants and officers, from action for damages in carrying into effect the provisions of this statute, of such importance as to be essential to the operation of the law in question?

Is not a statutory assortment of the people of a state on the line of race, such a perpetuation of the essential features of slavery as to come within the inhibition of the XIIIth Amendment?

Is it not the establishment of a statutory difference between the white and colored races in the enjoyment of chartered privileges, a badge of servitude which is prohibited by that amendment?

Is not *state* citizenship made an essential incident of *national* citizenship, by the XIVth Amendment, and if so are not the rights, privileges and immunities of the same within the scope of the national jurisdiction?

Can the rights of a citizen of the United States be protected and secured by the general government without securing his *personal* rights against invasion by the State?

Does not the exemption of nurses in attendance upon children, render this act obnoxious as class legislation and rebut the claim that it is *bona fide* a police regulation necessary to secure the health and morals of the community?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Plaintiff in Error relies on the following provisions of the Constitution of the United States in support of his contention that the said statute No. 111, of the State of Louisiana, 1890, is null and void.

THE THIRTEENTH AMENDMENT.

Section 1.—Neither SLAVERY nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to its jurisdiction.

THE FOURTEENTH AMENDMENT.

Section 1—*Affirmative Provisions.*

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are—

1—Citizens of the United States," and

2—(Citizens) " of the state in which they shall reside."

Restrictive Provisions.

1—"No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

2—"Nor shall any State deprive any citizen of life, liberty or property, without due process of law."

3—"Nor deny to any person within its jurisdiction, the equal protection of the laws."

This section has been separated into its constituent clauses, the more readily to show the construction for which the Plaintiff in Error contends.

POINTS OF PLAINTIFF'S CONTENTION.

I—The exemption of officers and railway companies from suits for damage by persons aggrieved by their action under this law.

The Court below held that the language of this section did not exempt from damage resulting from *bona fide* exercise of the power

conferred upon them by its provisions. The language of the act is explicit: "should any passenger refuse to occupy"—not the coach used for the race to which he belongs but—"the coach or compartment *to which he or she is assigned by the officer of such railway*, said officer shall have power to refuse to carry such passenger on his train and *for such refusal*, neither he nor the railway company he represents, shall be liable for damage, *in any of the courts of this state*." Is not this a clear denial to the person thus put off the train, of any right of action? Is it not that very denial of the "equal protection of the laws" which is clearly contemplated by the third restrictive provision of the Fourteenth Amendment?

If so, is this provision of such importance as to be essential to the validity of the law as a whole? Our contention is that no individual or corporation could be expected or induced to carry into effect this law, in a community where race admixture is a frequent thing and where the hazard of damage resulting from such assignment is very great, unless they were protected by such exemption. The State very clearly says to the railway, "You go forward and enforce this system of assorting the citizens of the United States on the line of race, and we will see that you suffer no loss through prosecution in OUR courts." Relying on this assurance, the company is willing to undertake the risk. Without it they might well shrink from such liability. The denial of the *right to prosecute*, then, becomes essential to the operation of the act, and if such "denial" is in derogation of the restriction of the Fourteenth Amendment, the whole act is null and void. It is a question for the Court to determine upon its knowledge of human nature and the conditions affecting human conduct, in regard to which it would be idle to cite authorities. If it is NOT a violation of this provision it would be difficult to imagine a statutory provision which could be violative of it.

II—We shall also contend that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action or of inheritance is *property;* and that the provisions of the act in question which authorize an officer of a railroad company to assign a person to a car set apart for a particular race, enables such officer to deprive him, to a certain extent at least, of this property —this reputation which has an actual pecuniary value—"without due process of law," and are, therefore, in violation of the Second restrictive clause of the first section of the XIVth Amendment of the Constitution of the United States.

This provision authorizing and requiring the officer in charge of

the train to pass upon and decide the question of race, is the very essence of the statute. If this is repugnant to the Constitutional provision, all the rest must fall.

There is no question that the law which puts it in the power of a railway conductor, at his own discretion, to require a man to ride in a "Jim Crow" car, that is, in the car "set apart exclusively for persons of the colored race," confers upon such conductor the power to deprive one of the reputation of being a white man, or at least to impair that reputation. The man who rides in a car set apart for the colored race, will inevitably be regarded as a colored man or at least be suspected of being one. And the officer has undoubtedly the power to entail upon him such suspicion. To do so, is to deprive him of "property" if such reputation *is* "property." Whether it is or not, is for the court to determine from its knowledge of existing conditions. Perhaps it might not be inappropriate to suggest some questions which may aid in deciding this inquiry. How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a *white* man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man. Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?

III—The Plaintiff in Error also contends that the provision of this act authorizing the conductor to "refuse to carry," *anglice* put off the train, any passenger who refuses to accept his decision as to "the race to which he belongs," is a deprivation of the *liberty* and *property* of the citizen "without due process of law," and as such is in conflict with the third restrictive clause of the XIVth Amendment.

The passenger is deprived of his liberty by being removed by the power with which the statute vests the conductor, from a place where he has a *right to be;* and of his property, by being refused and denied the enjoyment of that for which he has paid his money, to wit, the ticket purchased by him to the point of destination. This gave him the right to ride upon *that train* or any train, to the point designated. To take away that right, compell the passenger

to go on foot or by other means to such point, is to seize, convert and destroy his property by pretended force of law. It is *pro tanto* an act of legalized spoilation,—an act of forcible confiscation—a taking of property and interference with liberty under legalized forms and statutory methods, but without "*due* process of law."

IV—The plaintiff also contends that the provisions authorizing the officers of a train to require parties to occupy the particular cars or compartments set apart for distinct races, is a statutory grant of authority to interfere with natural domestic rights of the most sacred character.

A man may be white and his wife colored; a wife may be white and her children colored. Has the State the right to compel the husband to ride in one car and the wife in another? Or to assign the mother to one car and the children to another? Yet this is what the statute in question requires. In our case, it does not appear that the plaintiff may not have had with him a wife belonging to the other race, or children differing with him in the color of their skins? Has a State the right to order the mother to ride in one car and her young daughter, because her cheek may have a darker tinge, to ride alone in another? Yet such things as these, the act in question not only permits, but actually requires and commands to be done under penalty of fine and imprisonment, for failure or neglect. Are the courts of the United States to hold such things to be within the purview of a State's right to impose on citizens of the United States?

V—The plaintiff also insists that a wholesale assortment of the citizens of the United States, resident in the state of Louisiana, on the line of race, is a thing wholly impossible to be made, equitably and justly by any tribunal, much less by the conductor of a train without evidence, investigation or responsibility.

The Court will take notice of the fact that, in all parts of the country, race-intermixture has proceeded to such an extent that there are great numbers of citizens in whom the preponderance of the blood of one race or another, is impossible of ascertainment, except by careful scrutiny of the pedigree. As slavery did not permit the marriage of the slave, in a majority of cases even an approximate determination of this preponderance is an actual impossibility, with the most careful and deliberate weighing of evidence, much less by the casual scrutiny of a busy conductor.

But even if it were possible to determine preponderance of blood and so determine racial character in certain cases, what should be said of those cases in which the race admixture is equal. Are they white or colored?

There is no law of the United States, or of the State of Louisiana defining the limits of race—who are white and who are "colored"? By what rule then shall any tribunal be guided in determining racial character? It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice? Why not count every one as white in whom is visible any trace of white blood? There is but one reason to wit, the domination of the white race. Slavery not only introduced the rule of caste but prescribed its conditions, in the interests of that institution. The trace of color raised the presumption of bondage and was a bar to citizenship. The law in question is an attempt to apply this rule to the establishment of legalized caste-distinction *among citizens*.

It is not consistent with reason that the United States, having granted and bestowed *one equal citizenship* of the Udited States and prescribed *one equal citizenship in each state*, for all, will permit a State to compel a railway conductor to assort them arbitrarily according to his ideas of race, in the enjoyment of chartered privileges.

VI—The Plaintiff in Error, also insists that, even if it be held that such an assortment of citizens by race in the enjoyment of public privileges, is not a deprivation of liberty or property without due process of law, it is still such an interference with the personal liberty of the individual as is impossible to be made consistently with his rights as an equal citizen of the United States and of the State in which he resides.

In construing the first section of the XIVth Amendment, there appears to have been, both on the part of the Courts and of textual writers, an inclination to overlook and neglect the force and effect of its affirmative provisions.

The evident effect of these provisions taken alone and construed according to the plain and universal meaning of the terms employed, is to confer upon every person born or naturalized in the United States, two things:

(1)—National Citizenship.

(2)—Statal Citizenship, as *an essential incident* of national citizenship.

This grant both of *national* and *statal* citizenship in the Constitution of the United States, is a guaranty not only of *equality* of right but of *all natural rights and the free enjoyment of all public privileges* attaching either to *state* or national citizenship. Its effect is (1) to make national citizenship expressly *paramount and universal:* (2) to make Statal citizenship *expressly subordinate and incidental* to national citizenship.

The State is thereby ousted of *all control over citizenship*. It cannot make any man a citizen nor deprive any one of the estate of citizenship or of any of its rights and privileges.

What are the rights, "privileges and immunities of a citizen of the United States?" Previous to the adoption of this section of the Constitution they were very vague and difficult of definition. Now they include all "the rights, privileges and immunities" of a citizen *of a State*, because that citizenship is made incidental to, and co-extensive with *national* citizenship in every State; and the United States guarantees the full enjoyment of both. It is evident that National citizenship *plus* State citizenship covers the whole field of individual relation, so far as the same is regulated or prescribed by law. All the rights, "privileges and immunities," which *can attach* to the individual as a part of the body-politic, are embraced either by the relation of "Citizen of the United States" or by the relation of *citizen* "of the *State* in which he may reside." The United States having granted *both* stands pledged to protect and defend both.

This provision of Section 1 of the Fourteenth Amendment, *creates* a *new* citizenship of the United States embracing new rights, privileges and immunities, derivable in a *new* manner, controlled by *new* authority, having a *new* scope and extent, dependent on national authority for its existence and looking to national power for its preservation.

VII —It may be urged against this construction that it ousts the exclusive control of the State over "its own citizens" by inference based on the effect of the grant of citizenship.

That this is the real force of this provision of the Constitution would seem to be the only conclusion that can be reached from any reasonable interpretation of the language employed. The language of the affirmative provisions of the section, certainly includes everything that can be embraced by citizenship *of the United States and* citizenship of *the State of residence*. This leaves no room for any *exclusive State jurisdiction* of the personal rights of the citizen. If this provision means anything, it means that the government of the United States will not permit any legislation by the State which invades the *rights* of such citizens. These are fully covered by the grant of citizenship of the United States AND citizenship of the State. This construction is strengthened by the negative provisions which are supplemental of the positive ones. These prohibit the making or enforcement of any law "abridging the privileges and immunities of citizens of the United States;" provide that "life, liberty or property shall not be taken without due process of law;"

and forbid the denial to any person of the equal protection of the law. All these are express restrictions of statal power already made subordinate and incidental to the national jurisdiction by the positive provisions of the same section.

These restrictive provisions were not intended to be construed by themselves, but in connection with and as supplemental to the affirmative provisions—taken together they constitute this section, the *magna charta* of the American citizen's rights.

VIII—Taken by themselves, however, and read in the light of the construction put upon Section 3 Article II of the Constitution, these negative provisions would seem quite sufficient to oust the *exclusive* jurisdiction of the State and establish the appellate or supervisory jurisdiction of the United States in all matters touching the personal rights of citizens.

It has no doubt occurred to every member of the Court, though no allusion seems hitherto to have been made to it, that the construction and phraseology of this section is strikingly similar to that of Section 3 of the IVth Article of the Constitution: "No person held to service or labour in one State under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on the claim of the party to whom such service or labour may be due."

The celebrated case of Prigg vs. Pennsylvania; 16 Peters, 539, which finally determined the force of this section decided two things; (1) That the Courts of the United States had jurisdiction to consider and pass upon the validity of the acts of a State touching the rendition of fugitives from labour—to undo or invalidate all that might be done or attempted by virtue of State authority, in regard to the estate or condition of one claimed as a fugitive from labour; (2) That whenever the United States legislated upon the question, such legislation *wholly ousted* the State jurisdiction. What this section was to the fugitive from slavery, the provisions of the first section of the XIVth Amendment are to the rights and liberties of the citizen. In the former case, the Federal jurisdiction is inferred from the declaration "No person held to service, * * * shall be discharged therefrom;" in the other case, the jurisdiction is much more clearly indicated by the unqualified grant of national *and* state citizenship in the constitution. As the former gave jurisdiction concerning every matter relating to persons escaping from service or labour, so the the latter gives jurisdiction of *all* matters pertaining to the rights of a citizen of the United States and the essential incident of such citizenship, his status as a citizen of any state. As in that case,

state legislation was to be judged by its effect upon the acquired right of the master over the slave, so in this case, the statute is to be judged by its effect upon the *natural and legal rights* of the citizen. The Plaintiff in Error only asks that the rule of construction adopted by this Court *to perpetuate the interests of Slavery*, be *now* applied *in promotion of liberty* and for the protection of *the rights of the citizen*.

IX—The prime essential of all citizenship is *equality* of personal right and the *free* and secure enjoyment of all public privileges. These are the very essence of citizenship in all free governments.

A law assorting the citizens of a State in the enjoyment of a public franchise on the basis of race, is obnoxious to the spirit of republican institutions, because it is a legalization of *caste*. Slavery was the very essence of caste; the climax of unequal conditions. The citizen held the highest political rank attainable in the republic: the slave was the lowest grade of existence. ALL rights and privileges attached to the one; the other had *no legal rights*, either of person or property. Between them stood that strange nondescript, the "free person of color," who had such rights only as the white people of the state where he resided saw fit to confer upon him, but he could neither become a citizen of the United States *nor of any State*. The effect of the words of the XIVth Amendment, was to put *all* these classes on *the same level of right*, as *citizens;* and to make this Court the final arbiter and custodian of these rights. The effect of a law distinguishing between citizens as to race, in the enjoyment of a public franchise, is to legalize caste and restore, in part at least, the inequality of right which was an essential incident of slavery.

X—The power of the State to establish "police regulations.

The theory that the State governments had exclusive jurisdiction of certain specific areas of individual relation, which prevailed under our government up to the adoption of the XIVth Amendment, was so unique as to become a sort of fetich in our legal and political thought. The idea that certain phases of personal right were *wholly excluded* from the jurisdiction of the general government, was entirely correct. There was no definition of national citizenship in the constitution except in regard to naturalization, and so no relation was established between the individual and the general government requiring the latter to define or secure his natural rights or equal privileges and immunities. All the general government could do was to exercise the special jurisdiction conferred by the constitution. All outside of that was the *exclusive* domain of the States. The State might extend or withhold citizenship at its pleasure, the only check

upon its power in this respect being that imposed by the Court in Scott *vs.* Sandford, that the State could not make any colored person a citizen, so as to entitle him to any right as such, outside its own jurisdiction. Such exclusive jurisdiction still exists in regard to matters of political organization and control, and, indeed, in regard to all internal affairs, so long as the same do not conflict with the personal rights and privileges of the citizen. Of these, a final and corrective jurisdiction is reserved to the general government. It has the right, through its Courts, to inquire into and decide upon the force, tenor and justice of all provisions of State laws affecting the rights of the citizen. As in the case of fugitives from labor before the Congress had legislated upon the subject, the Federal Courts had jurisdiction to pass upon state laws and decide whether their purpose was to promote or to hinder such rendition, so now, the Court has jurisdiction to decide whether a State law is promotive of the citizen's right or intended to secure unjust restriction and limitation thereof.

It was natural that so great a change should prove a shock to established preconception. To avoid giving full and complete effect to the plain words of this amendment, the theory of exclusive state control over "police regulations" was formulated in what are known as the "Slaughter House Cases," 16 Wallace, 36.

In this case, an act of the legislature of Louisiana required all slaughter of food animals to be conducted at certain abattoirs to be erected by a company created by the act, during a period of twenty-five years. It was assailed on the ground that it deprived certain persons plying the trade of butcher, of the free exercise of their calling. The Court held that the law was a "police regulation" to promote the public health and that the state had the right to enact such legislation without being subject to the inhibition of the XIVth amendment unless it discriminated against the rights of colored citizens *as such*.

The demurring judges, Chief justice Chase, justices Field, Swayne and Bradley, concurring in the opinion of Mr. Justice Field, did not question the right of the State to make laws which should restrict individual right and privilege whenever the same were necessary for the promotion of public health and morals, but they contended that the XIVth Amendment conferred the jurisdiction to inquire whether this was the *real purpose* of the act, whether any discrimination against the colored citizen as such, was made by it or not. In other words, the Court held that the act was a police regulation intended to secure the public health and did not discriminate against *colored citizens* as such. The dissenting justices held that the promotion of the public health was

a mere pretence for the grant of an exclusive privilege which impaired the rights of many for the benefit of the few, and that the XIVth Amendment by its express terms did embrace an assertion of the rights of *all citizens* without regard to race or color. Two things are noticeable in these opinions. (1) That the Court expressly refrains from asserting that cases may not arise which will be within the purview of this Amendment, which do not embrace any distinction against the colored citizen as such. (2) That so strong a dissenting portion of the Court concur in the construction of this Amendment given by Mr. Justice Field, found on pages 95 to 101, including these significant declarations:

"It recognizes, if it does not create, citizens of the United States, and makes their citizenship depend upon the place of birth and not upon the laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen, now belong to him *as a citizen of the United States*."

Speaking of the "privileges and immunities" of the first restrictive clause, he says: "The privileges and immunities designated are those which of right belong to the citizens of all free governments."

The opinion of the Court, p. 72 et seq, treats the affirmative provisions of this Amendment as a "*definition* of citizenship. not only citizenship of the United States but citizenship of the States," and regards the negative ones as restrictive only of discrimination directed against colored citizens, *as such*.

The opinion in Strauder *vs.* West Virginia, 100 U. S., 303, clearly shows, however, that the Court had, in the interval, advanced from the position held in the "Slaughter House Case" to an unhesitating avowal of the conclusion, that the Fourteenth Amendment was intended and would be effective, in preventing discrimination as to right. In this opinion *only* the prohibitive clauses of the Amendment are considered and the language of the Court is based upon the inference to be made from them without any regard for the positive endowing force of the affirmative provisions.

"It ordains," says the Court "that no state shall deprive any person of life, liberty or property, without due process of law, or to deny to any person within its jurisdiction, the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race for whose protection the

Amendment was primarily designed, that no discrimation shall be made against them by law because of their color? The words of the Amendment are prohibitive but they contain a necessary implication of a most positive immunity or right most valuable to the colored man—the right to exemption from unfriendly legislation against them as colored—exemption from legal discrimination *implying inferiority* in civil society, lessening the enjoyment of the rights which others enjoy, and *discriminations which are steps towards reducing them to the condition of a subject race.*"

In our case, the Plaintiff in Error contends that this is the precise purpose and intended and inevitable effect of the statute in question. It is a "step toward reducing the colored people and those allied with it, to the condition of a *subject race.*"

XI—What an exclusive jurisdiction in the State to make and enforce "Police regulations" imports.

It is needless to cite authorities as to what constitute police regulations. All attempts at definition agree that they are regulations necessary to secure the physical health and moral welfare of society. No one questions the necessity of such regulations in any community or that they must to some extent interfere with the enjoyment of personal right and privilege. Every man must surrender something of his liberty for the well-being of the community of which he is a part. Two questions are of importance in regard to the jurisdiction of such regulations accorded to the State in the Slaughter House Cases. The one is, "How are police regulations to be distinguished from other criminal or correctional legislation? Is there any distinctive form or character by which they may be distinguished?

The Court very properly declares that the term is "incapable of exact definition." It even adopts the words of the decision in Thorpe *vs.* Rutland and Burlington Railroad, 27 Vermont 149, as indicating its character.

"It extends to the protection of the lives, limbs health, comfort and quiet of all persons and the protection of all property; and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity. Of the perfect right of the legislature to do this, no question ever was, or upon acknowledged general principles, ever can be made so far as natural persons are concerned."

No one pretends to contravene this right of the State to enact police regulations that shall to a limited extent affect personal liberty. The question is whether this is an unrestricted right; whether the State has the right under the claim of protecting public health or regulating public morals, to restrict the rights of the individual to *any extent* it may see fit? This seems to be the

force of the decision in the Slaughter House Cases. I say seems because the Court very clearly intimates that if it had been a case of discrimination against *colored citizens* as such, it would have been within the jurisdiction of this Court to consider at least the intent and character of this discrimination. As near as I am able to state it, then, the Court's definition of the relation of the XIVth Amendment to the State's power to enact and enforce police regulations is, that it has the sole power and sovereignty to do so, as long as it does not distinguish against the rights of colored citizens *as such*. It may distinguish against white citizens or invade the rights of all to any extent and the general government has no right to intervene; but if it imposes a greater burden or any inequality of privilege, upon the colored citizen, the general government is thereby vested with power to prevent or correct this inequality. This position viewed analytically, is a strange one. As has already been indicated, it is difficult to see how this section can be held to protect a colored citizen's right and not secure the rights of white citizens. If it did, it would be obnoxious to the objection of being class legislation just as opprobious and unjust as that by which slavery was establisbed.

But if the State has exclusive and final jurisdiction to make and enforce police regulations without question or review by the Federal Courts, why has it not sole sovereignty and exclusive jurisdiction over all the personal rights of the citizen in the same manner and to the same extent, as before the adoption of this Amendment? If this section means anything, it would seem that it must give authority to review the "police regulations" of the State just the same as any other legislation, to determine whether they unduly or unnecessarily interfere with the individual rights of the citizen or make unjust discrimination against any class; that if it gives the right to annull legislation inimical to one class, it must of necessity, give the same power as regards legislation injurious to any class.

In order to come within the scope of a "police regulation," even as defined in the "Slaughter House Cases," the act prohibited must be of a character to affect the general health or public morals of a whole community, not merely to minister to the wishes of one class or another. What is the act prohibited in the statute in question in this case? The sitting of a white man or woman in the car in which a colored man or woman sits or the sitting of a colored man or woman in the car in which white men or women are sitting,—is this dangerous to the public health? Does this contaminate public morals? If it does from whence comes the contamination? Why does it contaminate any more than in the house or on

the street? Is it the white who spreads the contagion or the black? And if color breeds contagion in a railway coach, why exempt nurses from the operation of the Act?

The title of an Act does not make it a "police provision" and a discrimination intended to humiliate or degrade one race in order to promote the pride of ascendency in another, is not made a "police regulation" by insisting that the one will not be entirely happy unless the other is shut out of their presence. Haman was troubled with the same sort of unhappiness because he saw Mordecai the Jew sitting at the Kings gate. He wanted a "police regulation" to prevent his being contaminated by the sight. He did not set out the real cause of his zeal for the public welfare: neither does this statute. He wanted to "down" the Jew: this act is intended to "keep the negro in his place." The exemption of nurses shows that the real evil lies not in the color of the skin but in the relation the colored person sustains to the white. If he is a dependent it may be endured: if he is not, his presence is insufferable. Instead of being intended to promote the *general* comfort and moral well-being, this act is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class. Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.

XII—The purpose and intent of the legislator as a rule of constitutional interpretation.

It is a remarkable fact connected with this decision, (the Slaughter House Cases,) and those which have followed it, that the rule that the purpose and intent of the lawmaker may be considered to explain doubt or ambiguity, seems in this case to have been used to *create* ambiguity and place upon this section a construction absolutely at variance with the plain and unquestioned purport of its words. No man can deny that the language employed is of the broadest and most universal character. "Every person," "no State," "any law," "any person" are the terms employed. The language has no more comprehensive or unmistakeable words. Yet in the face of these, the Court arrives at the conclusion that this section was intended *only to protect the rights of the colored citizen from infringment by State enactment!* This conclusion makes the "purpose and intent" inferred from external sources dominate and control the plain significance of the terms employed. Granting the assumption of the Court—which with deference, is only half-true—that the purpose of the section was to secure to the new-made colored citizen the same rights as white citizens had theretofore enjoyed, it does not follow that the language used should be wrested from its plain meaning to exclude

all other force and consequence. One of the most common things in all corrective legislation is the use of terms including other acts than those it is sought specifically to restrain. A wrong done to specific individuals or classes, is prohibited, not as to those classes alone, but as to *all;* or a specific offence calls attention to possible kindred offences, and the whole class is prohibited instead of the particular evil. Whatever may have been the special controlling motive of the people of the United States in enacting this section, or of the Congress which proposed it, one thing is certain, the language used is not particular but universal. If it protects the colored citizen from discriminating legislation, it protects also, in an equal degree, the rights of the white citizen. "All" can never be made to mean "some," nor "every person" be properly construed to be only one class or race, until the laws of English speech are overthrown.

This decision wholly neglects the fact that an amendment giving colored persons *exclusively* the protection it is admitted that this was intended to give them, would have been obnoxious to the severest opprobrium as *class-legislation of the rankest sort.* It would have been giving to the colored citizen a security, a "privilege and immunity," not conferred on white citizens. It would have left the national citizenship of the whites *dependent on ancestry* while that of the blacks was *determined by the place of birth.* It would have protected the one from State aggression and oppression and left the other unprotected. Suppose the colored people to secure control of certain states as they ultimately will, for ten cannot always chase a thousand no matter how white the ten or how black the thousand may be, such a provision as has been supposed or such as the Court conceives this to have been intended to be, would leave the personal rights of a white minority wholly at the mercy of a colored majority, without possibility of national protection or redress. Indeed, if the construction which the Court puts upon it be the correct one, if only the rights of *colored* citizens are protected by this section from impairment by statal action or neglect, it is little wonder that the white people of the south declare themselves ready to resist even to the death, the domination of a colored majority in any state. If such is the law and *only colored* citizens are secured in their rights by this amendment, I do not hesitate to say that they are fully justified in anything they may have done or may hereafter do, to prevent control of the machinery of the state governments by colored citizens.

It was said above, that the assumption that this section was adopted for the protection of the colored citizen, was at best only half-true. The history of the times shows that exclusive state

control over the persons and rights of the citizens of the state was not only the Gibraltar of slavery, but was the chief ingredient of that "paramount allegiance to the State," which was the twin of the doctrine of secession. Both rested on the same theory of the State's exclusive sovereignty over the inhabitance of the State. If slavery was one of the foundation stones of the Confederacy, as Mr. Stephens declared, the doctrine of "paramount allegiance" based on exclusive state-sovereignty over the personal rights of all inhabitants of the State, was certainly another. This exclusive sovereignty over the individual was well-founded, too, in the constitution. It came to be so fully accepted that Mr. Chief Justice Waite in Cruikshank's Case hereafter to be considered, even declares that it still exists. It was the nurse and secure defence of slavery and the excuse and justification of rebellion. A long and bloody war had just been concluded in which those in arms against the Union based the defence of their course wholly upon this theory. That the people of the United States should desire to eradicate this doctrine, is just as natural as that they should desire to secure the rights of the colored people they had freed. It was reasonable that they should seek to protect the nation against the recurrence of such peril. If they had such purpose, could they have effected it more fully than by the language of this section, creating a new and universal citizenship and making state-citizenship an incident of it? Thereby they would effect both ends with the same weapon. This they *meant* to do—and this they did, if the words of the constitution are to prevail, over a hypothetical limitation, based on a partial definition of the controling purpose of the framers. It was the *real purpose* to destroy both "paramount allegiance" and discrimination based on race, at one blow; and this the section under consideration does, if the terms employed are given their usual and universal significance. The people of the United States were not building for to-day and its prejudices alone, but for justice, liberty and a nationality secure for all time.

XIII—The case of the United States *vs.* Cruikshank, 92 U. S., 542, proceeds upon the same, as we conceive, mistaken view, both of the character and effect of the XIVth amendment. It wholly neglects the apparent effect of the affirmative clauses and dwells entirely upon the restrictive provisions. While admitting that all rights *granted or secured* by the Constitution of the United States, are within the protection of the general government, it entirely ignores the evident facts that the citizenship granted by this amendment differs *both in character and extent* from the citizenship of the United States, existing theretofore, and that *State*

citizenship with all its incidents, is directly *granted and secured* to classes never before entitled thereto, but expressly excluded therefrom. The opinion states, page 553, that it is the "duty of the States to protect all persons within their boundaries in the enjoyment of those inalienable rights with which they were endowed by their creator." And then, apparently oblivious of the fact that the States had failed to give such protection to the rights of their inhabitants and that their failure to do so in the past was *the sole reason* for the adoption of the XIIIth Amendment, and the apprehension that they might not do so in the future the sole reason for the adoption of the XIVth Amendment, the court proceeds to affirm that "sovereignty" for this purpose, (that is for the protection of the natural rights of the individual) "rests alone with the State." Truly, if this construction be the correct one, this section of the amendment is the absurdest piece of legislation ever written in a statute book. The States had many of them expressly denied a large portion of their population, not only liberty but *all natural rights*. The very definition of a slave was "a person without rights." (Code of Louisiana.) The nation conferred on more than half the population of this State liberty, national and state citizenship, embracing the inalienable rights of which they had been deprived and which were still denied by the State. Then, according to this construction, it said to the State: "The protection and security of these rights rests alone with you. I have made these people citizens and clothed them with the rights of citizens in the State and in the nation. You must not deny or impair these rights; *but if you do, it is your own affair*. I cannot prevent, restrain or hinder. Your sovereignty over them is paramount, exclusive and final. I cannot interfere to protect their rights or save their lives."

Does any man imagine—can any man believe when he recalls the heated war of words, the quarter-century of angry denunciation of this very theory, of the State's sole sovereignty over the lives and rights of its inhabitants, the years of bloody strife then just ended which resulted from this very theory, that the people of the United States meant to perpetuate this condition of affairs when they wrote these words in the Constitution which clothed these Ishmaels of our republic with the purple robe of citizenship? Does any one believe that they meant to restore *that very sovereignty* which was the excuse for resistance to national authority and which the bloody tide of war had only just overthrown? If that was their purpose, then Carlyle's grim designation of the people of Great Britain as "thirty millions of people—chiefly fools," should, when applied to the American people, be amended by leaving out the "chiefly" and saying "every last one a fool."

But the political aspect of these amendments was then to the fore and colored every man's thoughts. The old fetich of State-sovereignty which was essential to the stability of "a nation half-free and half-slave," still blinded the eyes which could not see that the system which was the Gibraltar of Slavery must, *ex necessitate*, be perilous to equal rights and liberty—that the Moloch of Slavery would never be the true God of Liberty. What was good for slavery must be bad for freedom.

This court, indeed, in Strauder *vs.* West Virginia, 100 U. S. 303, distinctly recognize the inconsistency of the ruling in Cruikshank's Case and admit that the effect of the amendment is to prohibit legislation prejudicial to *any* class of citizens whether colored or not.

"If in those states where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor, if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment."

It is but a step farther to what the Plaintiff in Error insists is the true construction, to wit, that "equal protection of the laws," is not a *comparative* equality—not merely equal as between one race and another, but a just and universal equality whereby the rights of life, liberty, and property are secured to all—the rights which belong to a citizen in every free country and every republican government.

In our case, the presentment does not allege the color or race of the Plaintiff in Error, but merely that he refused to abide by the assignment of the conductor to a compartment set aside for *his race* and *persisted* in sitting in one set apart for another race. He was by this presentment either a white man in a colored compartment or a colored man in a white compartment. In either case, assuming that he had paid his fare which is not in question, he had a right to ride where he chose, any law of the State to the contrary notwithstanding; for such a law discriminates in the enjoyment of a public right *solely* on the ground of race. The court will take notice of the fact that in all ages and all lands, it is the weak who suffer from all class discriminations and all caste legislation, and that, in this country, it is the colored race which must always be the victim of such legislation. In this case, if we take the evidence of the State's witnesses on which the presentment was

evidently based, and the self-description of the plaintiff in error who swears that he is seven-eighths white and that the colored intermixture is not visible, we have the case of a man who believed he had a right to the privilege and advantage of being esteemed a white man, asserting that right against the action of the conductor who for some reason, we know not what, was intent on putting upon him the indignity of belonging to the colored race. The mere statement of the fact shows, in the strongest possible light, the discrimination based on race which is the sole object of the statute.

XIV—The Civil Rights Case, 109 U. S. R. 3, while discussing at considerable length the provisions of this section of the XIVth Amendment is not applicable here, as it turns on the distinction between State acts and individual acts and considers only the effect of the prohibitive clauses of the section. It is to be noted, however, that although the learned Justice who delivered the opinion of the Court, mindful no doubt of his own dissenting opinion in the "Slaughter House Cases," declares that "positive rights and privileges are undoubtedly secured by the XIVth Amendment," yet shows that he has not considered its affirmative clauses as *grants of right*, since he adds: "But they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges."

Taken in its real significance, therefore, the opinion in the Civil Rights Cases, so far as it touches the questions at issue in this case, is strongly and expressly in favor of the Plaintiff in Error. The act of which he makes complaint is a "State act" and a "State proceeding" in regard to the rights granted by the XIVth Amendment.

The dissenting opinion of Mr. Justice Harlan in these cases is especially notable from the fact that we here first find formally and distinctly set forth the view that the national jurisdiction to protect the rights of the citizen is based on the affirmative as well as the prohibitive clauses of this amendment. He says:

"The first clause of this act is of a distinctly affirmative character. In its application to the colored race, *it created and granted*, as well citizenship of the United States as citizenship of the State in which they reside. It introduced all that race any of whose ancestors were imported and sold as slaves, into the political community, known as "The people of the United States." They became instantly citizens of the United States and of their respective States.

Not only were five millions of freedmen transformed into

national and *state* citizens by this amendment, but every citizen of the United States was endowed with a national citizenship determinable in a new manner and a state citizenship made an incident thereof and based wholly upon the national grant.

XV—The relation of the leading cases in which this section is construed, to the construction contended for by the Plaintiff in Error.

The decisions mentioned are really the only ones necessary to be considered in connection with the construction of this section. The others neither materially add to nor detract from what is there determined. In all these cases there is dissent which wisely leaves the door open for farther consideration. While the opinions in all of them enter into a general discussion of the legal effect of the section, it may be said that the Slaughter House Cases determine merely that the State has exclusive jurisdiction of such police regulations as are therein defined; that the Civil Rights Cases decide that Congress has no right to legislate in regard to the rights of citizens in places of amusement, &c., *until* the states have by legislation improperly restricted them; while the opinion in the case of the United States *vs.* Cruikshank, decides that the State has the same sole and exclusive jurisdiction over the lives, liberties and rights of all citizens residing in its borders that it had before the enactment of this amendment when slavery and its interests, not the liberties of the individual, were the objects the constitution was intended to secure.

Only by the most strained construction can this wholesale and compulsory racial assortment of passengers upon a railroad train, where all as citizens have an equal right as on a public highway, and where all pay an equal price for the accommodations received, be termed a police regulation. In the history of English jurisprudence only slavery has demanded that distinctions in civil rights or the enjoyment of public privilege be marked by race distinctions. To introduce them again into our jurisprudence is to reanimate in effect the institution which is denounced in form by the XIIIth Amendment, and the destruction of which threatened the nation's life. It is not a sort of legislation that ought to be helped by strained construction of the fundamental law. Even under the decision in the Slaughter House Cases, this is not to be classed among those "police regulations" which are beyond the jurisdiction of the court.

It also comes squarely within the exception made in the Civil Rights Cases; it is a statute expressly ordained by State legislation and carried into effect by State agencies and tribunals.

The act in question is exactly such an one as these two cases assert to be within the purview of this court's jurisdiction to review. It is an act of race discrimination pure and simple. The experience of the civilized world proves that it is not a matter of public health or morals, but simply a matter intended to re-introduce the caste-ideal on which slavery rested. The court will take notice of a fact inseparable from human nature, that, when the law distinguishes between the civil rights or privileges of two classes, it always is and always must be, to the detriment of the weaker class or race. A dominant race or class does not demand or enact class-distinctions for the sake of the weaker but for their own pleasure or enjoyment. This is not an act to secure *equal* privileges; these were already enjoyed under the law as it previously existed. The object of such a law is simply to debase and distinguish against the inferior race. Its purpose has been properly interpreted by the general designation of "Jim Crow Car" law. Its object is to separate the Negroes from the whites in public conveyances for the gratification and recognition of the sentiment of white superiority and white supremacy of right and power.

It is freely admitted that Cruikshank's case is squarely against us. If the opinion in this case is to be held as law, the relation of the State to the personal rights of the citizens of the United States residing therein, is precisely what it was before the adoption of this section of the constitution, and there is nothing to prevent a State from re-enacting nearly all the caste-distinctions, which slavery created. If that is the law, what is there to prevent a State from enacting the old rule of slavery jurisprudence, that insulting words from a colored man justify an assault by a white man or negative the presumption of malice in homicide. See the State *vs.* Jowers, 11 Iredell, N. C., 555: State *vs.* Davis, 7 Jones, N. C., 52, and State *vs.* Caesar, 9 Iredell, for a full discussion of this legal presumption of inequality. What is there, if the State's jurisdiction over personal rights is to remain as it was before this section was adopted, to prevent the State from adopting as "police regulations," laws requiring a colored man to remove his hat on meeting or addressing a white man? Compelling him to give way to his white superior on the highway and other acts of enforced inferiority?

Our contention is that the opinion in Cruikshank's Case cannot stand, because it is based on the false hypothesis that this section does not create or secure *new rights* to the individual but merely defines pre-existent rights and prohibits the States from impairing or denying them. We contend that it creates a *new citizenship*—new in character, new in extent; new in method of determination,

new in essential incident. That it endowed five millions of people with all the rights of national and state citizenship, both of which they were before forbidden by law to enjoy; that for these hitherto excluded classes, it created, granted and proclaimed a citizenship which embraced the old citizenship and added to it the privileges and immunities of the new one. That it enlarged the privileges and immunities of pre-existing citizenship, by changing the method of determination and adding to it the right of State-citizenship to attach immediately upon residence obtained in the State, without regard to State legislation. We insist that the inference of right, obligation and power of the general government to enforce, maintain and secure the lives, liberties and personal rights of the citizenship created, granted and declared by this Amendment, is infinitely clearer, stronger and more imperative than the inference drawn from the assertion of the owner's right to regain control of his fugitive slave, set forth in Section 3 of article IV. Upon the effect of such inference of right and power we adopt the whole of the argument of Judge Story in Prigg *vs.* Pennsylvania. The only difference in the cases is that in our case the inference is much stronger than in that and that the result to be attained, in that case, was in derogation of liberty, while in this, its maintenance and security is sought. In that case, the result was to deprive the slave even of the hope of escape: in this case, it would be to give the colored man a hope that some time in the future the promise of liberty and equality of civil right in the United States may be peacefully fulfilled. The one is a presumption in favor of justice and liberty as the other was a presumption in favor of inconceivable wrong. Shall this court which was so ready to commit the government to the perpetuation of wrong, hesitate to apply the same rule to secure the rights of its citizens?

XVI—The construction insisted on by the Plaintiff in Error does not impair the "exclusive jurisdiction" of the State, except as to the *personal rights* of citizens. In other respects it still remains. Neither is it open to the common objection that it would require national legislation in regard to all the rights, privileges and immunities of citizens. It merely asserts the right of the Federal Courts to pass upon legislative acts of the States touching such rights and the power of Congress to legislate in regard thereto, whenever it becomes necessary.

There are other parts of the Constitution which illustrate this relation. The power to provide uniform laws on the subject of bankruptcy and the inhibition of the States to pass laws impairing the obligation of contracts, are instances. In the absence of such

national legislation, the States may pass insolvent laws and even exempt within certain limits, the property of the debtor from execution; but the Federal Courts will inquire in regard to all such laws when presented to them, and determine how far they are consistent with the constitutional requirement. The enactment of a bankrupt law wipes them all away unless affirmed by it. So, too, in the absence of national regulation of inter-state commerce, statutes affecting it were passed by the State; the Federal Courts merely considering whether they were in obstruction of it or not. While laws taxing traders from other states more heavily than dealers resident within the state, no one questions the right of the state to tax them equally with its own citizens. The federal courts only inquire into the *equality* of such laws. So in the case of the rights of the citizen as provided in this Amendment; as long as the State protects and secures the rights of all citizens without injustice or discrimination, there is no need for legislative assertion of the national prerogative: the supervisory control of the Federal Courts over State legislation is sufficient. But suppose a State, say the State of Louisiana where the common law never prevailed, should repeal all statutes in regard to murder—all laws defining the crime, giving jurisdiction of its trial and prescribing its punishment—is there any doubt that the government of the United States would be able to provide for the security of its citizens resident in the State? The XIVth Amendment did not destroy the jurisdiction of the State over the rights of its citizens, nor even its exclusive jurisdiction in regard to other matters, but simply made its legislation in regard to the rights of citizens and its judicial action in relation thereto, reviewable by the courts of the United States and subject to restraint when found to be in derogation of the rights, privileges and immunities of the citizens to whom the nation has guaranteed the rights of equal citizenship in the State.

XVII—It has been decided in the case of the Louisville Railway Co. *vs.* Mississippi 133 U. S. R., 589, that the State may compell a railroad operated under its charter, to provide separate cars or compartments equal in character and accommodation, to be used by individuals of different races, if it sees fit to do so. But in this case the exception is expressly made that the right to compel individuals of different races to use these separate coaches is not thereby decided.

The act in question in our case, proceeds upon the hypothesis that the State has the right to authorize and require the officers of a railway to assort the citizens who engage passage on its lines, according to race, *and to punish the citizen if he refuses to submit to such assortment.*

The gist of our case is the unconstitutionality of the assortment; *not* the question of equal accommodation; that much, the decisions of the court give without a doubt. We insist that the State has no right to compel us to ride in a car "set apart" for a particular race, whether it is as good as another or not. Suppose the provisions were that one of these cars should be painted white and the other black; the invidiousness of the distinction would not be any greater than that provided by the act.

But if the State has a right to distinguish between citizens according to race in the enjoyment of public privilege, by compelling them to ride in separate coaches, what is to prevent the application of the same principle to other relations? Why may it not require all red-headed people to ride in a separate car? Why not require all colored people to walk on one side of the street and the whites on the other? Why may it not require every white man's house to be painted white and every colored man's black? Why may it not require every white man's vehicle to be of one color and compel the colored citizen to use one of different color on the highway? Why not require every white business man to use a white sign and every colored man who solicits custom a black one? One side of the street may be just as good as the other and the dark horses, coaches, clothes and signs may be as good or better than the white ones. The question is not as to the *equality* of the privileges enjoyed, but *the right of the State to label one citizen as white and another as colored* in the common enjoyment of a public highway as this court has often decided a railway to be.

Neither is it a question as to the right of the common-carrier to distinguish his patrons into first, second and third classes, according to the accommodation paid for. This statute is really a restriction on that right, since the carrier is thereby compelled to provide two cars for each class, and so prevented from making different rates of fares by the expense which would be incurred by a multiplicity of coaches. In fact, its plain purpose and effect is to provide the white passenger with an exclusive first class coach *without requiring him to pay an extra fare for it.*

XVIII—Has a state power to punish as a crime, an act done by a person of one race on a public highway, which if done by an individual of another race on the same highway is no offense?

This is exactly what the act in question does, what it was intended to do and *all* it does. A man of one race taking his seat in a car and refusing to surrender it, is guilty of a crime, while another person belonging to another race may occupy the same

without fault. The crime assigned depends not on the quality of the act, but on *the color of the skin*.

XIX—The criminal liability of the individual is not affected by inequality of accommodations.

While the act requires the accommodations for the white and black races to be "equal but separate," it by no means follows as a fact that they always are so. But the man who should refuse to go out of a clean and comfortable car into one reeking with filth at the behest of the conductor, would under this act be equally guilty of misdemeanor as if both were of equal desirability. The question of equality of accommodation cannot arise on the trial of a presentment under this statute. Equal or not equal, the refusal to obey the conductor's behest constitutes a crime. There is no averment in this case of equality of accommodation, but merely that the Plaintiff in Error was assigned "to the coach reserved for the race to which he the said Homer A. Plessy belonged" and that he "did then and there, unlawfully insist on going into a coach to which by race he did not belong." (See copy of information, printed Record, page 14.)

It does not appear to what race he belonged or what coach he entered, but, in the questionable language of the information, it is asserted that he did not belong to the *same race as the coach*. It is not asserted that the coach to which he was assigned was equal in accommodation to the one which it is alleged he committed a crime in entering. In his petition for certiorari (Printed Record, page one) the Plaintiff in Error avers himself to be "of mixed Caucasian and African descent, in the proportion of seven-eighths Caucasian and one-eighth African blood. That the mixture of colored blood is not discernable in him, that he is entitled to every right, privilege and immunity secured to citizens of the United States of the white race by the constitution of the United States, and that such right, privilege, recognition and immunity are worth to him the sum of Ten Thousand Dollars if the same be at all susceptible of being estimated by the standard value of money."

The affidavits of the state's witnesses, before the Recorder who bound over the Plaintiff in Error to the criminal court, where the same was filed before the information was entered therein, one of whom was the conductor of the train, (See printed Record, pages 4-5,) declare him to be "a person of the colored race" and that the car he entered and refused to leave was "assigned to passengers of the white race."

The crime, then, for which he became liable to imprisonment so far as the court can ascertain, was that a person of seven-eighths

Caucasian blood insisted in sitting peacefully and quietly in a car the state of Louisiana had commanded the company to set aside exclusively for the white race. Where on earth should he have gone? Will the court hold that a single drop of African blood is sufficient to color a whole ocean of Caucasian whiteness?

XX—The exception which is made in section four of the Act in question should not be passed over without consideration: "Nothing in this act shall be construed as applying to nurses attending children of the other race."

The court will take notice of the fact that if there are any cases in the state of Louisiana in which nurses of the white race are employed to take charge of children of the colored race, they are so few that it is not necessary to consider them as a class actually intended to be favored by this exception. Probably there is not a single instance of such relation in the state. What then is the force and effect of this provision? It simply secures to the white parent travelling on the railroads of the state, the right to take a colored person into the coach set apart for whites in a menial relation, in order to relieve the passenger of the care of the children making the journey with the parents. In other words, the act is simply intended to promote the comfort and sense of exclusiveness and superiority of the white race. They do not object to the colored person in an inferior or menial capacity—as a servant or dependent, ministering to the comfort of the white race—but only when as a man and a citizen he seeks to claim equal right and privilege on a public highway with the white citizens of the state. The act is not only class-legislation but class-legislation which is self-condemned by this provision, as intended for the comfort and advantage of one race and the discomfort and disadvantage of the other, thereby tending directly to constitute a "step toward reducing them to the condition of a subject race"—the tendency especially condemned in Slaudter *vs.* West Virginia, supra.

XXI—There is another point to be considered. The plaintiff insists that Act 111 of the Legislature of 1890, of the State of Louisiana is null and void because in tendency and purport it is in conflict with the Thirteenth Amendment of the Constitution of the United States; "Neither Slavery nor involuntary servitude—shall exist, &c."

What is meant by the word "Slavery" in this Amendment. It is evidently intended to embrace something more than a state of mere "involuntary servitude," since it is used in contradistinction to that term. It is the estate or condition of *being a slave*. What was the estate or condition of a slave? We have a right to suppose

that this term is used in the Amendment with relation to the estate or condition of those who had up to that moment been slaves in the United States. What was that legal condition? The slave as defined by the Code of Louisiana, by the courts of the various states, and by this court in Scott vs Sanford, was legally distinguished both from citizens and from "free persons of color," by one thing, he was a "person without rights." The fact that he was the property of another; that he was held in a state of involuntary servitude; that he might be bought and sold,—these were indeed incidents of his condition, striking and notable incidents, but they were all the results of one striking and distinctive feature of his legal relation to the body politic, which is expressed by the all-comprehensive statement that *he had no rights*. The master might grant him privilege, the State might restrain the master's brutality, but no right of person, of family, of marriage, of property, could attach to the slave. He was a person without rights before the law, and all the other distinctive facts of his status, flowed from this condition. He could not inherit, sue or be sued, marry, contract, or be seized of any estate, *because* he was "a person without rights."

The real distinction between the citizen and the slave was that the one was entitled to life, liberty, the pursuit of happiness and the protection of the law, while the other was beyond the domain of the law except when it took cognizance of his existence as the incident of another's right or as the violator of its behests. The law knew him only as a chattel or a malefactor.

This condition of utter helplessness and dependence came to be expressed in the public and private relations of the two classes. The slave was not only the property of his master, but he was also the defenceless and despised victim of the civil and political society to which he was subject as well as to his master. He could not resent words or blows from any citizen. Only in the last extremity was he permitted to defend his life. Impudent language from him was held the equivalent of a blow from one of the dominant class. He was in bondage to the whole white race as well as to his owner. This bondage was a more important feature of American slavery than chattelism—indeed it was the one feature which distinguished it from "involuntary servitude" which is the chief element of chattelism. Slavery was a caste, a legal condition of subjection to the dominant class, a bondage quite separable from the incident of ownership. The bondage of the Israelites in Egypt is a familiar instance, of this. It was unquestionably "Slavery;" but it was not chattelism. No single Egyptian owned any single Israelite. The political community of

Egypt simply denied them the common rights of men. It did not go as far as American Slavery in this respect since it did not by law deprive them of all natural and personal rights. It left the family and unlike our Christian slavery did not condemn a whole race to illegitimacy and adultery. It was this subjection to the control of the dominant race individually and collectively, which was the especially distinctive feature of slavery as contra-distinguished from involuntary servitude. The slave was one who had no rights—one who differed from the citizen in that he had no *civil or political* rights and from the "free person of color" in that he had no *personal* rights.

The object of the XIIIth Amendment was to abolish this discrepancy of right, not only so far as the legal form of chattelism was concerned, but so far as civil rights and all that regulation of relation between individuals of specific race and descent which marked the slave's attitude to the dominant race both individually and collectively was concerned.

There were in all the slave states specific codes of law intended for the regulation and control of the slave-class. They marked and defined not only his relation to his master but to the white race. He was required to conduct himself, not only "respectfully," which term had a very different signification when applied to the slave than when applied to the white man, but was expected and required to demean himself "submissively" to them. His position was that of legal subjection and statutory inferiority to the dominant race.

It was this condition and all its incidents which the Amendment was intended to eradicate. It meant to restore to him the rights of person and property—the natural rights of man—of which he had been deprived by slavery. It meant to undo all that slavery had done in establishing race discrimination and collective as well as personal control of the enslaved race.

It is quite possible that the term "involuntary servitude" may have been employed to prevent that very form of personal subjection which, soon after the emancipation of the slave, manifested itself in the enactment of the "Black Codes" which assumed control on the part of the State of all colored laborers who did not contract within a certain time to labor for the coming year and hired them out by public outcry. At least, it is evident that the purpose of this Amendment was not merely to destroy chattelism and involuntary servitude but the estate and condition of subjection and inferiority of personal right and privilege, which was the result and essential concomitant of slavery.

XXII—"Privileges and Immunities of citizens of the United States."

It has been suggested that the omission of the term "rights" from the category of things exempted from impairment by State authority, was an intended reservation of state control. We beg to suggest that exactly the contrary is true.

"Right" as defined by Chancellor Kent, "is that which any one is entitled to have or do, or to require another to do, within the limits prescribed by law." Rights may be natural or conferred. The exercise of any right is a "privilege" in the legal sense. The distinction has been sought to be made between the exercise of natural and conferred rights, that the latter alone is the basis of privilege: but it does not rest on any solid ground. Privilege is the exercise of a legal right, however the same may attach.

"Immunity" is the legal guaranty of non-interference,—either with "right"—that is the abstract title on which the claim that one may "have or do or require another to do," any specific thing rests—or with the "privilege," which is based upon or constitutes the exercise or enjoyment of such right.

"Right," which is the basis both of "privilege" and "immunity" is, therefore, expressly included by the use of these terms. No "right," of any citizen of the United States, can be denied or contravened by the law of any State, without impairing the "privileges" and "immunities" of the citizen which correlatively depend thereon.

XXIII—The construction of the First Section of the Fourteenth Amendment contended for by the Plaintiff in Error, is in strict accord with the Declaration of Independence, which is not a fable as some of our modern theorists would have us believe, but the all-embracing formula of personal rights on which our government is based and toward which it is tending with a power that neither legislation nor judicial construction can prevent. Every obstacle which Congress or the Courts have put in its way has been brushed aside. Under its impulse, the Fugitive Slave law, and the Dred Scott decision, both specially designed to secure the perpetuation of slavery under the constitution, became active forces in the eradication of that institution. It has become the controlling genius of the American people and as such must always be taken into account in construing any expression of the sovereign will, more especially a constitutional provision which more closely reflects the popular mind. This instrument not only asserts that "All men are created equal and endowed with certain inalienable rights, among which are life, liberty and the pursuit of happiness," but it also declares that the one great purpose for

which governments are instituted among men is to "secure these rights."

Applying this guiding principle to the case under consideration, what is it natural and reasonable to conclude was the purpose of the people of the United States, when in the most solemn manner, they ordered this broad, unmodified and supremely emphatic declaration to be enrolled among the mandates of our fundamental law? Were they thinking how to enlarge the power of the general government over individual rights so as to include all, or how to restrict it so as to include as few as possible? Were they thinking of State rights or human rights? Did they mean to perpetuate the caste-distinctions which had been injected into our law under a constitution expressly and avowedly intended to perpetuate slavery and prevent the spirit of liberty from growing so strong as to work its legal annihilation—were they seeking to maintain and preserve these discriminations, or to overthrow and destroy them?

The Declaration of Independence, with a far-reaching wisdom found in no other political utterance up to that time, makes the security of the individual's right to "the pursuit of happiness," a prime object of all government. This is the controlling idea of our institutions. It dominates the national as well as the state governments. In asserting national control over both state and national citizenship, in appointing the boundaries and distinctive qualities of each, in conferring on millions a status they had never before known and giving to every inhabitant of the country rights never before enjoyed and in restricting the rights of the states in regard thereto,—in doing this were the people consciously and actually intending to protect this right of the individual to the pursuit of happiness or not? If they were, was it the pursuit of happiness by all or by a part of the people which they sought to secure?

If the purpose was to secure the unrestricted pursuit of happiness by the four millions then just made free, now grown to nine millions, did they contemplate that they were leaving to the states the power to herd them away from her white citizens in the enjoyment of chartered privilege? Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake to-morrow with a black skin and curly hair—the two obvious and controlling indications of race—and in traveling through that portion of the country where the "Jim Crow Car" abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result, the indignation, the protests, the assertion of pure Caucasian ancestry. But the

conductor, the autocrat of Caste, armed with the power of the State conferred by this statute, will listen neither to denial or protest. "In you go or out you go," is his ultimatum.

What humiliation, what rage would then fill the judicial mind! How would the resources of language not be taxed in objurgation! Why would this sentiment prevail in your minds? Simply because you would then feel and know that such assortment of the citizens on the line of race was a discrimination intended to humiliate and degrade the former subject and dependent class—an attempt to perpetuate the caste distinctions on which slavery rested—a statute in the words of the Court "tending to reduce the colored people of the country to the condition of a subject race."

Because it does this the statute is a violation of the fundamental principles of all free government and the Fourteenth Amendment should be given that construction which will remedy such tendency and which is in plain accord with its words. Legal refinement is out of place when it seeks to find a way both to avoid the plain purport of the terms employed, the fundamental principle of our government and the controlling impulse and tendency of the American people.

ALBION W. TOURGEE,
of Counsel for Plaintiff in Error.

BRIEF OF JAMES C. WALKER, ESQ., OF COUNSEL FOR PLAINTIFF IN ERROR, ON POINTS SECOND, THIRD AND FIFTH OF ASSIGNMENT OF ERRORS, AND ON SUBDIVISIONS 7, 8 AND 9 UNDER POINT ONE, ASSIGNMENT OF ERRORS.

Assignment of Errors Subdivisions 7, 8, 9.

The Statute authorizes the Officers and Conductors of Passenger trains operated wholly within the limits of the State of Louisiana (1) to classify their passengers as of the white race and as of the colored race. (2) To assign them according to this classification, to separate coaches without regard to the fact that the coaches and accommodations to which those of one or of the other race are assigned should be substantially equal; (3) The officers and conductors of such passenger trains are authorized by the statute to "refuse to carry on such train" any passenger who shall decline to submit to their judgment as final and conclusive that he is of the white race or of the colored race; (4) The statute declares that "neither the conductor nor the railroad company he represents, shall be liable for damages for such refusal in any of the courts of this State," (Louisiana.)

We propose to take up these several points under the appropriate headings in the assignment of errors to which they have been referred as reasons indicating certain particulars in which the Supreme Court of the State erred in maintaining the constitutionality of the statute in question.

(7 and 9.) The said statute is an invasion and deprivation of the natural and absolute rights of citizens of the United States to the society and protection of their wives and children travelling in railroad trains, when said citizens are married to persons of the other race under the law and the sacrament of the church, marital unions between persons of both races, which are not forbidden by the laws of Louisiana.

(9) Neither the statute, nor the laws of the state of Louisiana, nor the decisions of its courts have defined the terms "colored race" and "persons of color" and the law in question has delegated to conductors of railway trains the right to make such classification and made penal a refusal to submit to their decision.

In a word the authority conferred by the statute upon the officers and conductors of railroads to classify and separate their passengers according as in their judgment they belong to the white race or to the colored race, is in conflict with the XIVth Amendment to the Federal Constitution in so far as it operates as a deprivation of liberty and property without due process of law and denies the equal protection of

the laws. We feel confident that upon this point, we are entitled to a reversal of the decree of the State Supreme Court.

To begin, the question is judicial and not legislative. It is judicial because the statute commits to the final and conclusive judgment of a railroad conductor whether a really white man is to be classed as a colored man. It is not a legislative question because neither the statute in question nor any other law of the state, nor any precedent of its tribunals within the scope of our research has ever defined the terms "colored persons" and "persons of the colored race." Recourse to the statute laws and judicial reports of other states makes manifest a most unaccountable variance in the conclusions arrived at.

The statute we are considering leaves uncertain and indefinite who are included among those classed as persons of the "colored race." How shall we surmount this difficulty? The legislature of Louisiana has left it to railroad conductors to surmount the difficulty, and to ensure correctness of judgment on their part, the statute exempts them from liability for error of judgment or wilful perversion of the power committed to them in any of the courts of the state. But of this later on.

It may not be an uninteresting fact, which we have authority to announce, however, that there are almost as many definitions of the terms, "colored persons" and "persons of color," as there are lexicographers and courts of the highest resort in the several states of the Union. After diligently scrutinizing the old Black Code of Louisiana, we find only designated as such, "negroes or blacks, griffs, mulattoes, and mulattoes of the first degree." The list seems to have been short. Under the Michigan State constitution the petitioner now before the court would be classed as a white man, as of mixed Caucasian and African descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; moreover the admixture of colored blood is not discernable in petitioner's complexion. People *vs.* Dean, 14 Mich., 406. In North Carolina, according to the North Carolina Revised Code, (1850) ch. 107, §79, petitioner is classed as a "free negro." State *vs.* Chavers, 5 Jones, N. C., 11.

As we said before, Louisiana law and precedents are silent on the subject, as far as our research extends. But what, if it were otherwise? How would it affect a citizen's constitutional rights to be classed by law as a white man in one state and as a negro or person of color in another state? One would think that his reputation and social status as a white man ought to be worth something. Reputation is a species of property, and is valuable in proportion as it entails rights and privileges. whether social or political. The rights and privileges of a white man, as such, are not to be taken from him by State legislation.

The effect would be to make petitioner's rights and privileges dependant on such classification, and would therefore be void.

Nobody can ignore the fact that while the political rights and privileges of white and black are equal before the law, social recognition, as of the white race entails consideration, esteem and respect in the community, often based on no higher claim, from which, however the humbler citizen of the other race is practically excluded.

Although successive legislatures of this State have purposely neglected, or inadvertently omitted, to define what is meant by the term "colored person, or persons of the colored race," of which other States and communities have not been so unmindful, as appears by certain statutes and constitutions to which we directly refer, the General Assembly of the State, in the Act we are considering, No. 111, approved July 10th, 1890, has delegated this power whether legislative or judicial, to the officers and conductors of railway trains; authorizing them to adjudge who is white and who is colored, and thus to discriminate on the ground of race and color. The exercise of such authority, we had almost said jurisdiction, must often be attended with great difficulty; must often depend upon closeness of observation, or upon evidence not always readily accessible. In a word the legislature has avoided this responsibility, and made it devolve upon the officers of common carriers, acting by virtue of public charters and carrying passengers for hire.

It may serve an useful purpose to refer at this time to a number of definitions of the terms "colored persons" and "colored race" which have been attempted by law writers, legislatures, and courts throughout the Union.

Colored Race—Negro, Mulatto. Am. and Eng. Ency. of Law, vol. 16; p. 484; 1 Bishop on Marriage and Divorce, 308. (Statutory definition in North Carolina.)

"A negro is a person having in his veins one-sixteenth or more of African blood." State *vs.* Chavers, 5 Jones 1. (N. Car.) 11.

"The term negro is identical in signification with the term colored person, and is a person with one-fourth or more of negro blood." Jones *vs.* Commonwealth, 80 Va. 544.

"The word negro means a black man, one descended from the African race, and does not commonly include a mulatto." Felix *vs.* State, 18, Ala. 720.

" Negro does not include a person who has less, though only a drop less, than one-fourth of African blood." McPharson *vs.* Com. 28 Gratt Va. 939; Am. and Eng. Ency. of Law, Vol. 15, p. 946.

"A Mulatto is a person begotten between a white and a black." Medway *vs.* Natick, 7 Mass. 88.

"Under this definition it has been decided that a person whose

father was a mulatto and whose mother was a white woman, was not a mulattò. But all courts have not followed this distinction, having considered a mulatto to be a person of mixed white, or European and negro descent, in whatever proportion the blood may be mixed." Am. and Eng. Ency. 947, and cases there cited.

"A mulatto is defined to be a person that is the offspring of a negress by a white man, or of a white woman by a negro." Thurman *vs.* State, 18 Ala. 276.

"In a suit for freedom, where the question at issue was whether plaintiff's were negroes, held that there was no error in allowing them to show their naked feet to the jury, evidence having been given by physicians that the foot was one of the distinguishing marks of race." Daniel *vs.* Guy, 23 Ark. 50.

"Persons are white, within the meaning of the Michigan State Constitution, who have less than one-fourth of African blood." People *vs.* Dean, 14 Mich. 406.

"Person of color, means a person of African descent." Heirn *vs.* Bridault, 37 Miss. 209.

"Free person of color, means a person descendant from a negro within the fourth degree inclusive, though an ancestor in the intervening generation was white." State *vs.* Dempsey, 9 Ired.(N.C.) L. 384.

"The instructions that according to N. C. Rev. Code, (1854) ch. 107, 79, a person must have in his veins less than one-sixteenth of negro blood, before he will cease to be a free negro, was held not to be error." State *vs.* Chavers, 5 Jones, N. C. 11.

"The question whether persons are colored or white, where color and features are doubtful, is for the most part for the jury to decide by reputation, by reception into society, and by their exercise of the privileges of a white man, as well as by admixture of blood." White *vs.* Tax Collector, 3 Rich S. C. 136.

"An indictment charging defendant as a free person of color, with carrying arms, cannot be sustained; for the act of North Carolina is confined to free negroes." State *vs.* Chavers, 5 Jones 11.

Under the provisions of the Michigan Constitution, conferring upon every white male citizen, and every civilized male inhabitant of Indian descent, the elective franchise a person who has one-eighth Indian blood, one-fourth African aud the remainder white is not entitled to vote. 1869. Walker *vs.* Brockway. 1 Mich. N. P. 57.

"On the question whether an individual is within the statute provision embracing persons having one-eighth or more negro blood, reputation, and the opinion of physicians may be given in evidence, but the weight of the evidence is for the jury." 1869. White *vs.* Clements, 39 Ga 232.

In the State of Louisiana, recently, Judge King of the Civil District Court of the Parish of Orleans, deciding the suit of one Raymond to annul his marriage, says: "a quadroon is one part of the African or negro race "xxx." Instead of marrying a woman of the white or Caucasian race, he has married one three-fourths Caucasian and one fourth of the negro or African race." Ibid. Yet in this suit of Raymond against his wife, he set up for sufficient cause to annul his marriage, that he was mistaken in the belief that she was of pure Caucasian blood.

"Intermarriage between the races is not forbidden by the law of Louisiana. Succession of Colwell 34 La. An. 266, which declares marriages in this state between white and colored persons to be legal. It is forbidden in eighteen states of the American Union; and is made penal in Pennsylvania, California and Maine." Ibid.

In 1866, the state of Virginia enacted a law expressly including quadroons, in the class termed colored persons.

These opinions, statutes and constitutions, so widely at variance when compared, will enable this Hon. Court to estimate the magnitude of the task which the Louisiana Legislature has imposed upon railroad conductors by requiring them to classify and separate their passengers according to race and color. But we pass on now to trace the lines of a parallel marked and distinct between the subject we have just discussed and another subject apparently dissimilar, upon which this Honorable Court has already decreed.

The Supreme Court of the United States in the case of the Chicago, Milwaukee and St. Paul Railway Company *vs.* State of Minnesota, 134 U. S., 418, 10 Sup. Ct. R. p. 462, refused to make peremptory a mandamus ordered by the State Supreme Court of Minnesota on the relation of the Railroad and Warehouse Commission created by the State law, to compel the railway to reduce the Tariff of freight on milk from three cents to two and one half cts. per gallon between points within the limits of the State, on the ground that the State law authorizing the Commission to fix the charges and adopt such as "they shall declare to be equal and reasonable;" is unconstitutional as depriving carriers of their property without due process of law, in so far as it makes the decision of the Commission, as to what are "equal and reasonable charges," final and conclusive. The State Supreme Court had decreed that there was but one fact traversible, viz. that the Railway Company had violated the law by not complying with the recommendations of the Commission, and that the law neither contemplates nor allows any issue to be made, or inquiry to be had, as to the equality or reasonableness in fact of the charges they had declared.

But on appeal this Hon. Court held that the question was judicial and not legislative; that the laws of the State of Minnesota hsd

never fixed or declared what charges were "equal and reasonable;" therefore that the recommendations of the Commission were not "final and conclusive," on the contrary that they were the subject of judicial investigation; that the Minnesota law deprived the Railway Company of its rights to such investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefore as an absolute finality the action of a Railroad commission, which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice.

In the same case, Mr. Justice Bradley dissenting said: "Due process of law does not always require a court. It merely requires such tribunals and proceeding as are proper to the subject in hand.

A line of federal cases, including Budd *vs.* New York, 143, U. S., 517, 53 Fed. R. p. 197; Mercantile Trust Co. *vs.* Texas Pacific Railway Company 51 Fed. R. p. 529, are to the same effect.

They establish and confirm the principle that where discretion has been left to State Railway Commissions to declare what rates shall be adopted as a tariff of freights and charges that is "reasonable and just," or that their recommendations shall be "conclusive evidence," or "sufficient evidence" of the reasonableness of the rates they fix, there still remains the question for judicial determination, according to the methods of investigation appertaining to courts of justice. "The effect of the provision in the laws being to deprive the railroad companies of the right to show that the rates fixed are not reasonable and just, the rates fixed by the Commissioners being in themselves evidence of their reasonableness, deprives them of their property without due process of law; and in so far as they are deprived of the same right of defense in the courts that other litigants would have under the same circumstances, they are denied the equal protection of the laws." The essential difference between the case of Budd *vs.* New York, 143 U. S. 517, and the other cases referred to was that the legislature itself had fixed the rate of freight, instead of leaving discretion to a local railway commission.

This is especially what we are contending for in the case now before this honorable Court. The legislature of the State of Louisiana instead of defining the terms "colored person and person of the colored race," has committed this important function, not to a railway commission, but to railroad conductors, whose judgment in this regard is to be accepted as final and conclusive, under penalty of fine and imprisonment; and without recourse to any of the courts of the State, which is expressly denied by the statute, in case a conductor should refuse to carry, and eject from the train, a passenger who will not accept his

judgment or decree as final and conclusive, as to whether he should be classed as of the white race, or of the colored race. Therefore we say that such provisions in the Louisiana statute of July 10th, 1890, deny the petitioner due process of law as respects his property and his liberty, and also that he is denied the equal protection of the laws which is a right every citizen of the State of Louisiana has, under the Federal Constitution, and there exists no sufficient reason why passengers on railroad trains should be isolated as exceptions to the general rule.

Again, it may be added, while a railroad conductor is perhaps the only person who can conveniently determine whether a passenger is of the white race or of the colored race, when a railway train is moving at the speed of thirty miles an hour, he cannot do so arbitrarily and without rule and regulation prescribing the limit within which his judgment shall be exercised; and there can be no due process of law unless such rule is provided by the legislature of Louisiana, in a word to define what is meant by the term "colored race," and how the facts shall be determined.

There is besides what we have said, a practical every day view to be taken of the working of the law in question; Intermarriages between persons of different races is legalized, and encouraged in the State of Louisiana, if not actively, it is by the silence and inaction of the legislature. To such as are thus united in the holy and sacred bonds of matrimony, the application of the statute we are discussing to their peculiar situation presents a very strange anomaly. A man has surely an absolute right to the companionship and society of his wife; and on the other hand, a wife has claims which cannot be denied on the protection of her husband. It would appear however, that these time honored truths fail to hold good on railway trains, operated within the limits of the State, since the adoption of Act 111, approved July 10th, 1890,entitled an act to promote the comfort of passengers,etc. The conductor is authorized, under the law in question, to assign the husband to one coach set apart for persons of one race, and the wife to another coach set apart for persons of a different race. And still it is persistently contended that this law does not discriminate on account of race or color. To pursue the principle another step beyond this: The statute actually separates parent and child. If the husband is white and the wife colored, their children partake of the status of their mother, so that the conductor of the railroad train has authority to assign them to the coach set apart for colored persons; on the other hand, the same rule does not hold good, if the husband is colored and the wife is white, their children do not partake of the status of their mother, as in the instance just referred to, they partake of the status of

their father, and the conductors has authority to assign them to the coach set apart for colored persons.

The trouble with this law is that it perpetuates race prejudice among citizens of the United States, and that the spirit of caste and race is exemplified in the spirit of legislation.

The fourteenth amendment prohibits a state from depriving a person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to any citizen as a member of society. "The duty of protecting all their citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty." U. S. *vs.* Cruikshank, 92 U. S. 542.

Another view of the subject-matter may be taken to show the impracticability of carrying the statute into operation without encroachment upon other fundamental rights of the citizen.

It has been decided by the Supreme Court of Louisiana, Exrel Abbott *vs.* Judge, 44 La.,Anl. 583, that the law is unconstitutional, as regulation of commerce between the States, a power which appropriately belongs to Congress. Interstate passengers, are, therefore, held not to be affected by the provisions of the statute. Its operation is then confined to passengers travelling wholly within the state. That is to say the law with respect to passengers within the state abridges privileges enjoyed by those who are travelling between the states, on the same trains.

A man and his wife set out upon their travels by railroad on the same passenger train, the one to traverse many states on the route, the other not to go beyond the limits of the State. Husband and wife, inter-state passenger and intra-state passenger are subject to different laws on the same train. If they are of different races, the first has the right to seek and enjoy the society of the other, but it is not the same with respect to the second, because he or she is not permitted to travel on the train, except in the coach assigned by the conductor, on account of race or color. We now approach the close of this division of our argument. Equal right means the same right shared by all alike. We are told that we are bound to accept as true what the title of the statute announces as its object, "to promote the comfort of passengers." But we must be permitted to urge at least a mild protest against the acceptance of the universality of this axiom, without impugning the sincerity of the legislature, when it is self-evident that

the text of the statute destroys our faith in the title that caps its headlines. Listen to what the Honorable Justice Harlan quoted in the Civil Rights Case: "It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul."

How far equal rights are protected under the statute, and that it may be truthfully said that this was the purpose of the statute, and that it legalizes no discrimination as to color, and is not class legislation, but is really intended for the comfort of persons of both races, we furnish an example, which we think, calculated to dispel every doubt on the subject: a white man, married to a colored person, boarding the train has the right to enter and take his seat in the white coach with his black servant, if the servant be the nurse of his children; but the children themselves, necessarily colored, or not, as the case may be, must occupy the colored coach, if the conductor please so to to assign them. On the other hand, although the white man and his black servant, employed as nurse, may occupy the white passenger coach, not so is it permitted to the colored wife; she is required to part with her husband at the coach door and take her seat in the coach intended for colored passengers. Thus the bottom rail is on top; the nurse is admitted to a privilege which the wife herself does not enjoy, and which is refused to the children whom she is attending. If there be any answer to this, we will readily confess our surprise.

(8) The statute deprives the citizen of remedy for wrong, and is unconstitutional for that reason.

What is the wrong authorized by the act ? and what is the remedy the citizen is deprived of ? Has the relator been guilty of, or is he even charged with, any misbehavior, *malum in se, or malum prohibitum*, under a constitutional law, which has forfeited his right to personal liberty, however temporary or limited the period may be under the provisions of the statute of July 10th, 1890 ? Has he violated any state law, or municipal ordinance, in the nature of a police regulation, to which any constitutional right reserved to him by the Federal Government must give way for the public welfare ? The demurrer to the plea he set up negatives every ground of complaint against him, except that he insisted upon remaining in a passenger coach of a local railway train "to which by race he did not belong." It is pretended that the law he is charged with violating was enacted to promote the comfort of passengers travelling on railroads operated wholly within the limits of the state, other than street railroads, by assigning to separate coaches and compartments on the trains, persons of the white race and those of the colored race. As a matter of law, nobody will challenge the state's right to regulate the operation of its own railways within the limitations prescribed by the Federal Constitution. But

this right to regulate and control must not interfere with the rights of citizens to the equal protection of the laws, nor deprive them of their liberty and property without due process of law; nor in carrying out this power must they be deprived of any right, privilege or immunity secured to them by the organic law. He complains that he has suffered all these wrongs, under authority of the state statute, and that the same law denies him remedy, or the right of recourse to any of the courts of the state. This is not equal protection of the laws.

Respondent sets up that relator has not been deprived of any right privilege or immunity by the statute of July 10th, 1890, or by the proceedings thereunder. This is a bold assertion to make against a man, be he white or colored, who has been arrested and thrown into prison for refusing to abide by the decision of a railway conductor, as to whether he is in point of fact white or colored, which refusal is made a crime by a statute of the state.

But, it is urged, the temporary deprivation of liberty which petitioner has suffered, until he gave bail, is only an incident that always attends the prosecution of those who are accused of offending the majesty of the state by the infraction of the law. Is the act of July 10th, 1890, a law? It is not a law. Why is it not a law? Because it has made to be a crime and punishable, such act as cannot be made a crime in the nature of things, even by the highest and most solemn expression of the state's legislative will, the right of a man and citizen to assert himself, to defend himself, to maintain his right, to complain when he is wronged, to expostulate with the wrong doer. This is a positive right, an absolute right, an inalienable right, a right protected by constitutional amendments. With equal reason might the legislature declare it to be a crime, and punishable, if a man defend his person, his family, or his property against unprovoked attack and unlawful intrusion. His deprivation of liberty for this cause, whether permanent or temporary, is a deprivation of the positive right to personal liberty, which it is one of the objects of the amendment to secure.

But the refrain is, the law is a local one, passed to promote the comfort of passengers on railroad trains, to prevent contact between the races.

Street railroads are not included in the provisions of the act; but who is there that does not know that contact between white and colored persons on street railroads is more immediate, and many thousand times more frequent, than on any other line or system of railroads carrying passengers for hire?

All police regulations are not necessarily constitutional; unconstitutional statutes are sometimes disguised in the habiliments of police regulations. Police regulations should be reasonable, and not involve

the sacrifice of natural and inalienable rights, nor can they make a crime out of a natural right.

Not any section of the statute under discussion, which contains any penal clause, is constitutional; certainly not that section which authorizes the conductor to drive a man from one coach to another, whether of equal accommodations or not. These are some of the wrongs the statute perpetrates. It forbids the courts of the state to afford remedy. "It affects the passenger's substantial rights to be able to show the facts and he cannot be constitutionally deprived of the power." Little Rock R. R. Co. 33 Ark. 816; 34 Am. Rep. 55.

"The legislature cannot, in defining crimes and declaring their punishment, take away or impair any inalienable right secured by the constitution." Lawton *vs.* Steele, 119 N. Y., 226; 16 Am. State Rep. 814.

"It is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong." Park *vs.* Detroit Free Press Co., 72 Mich. 560. 16 Am. State Rep. 544.

"A statute which attempts to relieve newspaper publishers from responsibility for every injury to character by libel, whether intentionally false or not, is unconstitutional and void." Ibid.

"The legislature has no authority to direct courts what disposition they shall make of a particular case or question that comes before them; and any legislative commands about such matters, other than those contained in the general law of the land, are unconstitutional and void." Baggs' Appeal, 2 Rapalje's Dig.

"The legislature cannot prescribe a rule of conclusive evidence and divest rights by prescribing to the courts what should be conclusive evidence." Little Rock R. R. 33 Ark. 816, 2168, No. 5.

"An act of the legislature which undertakes to determine questions of fact and law, affecting the rights of persons or property, is judicial in its character and is therefore not a rightful subject of legislation. The legislature has no constitutional power to control the action of the courts." Am. and Eng. Ency. 682.

"The legislature cannot prescribe a rule of conclusive evidence. It may declare what may be received as evidence, but it cannot make that conclusively true which may be shown to be false. It is not within the province of the legislature to divert rights by prescribing to the courts what should be conclusive evidence." Little Rock R. R., *vs.* Payne, 33 Ark. 816; Cairo & Fulton R. R., *vs.* Parks, 32 Ark. 131.

Assignment of Errors, Point Second.

SECOND. The next point of our brief is directed to the fact that the statute authorizes the conductors of Railway trains to assign their passengers, according to their classification of them as persons of the white race and persons of the colored race, to separate coaches, without regard to the fact that the coaches and accommodations to which those of the other race are assigned should be substantially equal.

The Supreme Court of the state says this is not so; that the statute will not support such construction. Reaffirmation and denial amount to but little when the text of the statute (Pr. Rec. p. 6) is readily accessible. There is no rule more familiar than that criminal statutes are to be construed as *stricti juris*. The statute leaves too much to be supplied by implication, to help out conclusions respecting the intention of the legislature, a rule which does not obtain, and should not be permitted to prevail.

While it is true that the railroad companies are required by the statute to provide separate but equal accommodations for passengers of the white and colored races under penalty of fine, there is nothing in the text of the several sections to indicate that the accomodations to which a contumacious passenger is assigned by the conductor shall be equal to those from which he is expelled. This is left entirely to inference though the statute is penal, and therefore to be construed strictly. The court was in error; because the literal text of the law terminating the second section of the statute is as follows: "And should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The conductor is here again made the supreme judge, from whose decree there is no appeal. It is not at all made a question whether the accommodations are equal or not. The conductor says the passenger must go to this or that coach, and no more about it, either in court or out of court. The one may be a palace car, the other a cattle car, but the passenger must obey at the *ipse dixit* of the conductor, who is not even an officer of the state, but a mere employe of a railroad. In you go, or off you go, if you "refuse;" and if you "insist," up you go to the Parish prison and the Criminal court.

If this text be applied, the law cannot escape the taint of unconstitutionality upon this ground alone, because the section promotes the conductor to the perilous elevation of a judge without appeal, and his decree is to be accepted, at the passenger's peril, not only as to who are white and who are colored, but as an imperative command that he

shall go where he is ordered, whether the accommodations are equal or not, and whether or not he be correctly classed as white or colored. If they are not equal, there is a clear discrimination between the passengers, founded on race or color. We do not mean to be understood to say that it is unconstitutional that a railway officer should so misbehave, no matter what his motive, but we do attack as unconstitutional the statute for so authorizing and enabling him to misbehave, to say nothing of the impunity it has attempted to couple with this authorization.

It is answered to our objection, if colored passengers are so assigned, under this law, to coaches which may or may not be equal as to comfort and accommodation, white passengers are called upon to take the same chances. Yes, when they are mistaken for colored persons. After all, however, discrimination in the matter is evident, and whether for or against the white race, or for or against the colored race, it is by state legislation on account of race or color, and such discrimination is forbidden.

The information (Pr. Rec. p. 4) presented by the counsel for the state of Louisiana, faithfully follows the statute by keeping silent as to whether the coach to which the conductor ordered the petitioner to go, was or was not equal in point of accommodations, compared with the coach from which he was expelled. Neither does the same pleading charge that the petitioner, H. A. Plessy, is a colored man, and that he insisted on remaining in a coach of a railway train set apart for persons of the white race; an allegation which has been industriously suppressed in the information, simply we infer, because there exists no positive law or precedent in Louisiana to authorize a legal conclusion whether an octoroon is to be classed as of the white race or of the colored race; although the affidavit contained in the record(p.4,)under which petitioner was arrested and thrown into prison for refusing to obey the command of the conductor, fully recites the fact. We condescend, however, to notice a mere sophism on the part of the respondent, that petitioner has not set up in his plea whether he is of the colored race or of the white race. We have been taught that affidavits, indictments and informations are the appropriate sources from which to seek for the knowledge of facts charged against accused persons; and that the burden of allegation and proof as to whether petitioner is of the white race or of the colored race devolves upon the state, as part of the accusation against petitioner. Any way this fact could only have been pleaded by defendant by way of answer, or set up by way of proof to the merits of the prosecution, and not by way of exception to the jurisdiction of the court, which is the only question we have anything to do with. The issue upon the plea in the lower court, narrowed down, was simply whether the court had a

right to entertain cognizance and jurisdiction of a cause alleged to be founded upon a state law in conflict with the amendments to the United States constitution. It is the only issue here, before the Supreme Court. Whether the petitioner, H. A. Plessy, is white or colored, or mostly white, or mostly colored, cuts no figure in the determination of the question of a court's jurisdiction or authority to hear and determine a case upon constitutional grounds. Every fact and argument is set up in the plea filed in the court below, that petitioner depends upon in this Honorable Court to show that the state courts were without constitutional authority to entertain the proceedings complained of against petitioner.

Indeed, neither the information nor the statute enlighten us whether a passenger who is an octoroon, and in whom color is not discernible, should be assigned to a coach set apart for colored passengers, or to a coach set apart for white passengers. It appears to us that in either event, such octoroon is made to suffer not for his own fault, but because at will, one conductor has authority under the state law to assign him to a coach among white passengers, and another conductor, with equal authority and reason, may assign him to a coach among colored passengers.

Assignment of Errors, Point Third.

THIRD. The court erred in its decree that "the statute obviously means that the coach to which the passenger is assigned shall be, according to the requirements of the act, to the coach to which the passenger by race belongs." Now the error upon this point consists in the absence of data, precedent, or statute upon which a conductor is to decide. How can the court itself say to what race belong quadroons, and octoroons and those persons who are of mixed Caucasian and African descent in the proportion of fifteen-sixteenths Caucasian and one-sixteenth part African blood? Will the court say, can the court say, whether these persons are of the white race, or of the colored race, to use the classification paraphrased in the statute? The court cannot, because these persons are not of any distinct race, they are of mixed races, representing almost in perfection the Caucasian type. There must be a time when color runs out entirely. When is this? When color ceases to be discernable, or at so many degrees removed from the African ancestor? Who, what law has fixed these degrees? Who will say from mere inspection whether the relator in this cause is of pure Caucasian blood or otherwise? The conductor of a railroad train is expected to do all this, without the aid of the legislature or of the court to guide him. The race to which the octoroon belongs is just where the state Supreme Court left it, to be decided by the railroad conductors.

The court is confident that the statute obviously provides that the passenger shall be assigned to the coach to which by race he belongs; but the trouble is the court takes for granted what is only assumed, and not granted or proved, that is to say the race to which the passenger belongs; when neither jurists, lexicographers, nor scientists, nor statute laws nor adjudged precedents of the state of Louisiana, enable us to say what race the passengers belongs to, if he be an "octoroon." We know that he is not of pure Caucasian type, neither can he be said to be of any of the colored races. Which race is the colored race referred to in the statute? There are Africans, Malays, Chinese, Polynesians; there are griffs and mulattoes. But which of all these is the colored race the statute speaks of? The legislature might have relieved us from this perplexity, but it has not done so.

Assignment of Errors, Point Fourth.

FOURTH. We are next to consider another important provision in the statute we are attacking. "That neither the conductor nor the railroad company he represents shall be liable for damages for such refusal (to carry the passenger who refuses to occupy the coach to which the conductor assigns him on account of race to which he belongs) in any of the courts of this state," (Louisiana.) Omitting the words in parenthesis, these are the concluding sentences of the second section of the statute.

Yet the Supreme Court of the state is clear in its opinion that the statute does not exempt the officer or conductor from damages for refusing to carry a passenger who refuses to obey an assignment to a coach to which his race does not belong. According to our construction the contrary of what the court has maintained is equally apparent. More than this, we think we discern the motive that induced the legislature to incorporate this important provision in the statute. The words certainly mean something intelligible. If they mean nothing, why encumber the statute with them? Our idea is that the assurance of immunity from damages held out to the railroad companies would quicken their interest in a matter to which they would otherwise be indifferent. The courts of the state are sought to be rendered powerless to condemn conductors and railroad companies as responsible for the consequences of their own acts and the abuse of discretion reposed in them by the provisions of the statute.

The legislature might with equal reason undertake by anticipation to say that the courts shall not condemn a policeman for clubbing an unresisting prisoner in his custody.

It is for the courts to adjudge, not for the legislature to command, whether railroads and conductors shall be held responsible by passengers whose rights are ignored or invaded.

In this same connection, we will add that by this provision the legislature of our state has undertaken to say what construction shall be placed on the statute, and to interpret the constitutionality of its own act, an undisguised assumption of judicial power.

"A mandate of the legislature to the judiciary, directing what construction shall be placed on existing statutes, is an assumption of judicial power, and unconstitutional." Governor *vs.* Porter, 5 Hum. 165.

"A statute providing that no person shall recover damages from a municipality for an injury from a defect in a highway, unless he resides in a country where similar injuries constitute a like cause of action, is unconstitutional." (Clearly because it denies equal protection of the laws.) Pearson *vs.* City of Portland, 69, Me. 278.

"Positive rights and privileges are undoubtedly secured by the XIVth Amendment, but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges." Bradley, J. Civil Rights cases 109, U. S., p. 3.

"As to these words from Magna Charta, 'by the law of the land,' after volumes spoken and written, with a view to their exposition, the good sense of mankind has at length settled down to this that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." Bank of Columbia *vs.* Okely, 4 Wheat, 244.

Assignment of Errors, Point Fifth.

FIFTH. This leads us to another branch of the argument closely connected with what has been said: That officers and conductors of passenger trains are authorized by the statute to "refuse to carry on such trains" any passenger who shall decline to submit to their judgment as final and conclusive that he is of the white race or of the colored race.

The opinion of the State Supreme Court was in effect that "the statute utterly repels the charge that it vests the officers of the company with a judicial power to determine the race to which the passenger belongs." This was error on the part of the court. We are again fortified by reference to the statute.

According to the 2nd section of the act it is expressly provided that "the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs," and terminates with the provision that in case of refusal on the part of the passenger to occupy the coach to which he is assigned, "said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither

he nor the railway company which he represent, shall be liable for damages in any of the courts of this state."

The only reason the court has given in its decree for overruling what we are here contending for, is to affirm what we have said in equivalent terms. The court said "the 'discretion' vested in the officer to 'decide' primarily the coach to which by race each passenger belongs is only that 'necessary discretion' attending any imposition of a duty, etc." What idea do these words convy? Neither more nor less than what we say ourselves.

"Discretion to decide" which are the words the court has used in the decree, are the equivalents of the words "judicial power," which the Court finds fault with us for using. When the conductor "decides" what coach the passenger belongs to, he "decides" at the same instant whether the passenger is of the white race or of the colored race, and if the passenger refuses to submit to the "discretion of the conductor to decide," or his "judicial power," or the "necessary discretion that attends the exercise of the duty imposed upon him," which is all one thing, the conductor shall have power to refuse to carry such passenger on his train. So that sentence follows speedily upon the heels of the judgment.

JAMES C. WALKER,
of Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895

No. 210.

HOMER A. PLESSY,
Plaintiff in Error,

—vs.—

J. H. FERGUSON, JUDGE OF SECTION "A," CRIMINAL DISTRICT COURT, PARISH OF ORLEANS,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

M. J. CUNNINGHAM,
Attorney-General of Louisiana,

LIONAL ADAMS,
ALEXANDER PORTER MORSE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

SYLLABUS.

1. The Supreme Court shall have control and general supervision over all inferior courts. They shall have powers to issue writs of *certiorari*, prohibition, mandamus, *quo warranto* and other remedial writs. Const. Art. 90.
2. Prohibition is an extraordinary writ issuing out of a court of superior jurisdiction and directed to an inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it had no control, or where such inferior tribunal assumes to entertain a cause over which

it has jurisdiction, but goes beyond its legitimate powers and transgresses the bounds prescribed by law. 19 A. & E., Ency. Law, p. 263, C. P. Arts. 845, 846.

It is conceded that where an inferior tribuual is proceeding under an unconstitutional act, prohibition is the proper remedy.

3. A *certiorari* is a writ issuing from a superior court to an inferior court, tribunal, or officer exercising judicial powers, commanding the latter to return the proceedings in a cause to the superior court, that it may determine whether the same were according to the essential requirements of the law. 3 A. & E. Ency. Law, pp. 60, 61. C. P. Art. 855.

In these proceedings it has been invoked as an ancillary process with a view to obtain a full return to the writ of prohibition.

4. Prohibition is wholly collateral to the original proceeding. It is substantially a proceeding between two courts, a superior and an inferior, and is the means by which the superior tribunal exercises its superintendence over the inferior, and keeps it within the limits of its rightful jurisdiction. High's Ex. L. Rem. §768.

The only proceedings that can be inquired of or considered, are those returned as having been had in the subordinate court.

5. A State has the power to require that railroad trains within her limits shall have separate accomodations for the two races, and, this provision, as it affects only commerce within the State, is no invasion of the powers given to Congress by the commerce clause. 133 U. S. 587, 591; 6 South R. 204, 205.

6. The denial to any person to the admission and accomodations and privileges of an inn, a public conveyance, or a theatre, does not subject him to any form of servitude, or tend to fasten upon him any badge of slavery, even thongh the denial be founded on the race or color of that person. Such denial is not therefore obnoxious to the provisions of the Thirteenth Amendment. Civil Rights Cases, 109 U. S. 21.

7. The Fourteenth Amendment is violated only when the States attempt by legislation to establish an *inequality* in respect to the enjoyment of any rights or privileges. Tied. Lim. P. Pow. §201.

8. The regulation of the civil rights of individuals, is unquestionably a proper subject for the exercise of a State's police power, and laws passed to effect such regulations have been uniformly held constitutional and valid, except in extreme cases.

Laws may, therefore, be enacted, providing for separate schools for the different races, and separate accommodations by common carriers. 18 A. & E. Ency. Law, pp. 753, 754 and authorities cited.

9. A separation of passengers may be made solely on the ground of race or color as a reasonable regulation, provided accommodations equal in quality and convenience are furnished to both alike. 22 Fed. R. 843-845.

10. Equality of accommodation does not mean identity of accommodation; and it is not unreasonable, under certain circumstances, to separate white and and colored passengers on a railway train, if attention is given to the requirement that all, by paying the same price, shall have sub-

stantially the same comforts, privileges and pleasures furnished to either class. 23 Fed. R. 318, 319; *Id.* 637.

11. The phrase "persons of color" embraces universally, "not only all persons descended wholly from African ancestors, but also those who have descended in part only from such ancestors, and have a distinct admixture of African blood." And. Dic. Law. p. 195; Cent. Dict. p. 1111.

12. The duties required of the officers of passenger trains are of a peremptory and mandatory nature, and are in no way discretionary in their character, and in no sense involve the exercise of any degree of judgment.

They are in no sense judicial; they are purely ministerial. High's Ex. L. Rem. §§24, 34

13. The penalty imposed upon the contumacious passenger is not for refusing to occupy the coach or compartment to which he is assigned by the railway officer, but for "insisting on going into a coach or compartment to which he does not belong." Act 111 of 1890, *Id.*, Sec. 2.

14. None of the provisions of the statute pretend to make a criminal offense of "the refusal of any passenger to abide by the decision of the conductor;" nor "to make a peaceable refusal accept his decision as to the race to which the passenger belongs, a crime, or to make said act punishable by fine or imprisonment." Act 111 of 1890, Sec. 2:

15. There is nothing in the act that authorizes any person to determine, in any way, the question of race, or to compel the citizen to accept such determination, or to make the refusal to comply with the same a penal offense. *Id.* Sec. 2.

16. The clear and specific requirement of the statute is, that

the railway company "shall provide *equal*, but separate accomodations for the white and colored races." *Id.* Sec. 1.

17. Therefore, any passenger of the white race insisting on going into a coach or compartment set apart for the colored race, or any colored man who insists on going into a coach or compartment assigned and set apart for passengers of the white race, are equally affected. *Id.* Sec. 2.

Proceedings.

Homer A. Plessy was proceeded against in the Criminal District Court for the Parish of Orleans, State of Louisiana, by information, the charge being (omitting the formal parts) "that one Homer Adolph Plessy, late of the Parish of Orleans, on the 7th day of June, in year of our Lord, one thousand eight hundred and ninety two, with force and arms, in the parish of Orleans aforesaid, and within the the jurisdiction of the Criminal District Court for the Parish of Orleans, being then a passenger traveling wholly within the limits of the State of Louisiana on a passenger train belonging to the East Louisiana Railroad Company, a railway company carrying passengers in their coaches within the State of Louisiana, and on which, the officers of the said

East Louisiana Railroad Company had power and were required to assign and did assign the said Homer Adolph Plessy to the coach for the race to which the said Homer Adolph Plessy belonged—unlawfully did then and there insist on going into a coach to which by race he did not belong; contrary to the form of the Statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same.

(Signed) LIONEL ADAMS,

Assistant District Attorney for the Parish of Orleans.

The information was filed July 20th, 1892. On the 13th of October, 1892, the defendant in person was placed at the bar of the Court to be arraigned on the charge preferred against him in the said information, and after having heard the same read and being called upon to plead thereto, pleaded to the jurisdiction of the Court, the matters set out in the plea to the jurisdiction being substantially as follows:

1st. That Plessy is a citizen of the United States and a resident of Louisiana.

2d. That the East Louisiana Railroad Company is a corporation under the laws of Louisiana, doing business as a common carrier and carrying passen-

gers for hire, which cannot be authorized to distinguish between citizens according to race.

3d. That race is a question of law and fact, which an officer of a railroad corporation cannot be authorized to determine.

4th. That the said defendant bought and paid for a ticket of said company, entitling him to a first-class passage from New Orleans to Covington, both points being within the State, and had the same in his possession and unused at the time of the act alleged in the information, as the basis thereof, and that the coach which he entered and occupied was a first-class one, as called for by his ticket.

5th. That defendant was guilty of no breach of the peace, no noisy or obstreperous conduct, and uttered no profane or vulgar language, was respectably and cleanly dressed, was not intoxicated or affected by any noxious disease; and that no objection was made to his personal appearance, conduct or condition by any one in said coach, nor could any objection have been made.

6th. That Act III of 1890, under which the information is drawn, is, in its several parts, in conflict with the Constitution of the United States.

7th. That Section 2 of said Act pretends to confer upon the conductor of a railroad train power to determine the question of race and to arrest

the passengers upon the train in accordance with his decision of that question; that the refusal of any passenger to abide by the decision of the conductor is attempted to be made a criminal offense and is the gist of the present information. That the Legislature has no power to confer judicial functions upon an officer of a passenger train, nor to make a peaceable refusal to accept his decision as to the race to which the passenger belongs a crime, or an act punishable by a fine or imprisonment.

8th. That the same section is unconstitutional and void, in that it provides a summary punishment for such pretended criminal act, by authorizing the officer to refuse to carry such pretendedly contumacious passenger and exempting both the company and the officer from any claim for damages on the part of said passenger; the same being an imposition of punishment without due process of law, and the denial to citizens of the United States of an equal protection of the laws.

9th. That the purpose and object of said act, as appears upon its face, is to assort and classify all passengers upon railroads doing business within the State according to race, and to make the rights and privileges of the citizens of the United States dependent on said classification, and is therefore void.

10th. That race is a scientific and legal question of great difficulty, that the State has no power to authorize any person to determine the same without testimony, or to make the rights or privileges of any citizen of the United States dependent upon the fact of race or its determination by such unauthorized person, nor to compel the citizen to accept such determination, nor to make refusal to comply with the same a penal offense.

11th. That the State has no right to distinguish between the rights and privileges of citizens of the United States on the ground of race as regards place privilege or accommodation in public railway trains within said State;—a party purchasing a ticket of a particular class being entitled to take any seat in any car of the class for which his passage calls not occupied by another.

12th. The act deprives the citizen of remedies for wrong and is unconstitutional for that reason, and for the further reason that the State neither has, nor can have power to distinguish between citizens of the United States as regards any right, privilege or immunity to be enjoyed or exercised by such citizen on account of race or color.

13th. That a State has no power or authority to grant exclusive rights or privileges to citizens of the United States of one race which are denied to

citizens of another race, or to make the refusal to submit to such denial a penal offense.

14th. That the statute in question establishes an insidious distinction and discrimination between citizens of the United States based on race, which is obnoxious to the fundamental principles of national citizenship, perpetuates involuntary servitude as regards citizens of the colored race under the merest pretense of promoting the comforts of passengers on railway trains, and in further respects abridges the privileges and immunities of of the citizens of the United States and the rights secured by the 13th and 14th Amendments of the Federal Constitution.

Issue upon the plea was joined by demurrer, to which in turn defendant filed a joinder. The trial Court overruled the plea to the jurisdiction and directed the defendant to plead over the following reasons:

Opinion Upon Plea.

"The information in this case is based on Act No. 111, approved July 10th, 1890. It charges that the defendant unlawfully insisted on going into a coach to which, by race, he did not belong.

"There is no averment as to the color of the defendant. Defendant, before arraignment, filed a

plea herein, based on fifteen grounds and prayed therein to be dismissed and discharged.

"The title of the act referred to is 'to promote the comfort of passengers on railway trains; requireing all railway companies carrying passengers on their trains in the State, to provide *equal*, but separate accommodation for the white and colored races, by providing separate coaches or compartments, so as to secure separate accommodations, defining the duties of the officers of such railways; directing them to assign passengers to the coaches or compartments set aside for the use of the races to which such passengers belong; authorizing them to refuse to carry on their trains such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned, to exonerate such railway companies from any and all blame or damages that might proceed or result from such a refusal; to prescribe penalties for all violations of this Act, etc.' "

It is urged by defendant's attorney that the title of the Act "to promote the comfort of railway passengers" is evidently not the design of the Act; that its purpose is to legalize a discrimination between classes of citizens based on race and color.

This law is clear and free from all ambiguity, and the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

Judges have nothing to do with the policy of particular acts passed by the Legislature.

The will of the law giver being understood, nothing remains but to carry it into effect. 3 R. 465.

It is claimed also, and in fact, it is conceded by the State's Attorney, that such part of the statute as exempts from liability the railway companies and its officers is unconstitutional.

It is a rule of interpretation that a law may be unconstitutional in one part and valid in all other parts. H. D. Vol. 1, pp. 779-80; No. 10 & 31 p. 782, Nos. 3 & 6. Eliminate the clause, which is objected to and there remains a perfectly valid and constitutional enactment.

It is further urged in support of the plea herein that judicial functions are delegated to the conductor of the train by the Legislature, and that it has exceeded its authority by so doing. In an analogous case reported in the Federal Reporter, Vol. XXIII, page 319, it was held that the conductor was the proper officer to decide upon her (a colored woman) right to ride in the ladies' car.

The Act in question authorizes the officers of the train to assign passengers to the coach or compartment used for the race to which such passenger belongs. To decide upon the right of defendant to ride in a certain car.

The officer, it is true, determines for the time being, the question of color. He does so at his peril. His decision is subject to subsequent judical investigation and determination. Clearly, railway companies have the right to adopt reasonable rules and regulations for their protection and for the proper conduct of their business, and to designate who shall execute said regulations. It is in the nature of a police regulation.

If, therefore, said companies have such right it follows that the Legislature, the law maker, has the undoubted right to so declare in an expression of legislative will.

Counsel for defendant contends that the accused is deprived by the said power delegated to the conductor, of liberty and property without due process of law, in violation of the Constitution of the United States. It would be impracticable, in fact, almost impossible, to organize and utilize a Circuit Court or any tribunal with special jurisdiction to *instanter* try and determine the color of a passenger, when the question was specially put at issue.

The defendant herein was not, in a proper sense, deprived of his liberty by the act of the officer of the company.

There is no pretense that he was not provided

with equal accommodations with the passengers of that class to which he did not belong. He was simply deprived of the liberty of doing as he pleased, and of violating a penal statute with impunity.

It is urged that the defendant was deprived of his property, because he purchased a first-class ticket, and never used it, by reason of the act of the conductor. The railway company was blameless in the matter. The ticket purchased by the defendant was not used simply because the defendant refused to ride in the car or compartment to which he was assigned by the conductor, without a valid reason for said refusal, and insisted on going into a coach to which, by race, he did not belong, according to the information.

Another ground is, that said act does not afford equal protection, in violation of Art. XIV of the constitution. The act expressively provides, that all railway companies carrying passengers in their coaches in this State shall provide *equal* accommodations for the white and colored races. Also, that *any* passenger insisting on going into a coach or compartment to which, by race, he does not belong, shall be liable to be punished according to its provisions. Should a *white* passenger insist on going into a coach or compartment to which by race he

does not belong, he would thereby render himself liable to punishment according to this law, There is, therefore, no distinction or unjust indiscrimination in this respect *on account of color.* The important question for consideration in this case is, had the Legislature the right to authorize and empower railway companies *within* the State to provide equal but separate cars or compartments for the different races.

In the case entitled Logwood and wife vs. Memphis & C. R. R. Co., Judge Hammond of the Circuit Court charged the jury "that common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price, alike. Equal accommodations do not mean *identical* accommodations. Races and nationalities, under some circumstances, to be determined on the facts of each case, may be separated; but in all cases the carrier must furnish, substantially, the same accommodations to all, by providing equal comforts, privileges and pleasures to every class. Colored people and white people may be so separated, if carriers proceed according to this rule.

"If a railroad company furnished for white ladies a car with special privileges of seclusion and other comforts, the same must be substantially furnished for colored women.

"All travelers have to submit to some discomforts and inconveniences, and should not be too exacting.

"The brakeman on the train having referred Mrs. Logwood to the conductor, who was the proper officer to decide upon her right to ride in the ladies' car, and she having gone to him, the question in this case must be determined by what occurred between them, and if you believe from the proof that the conductor ratified the act of the brakeman, by telling her she must ride in the front car, and would not be permitted to go into the ladies' car, the company is undoubtedly liable for damages, unless you conclude from the evidence that the front car was under the rule already announced, equal to the ladies' car.

"But if you believe that the conductor told her that at his convenience he would admit her to the ladies' car, and there was no unreasonable delay or discomfort in so doing, the plaintifl cannot recover in this case."

In the case entitled Murphy vs. Western & A. R. R. and others in Circuit Court of Tennessee held: That a railroad company may set apart certain cars to be occupied by white people, and certain cars to be occupied by colored people, but if it charges the same fare to each race, it must furnish

substantially like and equal accommodations. It was held in Maryland, in an admiralty proceeding, that, on a night steamboat plying on the Chesapeake Bay, colored female passengers may be assigned a different sleeping cabin from white female passengers.

The right to make such separation can only be upheld when the carrier in good faith furnishes accommodations equal in quality and convenience to both alike. Federal Reporter Vol. XXII, p. 843.

In the year 1888 the Legislature of the State of Mississippi passed an act with which the act under consideration is identical.

In a case reported in the 133 United States Reports, at page 591, the Supreme Court in interpreting the Mississippi Statute, use the following language: "So far as the first section is concerned (and it is with that alone we have to do) its provisions are fully complied with when to trains within the State, is attached a separate car for colored passengers."

"This may cause an extra expense to the railroad company; but not more so than State Statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State."

The argument herein by the counsel for defendant displayed great research, learning and ability; the court, however, is of the opinion, after mature deliberation, and careful consideration of the questions involved and of the authorities cited in support of the grounds presented, as well as the able argument of the District-Attorney—for the reasons stated, that the plea herein filed by defendent should be dismissed, and it is further ordered that the defendant plead over."

Thereupon, on the 22nd of November, 1892, Plessy filed in the Supreme Court of Louisiana, this application for writs of prohibition and *certiorari*:

EX. PARTE, HOMER A. PLESSY.

To the Honorable, the Supreme Court of the State of Louisiana.

The petition of Homer A. Plessy respectfully represents: That said petitioner is a citizen of the United States and a resident of the State of Louisiana; moreover, that petitioner is of mixed Caucasian and African descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood is not discernible in petitioner, and he is entitled to every recognition, right, privilege and immunity secured to citizens of the United States of the white race by the Consti-

tution and laws of the United States, and such right, privilege, recognition and immunity are of value greatly exceeding the sum of ten thousand dollars, if the same be at all susceptible of being estimated by the standard value of money.

Petitioner further represents: That on or about the seventh day of June of the present year, 1892, he engaged and paid for one first-class passage on East Louisiana Railway, at and from the City of New Orleans in the State of Louisiana, to the City of Covington, in St. Tammany Parish, also in the State of Louisiana, and thereupon petitioner entered a passenger train of said railway and took possession of a vacant seat in a coach or compartment of said train where passengers of the white race were accommodated.

That said East Louisiana Railway Company is incorporated by the laws of the State of Louisiana as a common carrier, carrying passengers for hire, and is not and cannot be authorized to distinguish between citizens according to race; but, notwithstanding, upon the approach of the conductor of said train, petitioner was by him ordered and required, under penalty of ejectment from said train, and imprisonment, to vacate said coach or compartment, and to occupy another seat in another compartment or coach of said train assigned

by said company for persons not of the white race, for no other reason announced by said conductor than that petitioner was of the colored race. That petitioner refused to comply with said unreasonable command, and insisted upon occupying and being permitted to occupy and remain in the seat and coach where he then was, whereupon, with the aid of an officer of police, viz: C. C. Cain, as further appears herein, said petitioner was forcibly ejected from said coach and train, and hurried off and imprisoned in the Parish jail of New Orleans, and there held to answer a charge or affidavit made by said officer, to the effect and in substance that petitioner was guilty of having criminally violated an act of the General Assembly of the State of Louisiana, approved July 10th, 1890, No. 111 of the Session Acts, in such cases made and provided.

That petitioner was subsequently brought before the Hon. A. R. Moulin, Recorder of the Second Recorder's Court for the City of New Orleans, for preliminary examination upon the facts set forth in the said affidavit, and petitioner was by the said Recorder thereupon committed for trial to the Honorable the Criminal District Court for the Parish of Orleans. That said proceedings and affidavit appear by exhibit "A" hereto annexed and made part of this petition.

Petitioner further avers that upon the receipt of the said papers and proceeding by the said officers of the said Criminal District Court for the Parish of Orleans, the said cause was allotted and assigned to Section "A" of the said Criminal District Court; and after leave of the Honorable the Judge of said Section "A," the Assistant District Attorney for the Parish of Orleans, prosecuting in behalf of the State of Louisiana, presented and filed an information against petitioner for the subject-matter as herein set forth, and as set forth in said above mentioned affidavit; and said information is hereto annexed, marked Exhibit "B," and made part of this petition, and is predicated only and solely on the facts set forth in said affidavit, and on the provisions of said Act of the General Assembly of this State, approved July 10th, 1890, which petitioner affirms to be in all its parts null and void, because in conflict with the Constitution of the United States, as hereinafter appears in detail and specifically set forth in the plea which petitioner interposed against the said proceeding.

That petitioner hereto annexes and makes part of this petition marked Exhibit "C" a verbatim copy of the said Act of the General Assembly of this State, No. 111, approved July 10th, 1890.

And petitioner also says that the said Criminal

District Court for the Parish of Orleans has no jurisdiction or authority to hear and determine the facts set forth in the said affidavit and information, because the said court is precluded from so doing by reason that the said Act of the General Assembly of the State of Louisiana, approved July 10th, 1890, is in conflict with the Constitution of the United States in its several parts, as aforesaid, and petitioner has thus pleaded and excepted in his defense, upon arraignment to answer said information in the said Criminal District Court, as appears by petitioner's plea hereto annexed marked "D" and made part of this petition; moreover, that petitioner now repeats and renews in this Honorable Court all and singular the allegations of the said annexed plea in manner and form as therein recited, the same being too lengthy and numerous to be otherwise referred to.

And petitioner further represents that petitioner's counsel, acting in his behalf, joined issue upon demurrer being filed to said plea by the said Assistant District Attorney; and after hearing argument for the State and for the accused, the said judge of Section "A" Criminal District Court, aforesaid, maintained the said demurrer thereto, and overruled petitioner's said plea, and has ordered petitioners to answer and plead over to the facts set

forth in the said information. That unless said judge of the Criminal District Court be enjoined by writ of prohibition from further proceeding in said cause, the said court will proceed to fine and sentence petitioner to imprisonment and thus deprive him of his constitutional rights set forth in said plea annexed; notwithstanding that said statute under which petitioner is being prosecuted is in conflict with the Constitution of the United States, and there lies no appeal from such sentence as the said statute provides, and therefore petitioner is without relief or remedy except to apply to this Honorable Court for writs of prohibition and *certiorari* to prohibit the said Judge of Section "A," Criminal District Court, from proceeding further with said prosecution against petitioner, and that the record of the same be sent to this Honorable Court to the end that the validity of said proceedings be ascertained; and the said proceedings are entitled "State of Louisiana vs. Homer A. Plessy, No. 19,117 of the docket of the Criminal District Court for the Parish of Orleans.

And petitioner further says that he has duly and formally notified the said Honorable Judge of Section "A" Criminal District Court of his intention to apply to this Honorable Court to issue the said writs, and that he has complied with every

other necessary preliminary according to his best knowledge and information.

Wherefore, petitioner prays that writs of prohibition and *certiorari* issue herein, directed to the Honorable J. H. Ferguson, Judge of Criminal District Court for the Parish of Orleans; that he be prohibited from proceeding further with the cause entitled State of Louisiana vs. Homer A. Plessy, No. 19,117 of the docket of the said Court, until further ordered; and that the record thereof be certified and transmitted to this Honorable Court to the end that the validity of said proceedings be ascertained; and petitioner prays that said writs of prohibition be made peremptory in due course, and that he have such other and further relief the nature of the case requires.

(Signed): ALBION W. TOURGEE,
JAS. C. WALKER,
of Counsel.

Pursuant to the prayer of the petitioner, an order was issued "commanding respondent to show cause on Saturday, the 26th day of November, A. D. 1892, at 11 o'clock A. M., why the writ of prohibition should not be made perpetual as prayed for. It is further ordered, that respondent certify and transmit to this court on that date a record of the proceedings had in the said case entitled and numbered

on the docket of the Criminal District Court for the Parish of Orleans, 'State of Louisiana vs. Homer A. Plessy, No. 19,117,' to the end that the validity of said proceedings be ascertained; and it is further ordered; until the further order of this court all proceedings in said case be stayed."

Respondent, having in obedience to the writs to him directed, transmitted to the Supreme Court a certified copy of the proceedings in the cause, filed the subjoined answer:—

ANSWER OF RESPONDENT.

To the Honorable the Supreme Court of Louisiana:

Now into court comes John H. Ferguson, presiding judge of Section "A," of the Criminal District Court of the Parish of Orleans, State of Louisiana, made respondent in the above entitled and numbered cause, and having suggested that in obedience to the mandate of this Honorable Court he has herewith transmitted to this Honorable Court a certified copy of the proceedings in the prosecution entitled "The State of Louisiana vs. Homer A. Plessy," being a prosecution by information for violation of the provisions of Act No. 111 of 1890, for answer to the writ of prohibition to him directed, with respect says:—

That the cognizance of the said cause of the State

of Louisiana vs. Homer A. Plessy, belongs of right to the said Section "A," of the Criminal District Court of the Parish of Orleans, and that your respondent, as the presiding judge of the said Court is competent to hear and determine the same.

Respondent respectfully represents that so much of the said Act No. 111 of 1890 as is charged in the information against the said Homer A. Plessy filed, to have been violated, is a good and valid statute of the State of Louisiana, and that the said Homer A. Plessy is by the law of the land bound to answer the same. And in support of the said plea, respondent annexes hereto and makes part hereof the opinion and decree by him rendered in his official capacity in passing upon the plea to the jurisdiction of the Court by the said Homer A. Plessy interposed. Respondent respectfully avers that nowhere in the information against the said Homer A. Plessy in the said court filed it is alleged either that the said Homer A. Plessy was a white man or a colored man, or that he belonged to the white race or to the colored race. Nor is it anywhere in the said hereinbefore mentioned plea to the jurisdiction of the court by the said Homer A. Plessy interposed, either pleaded, averred or admitted that the said Homer A. Plessy is a colored man or belongs to the colored race, or that he was of

mixed Caucasian and African descent, or that belonging to the colored race, he was by reason thereof, denied and deprived of any right, privilege or immunity because of his race and color.

Respondent further avers that instead of pleading, averring or admitting that the said Homer A. Plessy was, of, and did belong to the colored race, the said, Homer A. Plessy, on the contrary, declined and refused either by pleading, or otherwise, to acknowledge and admit that he was in any sense or in any proportion a colored man.

Respondent further respectfully represents, that the affidavit of C. C. Cain, made before the Recorder of the Second Recorder's Court, against the said Homer A. Plessy, which is annexed to, and made part of relator's petition praying for the writ of prohibition herein, forms no part of the proceedings had before your respondent; was at no time produced or offered in any of the proceedings had before your respondent; nor has the same ever been inspected or seen by your respondent; either by copy or in the original, until the service upon him of the writs of prohibition and *certiorari* issued herein.

Respondent respectfully represents that so far as the proceedings in his Court are concerned, he does not, cannot, and will not know until the trial of the said Homer A. Plessy, under the information

against him filed, whether the said Homer A. Plessy, was a white man or a colored man insisting upon going into, and remaining in a compartment of a coach, which by reason of his race or color he did not belong.

Respondent further avers that apart from the matter and things set up and alleged in the plea filed by the said Homer A. Plessy, in this cause pleaded there is nothing in the prosecution against him instituted in the proceedings had thereunder which could or does raise any question under the constitution and laws of the United States.

Respondent respectfully represents that it was competent for the State of Louisiana, through its Legislature, to prohibit the acts of the said Homer A. Plessy, which are charged against him as an offense, and that the proceedings had under the penal law of the State forbidding the same have been regular and in pursuance with the requirements of the said Act.

Wherefore, respondent prays that after due proceedings had, that the answer of your respondent be considered as sufficient in law to justify his conduct; that the complaint against him by the said petitioner brought, be dismissed; and that the said petitioner be sentenced to pay costs.

And your respondent prays for all general and equitable relief.

(Signed.) J. H. FURGUSON,
Respondent.

After argument, the Supreme Court of the State rendered its decision dissolving the provisional writ of prohibition, and denying the relief sought by relator. A rehearing having been applied for and refused, a writ of error was taken to the Supreme Court of the United States; and an assignment of errors has been filed in this Court.

BRIEF.

The extraordinary remedies of *certiorari* and prohibition invoked were before the State Supreme Court under authority of Art, 90 of the State Constitution.

"The Supreme Court shall have control and general supervision over all inferior courts. They shall have power to issue writs of *certiorari*, prohibition, mandamus, quo warranto and other remedial writs."

The writ of prohibition, "is an order rendered in the name of the State, by an appellate court of competent jurisdiction, and directed to the judge and to a party suing in a suit before an inferior court, forbidding them to proceed further in the cause, on the ground that the cognizance of the said cause

does not belong to such court, but to another, or that it is not competent to decide it." C. P., Article 846.

This mandate only issues to courts or inferior judges which exceeded the bounds of their jurisdiction. C. P. Art. 845.

The writ of *certiorari* "is an order rendered in the name of the State, by a competent tribunal, and directed to an inferior judge, commanding him to send to such tribunal a certified copy of the proceedings in a suit pending before him, to the end that their validity may be ascertained." C. P., Article 855.

In the present proceedings *certiorari* has been invoked, as an ancilliary process with a view to obtain a full return to the writ of prohibition.

A writ of prohibition is an extraordinary writ issuing out of a court of superior jurisdiction and directed to an inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it had no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers and transgresses the bounds prescribed to it by law.

19 A. & E. Ency. Law, p. 263.

It is conceded that where an inferior tribunal is

proceeding under an unconstitutional act prohibition is the proper remedy.

I

It is elementary that the action by prohibition is in no sense a part or continuation of the action prohibited by removing from a lower to a higher court for the purpose of obtaining a decision in the latter tribunal. So far from this, it is regarded as wholly collateral to the original proceeding, being intended to arrest that proceeding and to prevent is further prosecution before the Court having no jurisdiction of the subject matter in dispute. In other words it is substantially a proceeding between two Courts, a a superior and inferior, and is the means by which the superior tribunal exercises its superintendence over the inferior and keeps it within the limits of its rightful jurisdiction. High's Ex. L. Rem., Section 768.

The only questions therefore legitimately submitted for consideration in such proceeding are those presented by the pleadings and proceedings of the subordinate tribunal. It is not competent to introduce new and distinct matter in the reviewing court not pleaded in the court below. The question is, whether in the prosecution presented by this record, the Judge of Section "A" of the Criminal

District Court for the Parish of Orleans had jurisdiction to try and punish the relator for the facts charged against him in the information.

The condition of affairs and the attitude of the relator, as fixed by the pleadings in the court below, must remain unchanged for the purposes of this application. No evidence had nor could have been taken in the trial court. As set out in the answer of respondent, it is nowhere alleged in the information "either that the said Homer A. Plessy, was a white man or a colored man, or that he belonged to the white race or to the colored race. Nor is it anywherein the said herein before mentioned plea to the jurisdiction of the court by the said Homer A. Plessy, interposed, either pleaded, averred or admitted that the said Homer A. Plessy is a colored man or belongs to the colored race or that he was of mixed Caucasian and African descent, or that belonging to the colored race he was by reason thereof denied and deprived of any rights, privileges or immunities because of his race and color."

And further, that respondent "will not know until the trial of the said Homer A. Plessy, under the information against him filed, whether the said Homer A. Plessy was a white man or colored man insisting upon going and remaining in a compartment of a coach, to which by reason of his race or color he did not belong."

Upon the state of facts as they existed atthe tiine the restraining order was issued by the supervisory court, must the rights of the plaintiff in error be determined. Is there anything in these proceedings that presents a question under the constitution and laws of the United States? Does the Act 111 of 1890 in any of its provisions undertake "to regulate commerce among the several States and with the Indian Tribes?" Does it in any respect violate the provisions of the 13th and 14th amendments of the Federal Constitution?

On the 22nd of March, 1888, the Legislature of Mississippi passed an act entitled "An act promoting the comfort of passengers on railroad trains," which is as follows: Section 1. "That all railroads carrying passengers in this State, (other than street railroads), shall provide equal, but separate accommodations for the white and colored races; to provide two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations." Section 2. "That the conductors of such passenger trains shall have power, and hereby required, to assign each passenger to a car or a compartment of a car, (when it is divided by a partition) used for the race to which said passenger belongs; and should any passenger refuse to occupy the car to which he or she

is assigned by such conductor, such conductor shall have power to refuse to carry such passenger on his train; and for such refusal, neither he nor the railroad company shall be liable for any damage in any court in this State." Section 3. "All railroads that shall refuse or neglect, within sixty days after the approval of this act, to comply with the requirements of Section 1 of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in any court of competent jurisdiction, be fined not more than $500 and any conductor that shall neglect or refuse to carry out the provisions of this act, shall, upon conviction be fined not less than $25; nor more than $50 for each offense.

The constitutionality of this act, from which our own is borrowed, was assailed upon the ground that it operated an interference with interstate commerce. It was held by the Supreme Court of the State that Congress having no jurisdiction over the transportation of domestic travelers, its authority being confined to commerce "with foreign nations and among the states and with the Indian tribes," the transportation of passengers, taken up and set down within a State, is to be controlled by the state; and that the statute was purely local in character and did not look across the State lines or attempt to interfere or affect the carrier outside of the

State, it was not amenable to the objection that it was an attempt to regulate interstate commerce. It was purely in the nature of a police regulation, operative in Mississippi and not elsewhere. 6th Southern Reporter, 204, 205.

Upon appeal, the Supreme Court of the United States held, that the statute of the State of Mississippi does not violate the commerce clause of the Constitution of the United State. It was held that the State had the power to require that railroad trains within her limits shall have separate accommodations for the two races and that this provision, as it affected only commerce within the State, was no invasion of the powers given to Congress by the Commerce clause. 133 U. S. 587, 591.

The denial to any person of admission to the accommodations and privileges of an inn, a public conveyance or a theatre, does not subject that person to any form of servitude, or tend to fasten upon him any badge of slavery, even though the denial be founded on the race or color of that person. It is not, therefore, obnoxious to the provisions of the Thirteenth Amendment. Civil Rights Cases, 109 U. S. 21.

The regulation of the civil rights of individuals is unquestionably a proper subject for the exercise of a State's police power, and laws passed to effect

such regulations have been universally held constitutional and valid, except in extreme cases. Laws may be enacted providing for separate schools for the different races and separate accommodations by common carriers. 18 A. and E. Ency. Law pp, 753, 754 and authorities cited.

As a matter of law is it legal to separate passengers for any purpose because of race or color?

Where the statute affects merely the local and domestic transportation or carriage of passengers, this is a matter which can be regulated by State law, and even in the absence of any legislation on the subject the common carrier was at liberty to adopt in reference thereto such reasonable regulations as the common law allows.

A separation of passengers may be made solely on the ground of race or color as a reasonable regulation, provided accommodations equal in quality and convenience are furnished to both alike. 22nd Federal Reporter, pages 843, 844, 845.

Equality of accommodation does not mean *identity* of accommodation, and it is not unreasonable, under certain circumstances, to separate white and colored passengers on a railway train if attention is given to the requirement that by paying the same price, all shall have substantially the same comforts, privileges and pleasures furnished to either ass. 23rd Federal Reporter, 318, 319.

In all ordinary cases of police powers, the meaning and legal effect of the Tenth Amendment of the United States Constitution is clear, viz: That unless the exercise of a particular police power is granted to the United States government, expressly or by necessary implication, the power resides in the State government, and may be exercised by it, unless the State Constitution prohibits its exercise.

It may, therefore, be stated as a general proposition, that, with few exceptions, the police power in the United States is located in the States. The State is entrusted with the duty of enacting and maintaining all those internal regulations which are necessary for the preservation and prevention of injury to the rights of others.

The Fourteenth Amendment is violated only when the States attempt by legislation to establish an *inequality* in respect to the enjoyment of any rights or privileges.

Tied. Lim. Pol. Pow. § 201.

A railroad company may set apart certain cars to be occupied by white people and certain cars to be occupied by colored people but if it charges the same fare to each race, it must furnish substantially like and equal accommodation. 23rd Federal Reporter 637.

These authorities have determined not only that

the common carrier had the right to adopt all reasonable and needful regulations for the comfort and safety of the passengers, but that the question of separating passengers because of race or color, which was a matter which in the case of local and domestic transportation matters belonged exclusively to the State legislatures and in affecting interstate commerce exclusively to Congress.

The term color in the sense employed in the statute presents none of the scientific and legal difficulties contemplated by counsel. There is no difference between its usual and its technical significance "Color (C) specifically, in the United States, belonging wholly or partly to the African race." Century Dictionary page 1111.

The phrase "persons of color" embraces, universally, not only "all persons descended wholly from African ancestors, but also those who have descended in part only from such ancestors, and have a distinct admixture of African blood." Anderson's Dictionary of Law, p. 195.

The duties imposed upon the officers of passenger trains under the Statutes are in no sense judicial, they are purely ministerial.

The duties required of them are of a peremptory and mandatory nature are in no way discretionary in their character and in no sense involve the exer-

cise of any degree of judgment upon the part of the officers. High's Ex. L. Rem. Sections 24-34.

The penalty imposed upon the contumacious passenger is not for refusing to occupy the coach or compartment to which he is assigned by the railway officer, but for "insisting on going into a coach or compartment to which by race he does not belong."

None of the provisions of the statute pretend to make a criminal offense of "the refusal of any passenger to abide by the decision of the conductor," or to make a peaceable refusal to accept his decision as to the race to which the passenger belongs, a crime, or to make said act punishable by fine or imprisonment." Act 111 of 1890, Section 2.

There is nothing in the act that authorizes any person to determine in any way the question of race or "to compel the citizens to accept such determination or to make the refusal to comply with the same a penal offense." On the contrary, a penalty is imposed upon any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs." Id., Section 2.

The position of plaintiff in error in this regard is exactly contrary to that insisted upon by parties similarly situated in the Virginia cases, 100 U. S.,

303, 313 and 339 in Neal vs. Delaware, 103 U. S. 370, and in Murray vs. Louisiana, No. 718, now pending in this court. They insist that every man must know the difference between a negro and a white man, that the exercise of judgment is not necessary to determine that question, and that men must be put on juries because they are negroes. Here, it seems that the rule is reversed, that there is no difference between a white man and a negro, that no difference in color must be observed by a railroad conductor, and if he notes any such distinction he is undertaking to judicially consign complainant to the inferior race. Of course, in some cases, where the proportion of colored blood was very small, it would be hard to tell the difference between a negro and a white man, and it might well be that the question as to whether a party prosecuted under the Act of 1890 belonged to the one race or to the other, or a question as to damages against the railroad company by reason of a given individual being assigned to a car to which persons of his race did not belong, might well arise under the Act in question; and if so it would have to be judicially determined to what race the party belonged. But as a rule, there is no question as to which race a man belongs, it requires no exercise of judicial powers to determine that question, and when the con-

ductor directs a passenger to a given coach, he does not arbitrarily consign the passenger to a particular race.

The act does not in any of its provisions "grant exclusive rights or privileges to citizens of the United States of one race which are denied to citizens of another race, nor make the refusal to submit to such denial a penal offense."

The clear and specific requirement of the statute is, that the railway companies "shall provide *equal* but separate accommodations for the white and colored races." And any passenger of the white race insisting on going into a coach or compartment set apart for the colored race, is guilty of exactly the same offense as when a passenger of the colored race insists on going into a coach or compartment assigned and set apart for passengers of the white race.

The notice that this case was about to be reached came to the Attorney-General so unexpectedly he could not devote the time to it he had intended. We therefore trust our reasons for copying the opinion of the State Supreme Court in our brief it will be understood. It thoroughly covers the grounds presented in the case and we therefore embody it in full.

His Honor Mr. Justice Fenner pronounced the opinion and judgment of the Court in the following case:

Ex Parte HOMER A. PLESSY. No. 11134.

Application for certiorari and prohibition.

We have held that when a party is prosecuted for crime under a law alleged to be unconstitutional, in a case which is unappealable and where a proper plea setting up the unconstitutionality has been overruled by the judge, a proper case arises for the exercise of our supervisory jurisdiction in determining whether the judge is exceeding the bounds of judicial power by entertaining a prosecution for a crime not created by law.

State *ex rel.* Walker *v.* Judge, 39 Annual, 132.

State *ex rel.* Abbott *v.* Judge, 44 Annual, 583.

Relator's application conforms to all the requirements of this rule. He alleges that he is being prosecuted for a violation of Act No. 111 of 1890; that said act is unconstitutional; that his plea of its unconstitutionality has been presented to and overruled by the respondent judge, and that the case is unappealable.

He therefore applies for writs of certiorari and prohibition in order that we may determine the validity of the pro-
43 ceedings, and, in case we find him entitled to such relief, may restrain further proceedings against him in the cause.

The judge, in his answer, maintains the constitutionality of the law and the validity of his proceeding.

The legislative act in question is entitled:

"An act to promote the comfort of passengers on railway trains; requiring all railway companies carrying passengers on their trains in this State to provide equal but separate accommodations for the white and colored races by providing sepa-

ate coaches or compartments, so as to secure separate accom modations; defining the duties of the officers of such railways; directing them to assign passengers to the coaches or compartments set aside for the use of the race to which such passengers belong; authorizing them to refuse to carry on their trains such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned; to exonerate such railway companies from any and all blame or damages that might proceed from such refusal; to prescribe penalties for all violations of this act," etc.

The 1st section of the act requires that "all railway companies carrying passengers in their coaches in this State shall provide equal but seperate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train or by dividing the passenger coaches by a partition, so as to secure separate accommodations," and that "no person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to."

44 The 2d section provides "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong shall be liable to a fine of $25, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison," and a like penalty is imposed on "any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs;" and it is further provided that "should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such rail way said officer shall have power to refuse to carry such pas-

senger on his train, and for such refusal neither he nor the railway company shall be liable for damages in any of the courts of this State."

The 3rd section provides penalties upon officers, directors, conductors, and employees of railway companies who shall refuse or neglect to comply with the provisions of the act.

We have had occasion very recently to consider the constitutionality of this act as applicable to interstate passengers, and held that if so applied it would be unconstitutional, because in violation of the exclusive right vested in Congress to regulate commerce between the States.

State *ex rel.* Abbott *v.* Judge, 44 Annual, 583.

The instant case presents no such application of the statute; but it appears on the face of the information that relator was proceeded against as "a passenger travelling wholly
45 within the limits of the State of Louisiana on a passenger train belonging to the East Louisiana Railroad Company, carrying passengers in their coaches within the State of Louisiana." It thus appears that the interstate-commerce clause of the Constitution of the United States is not involved.

The relator's plea of the unconstitutionality of the statute contains no less than fourteen enumerated paragraphs, which do not require reproduction, because most of them are argumentative, and no provisions of the State or Federal constitutions are referred to as violated by the statute except the thirteenth and fourteenth amendments to the Constitution of the United States. The whole gravamen of relator's plea is contained in the 14th ground, which is as follows:

"That the statute in question establishes an invidious distinction and discrimination between citizens of the United States based on race which is obnoxious to the fundamental principles of national citizenship, perpetuates involuntary servitude as regards citizens of the colored race under the merest pre-

tense of promoting the comforts of passengers on railway trains, and in further respects abridges the privileges and immunities of the citizens of the United States and the rights secured by the 13th and 14th amendments of the Federal Constitution."

So far as the thirteenth amendment is concerned, its application to this statute may be at once eliminated, because the Supreme Court of the United States has clearly decided that it does not refer to rights of the character here involved. We will, for the sake of brevity, quote only the syllabus of the decision, as follows:

"The XIII amendment relates only to slavery and involuntary servitude (which it abolishes), and although by its reflex action it establishes universal freedom in the United
46 States, and Congress may probably pass laws directly enforcing its provisions, yet such legislative power extends only to the subject of slavery and its incidents, and the denial of equal accommodations in inns, public conveyances, and places of public amusements imposes no badge of slavery or involuntary servitude upon the party, but at most infringes rights which are protected from State aggression by the XIVth amendment."

Civil Rights cases, 109th United States, 3.

We may therefore confine ourselves to the question whether or not the statute violates the XIVth amendment, which provides that "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."

A further elimination may be made of the question whether a statute requiring separate accommodations for the races, without requiring the accommodations to be equal, would contravene the amendment, because the statute here explicitly requires that the accommodations shall be equal.

We thus reach the sole question involved in this case, which is whether a statute requiring railroads to furnish separate but equal accommodations for the two races and requiring domestic passengers to confine themselves to the accommodations provided for the race to which they belong violates the XIV amendment.

The first branch of the above question, as to the binding effect of the statute on railways, has been definitely decided by the Supreme Court of the United States on a statute almost identical, holding that the provision requiring railroads to furnish separate but equal accommodations was valid.

47 Louisville & C. Railway Company vs. Mississippi, 133 United States, 587.

But the court said: "Whether such *such* accommodations shall be a matter of choice or compulsion" (on the part of passengers) "does not enter into this case."

The validity of such statutes, in so far as they require passengers, under penalties, to confine themselves to the separate and equal accommodations provided for the race to which they belong has not as yet been directly presented to or decided by the Supreme Court of the United States.

But the validity of such statutes and of similar regulations made by common carriers in absence of statute and the validity of similar regulations or statutes, as applied to public schools, have arisen in very many cases before the highest courts of the several States and before inferior Federal courts, resulting in an almost uniform course of decision to the effect that statutes or regulations enforcing the separation of the races in public conveyances or in public schools, so long at least as the facilities or accommodations provided are substantially equal, do not abridge any privilege or immunity of citizens or otherwise contravene the XIV amendment.

We refer to the following, amongst other, numerous decisions:

West Chester R. R. Co. vs. Miles, 55 Pa. State, 209.
State vs. McCann, 21 Ohio, 210.
People vs. Gallagher, 93 New York, 438.
Cory vs. Carter, 48 Ind., 337.
State vs. Duffy, 7 Nev., 342.
People vs. Gaston, 13 Abb., N. Y., 160.
Louisville & C. Railway vs. State, 66 Mississippi, 662.
Lehew vs. Brummell (Mo.), 15 S. W. Rep., 765.
Dawson vs. Lee, 83 Ky., 49.
48 Ward vs. Flood, 48 Cal., 36.
Chesapeake Railway Co. vs. Wells, 85 Tenn., 613.
Bertonneau vs Directors, 3 Woods (C. C. R.), 177.
The Sue, 22 Federal Reporter, 843.
Logwood vs. Memphis, 23 *ib.*, 318.
Murphy vs. Weston R. Co., 23 *ib.*, 637.

It would little boot for us to make extensive quotations from these decisions. They all accord in the general principle that in such matters equality and not identity or community of accommodations is the extreme test of conformity to the requirements of the XIV amendment.

The cogency of the reasons on which this principle is founded perhaps accounts for the singular fact that notwithstanding the general prevalence throughout the country of such statutes and regulations and the frequency of decisions maintaining them no one has yet undertaken to submit the question to the final arbitrament of the Supreme Court of the United States.

In a case which arose as far back as 1849 the Supreme Court of Massachusetts, through its great Chief Justice Shaw, considered this subject, saying: "Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law to equal rights, constitutional and political, civil and social, the question then arises whether the regula-

tion in question, which provides separate schools for colored children, is a violation of any of these rights," and the court held that it was not, saying, in conclusion:

"It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, 49 founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law and cannot be changed by law. Whether this distinction and prejudice, existing in the opinions and feelings of the community would not be as effectually fostered by compelling colored and white children to associate together may well be doubted."

Roberts vs. Boston, 5 Cush., 198.

The general rule applied to carriers is well stated by Mr Hutchinson: "If the conveyance employed be adapted to the carriage of passengers separated into different classes, according to the fare which may be charged, the character of the accommodations afforded, or of the persons to be carried, the carrier may so divide them, and any regulation confining those of one class to one part of the conveyance will not be regarded as unreasonable if made in good faith for the better accommodation and convenience of the passengers."

Hutchinson on Carriers, paragraph 542.

In applying this rule the Supreme Court of Pennsylvania said: "The right to separate passengers being clear in proper cases and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and the black races in this State, resulting from nature, law and custom, as makes it a reasonable ground of separation." The court then proceeds to discuss these differences, taking care to say: "To assert separateness is not to declare inferiority in either. It is simply to say that, following the order of divine Providence, human authority ought not to compel these widely separated races to intermix." Con-

cluding, the court said: "Law and custom having sanc-
50 tioned a separation of races, it is not the province of the judiciary to legislate it away. * * * Following these guides, we are compelled to declare that, at the time of the alleged injury, there was that natural, legal, and customary difference between the white and black races in this State which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights both of the carriers and passengers,"

West Chester R. R. Co. vs. Miles, 55 Penn. St., 209.

Both the decisions from which we have quoted were rendered before the adoption of the XIV amendment, but in States where the civil rights of the colored race were fully recognized. We have referred to them as indicating the germinal principles which have been followed in the numerous decisions cited above applying to the XIV amendment. That amendment, it is well settled, created no new rights whatever, but only extended the operation of existing rights and furnished additional protection for such rights.

Barbier vs. Connelly, 113 United States, 27.

United States vs. Cruikshanks, 92 United States, 542.

Slaughterhouse cases, 16 Wallace, 36.

The statute here in question is an exercise of the police power and expresses the conviction of the legislative department of the State that the separation of the races in public conveyances, with proper sanctions enforcing the substantial equality of the accommodations supplied to each, is in the interest of public order, peace, and comfort. It undoubtedly imposes a severe burden upon railways, but the Supreme Court of the United States has held that they are bound to bear it. It impairs no right of passengers of either race,
51 who are secured that equality of accommodations which satisfies every reasonable claim.

The regulation of domestic commerce is as exclusively a State function as the regulation of interstate commerce is a Federal function. It is as much within the control of State legislation as the public school system or the law of marriage. To hold that the requirement of separate though equal accommodations in public conveyances violated the XIVth Amendment would on the same principles necessarily entail the nullity of statutes establishing separate schools and of others, existing in many States, prohibiting inter-marriage between the races. All are regulations based upon difference of race, and if such difference cannot furnish a basis for such legislation in one of these cases it cannot in any.

The statute applies to the two races with such perfect fairness and equality that the record brought up for our inspection does not disclose whether the person prosecuted is a white or colored man. The charge is simply that he "did then and there unlawfully insist on going into a coach to which by race he did not belong." Obviously, if the fact charged be proved the penalty would be the same, whether the accused were white or colored.

We have been at pains to expound this statute because the dissatisfaction felt with it by a portion of the people seems to us so unreasonable that we can account for it only on the ground of some misconception. Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other; one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such
52 contact if it could be done without the sacrifice of equal accommodations. It is very certain that such unreasonable insistence upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggestd by Chief Justice Shaw, to foster and intensify repulsion between them rather than to extinguish it,

We will conclude by noticing some charges made against the statute by relator, based, as we think, on an utterly un warranted construction.

He claims that the statute vests the officers of the company with a judicial power to determine the race to which the passenger belongs; that they may assign the passsenger to a coach to which by race he does not belong and that such assignment is binding on the passenger, and that, though wrongfully made, the officer and the railway companies are exempted from any legal responsibility.

The reading of the statute utterly repels these charges.

Not only does not the statute authorize the conductor or other officer to assign a passenger to a coach to which by race he does not belong, but it affirmatively requires him "to assign each passenger to the coach used for the race to which such passenger belongs," and it punishes for failure to make such assignment.

When the statute authorizes the conductor to refuse to carry any passenger who shall "refuse to occupy the coach to which he or she is assigned by the officer of such railway," it obviously means an assignment according *the* the requirements of the act—*i. e.*, to the coach to which the passenger by rac e belongs; and the exemption from damages is subject to the same construction.

It is too clear for discussion that a refusal to carry a passenger because he had refused to obey an assignment to a coach
53 to which his race did not belong would not be exempted from redress in action for damages.

The discretion vested in the officer to decide primarily the coach to which each passenger by race belongs is only that necessary discretion attending every imposition of a duty to determine whether the occasion exists which calls for its exercise. It is a discretion to be exercised at his peril and at the peril of his employer.

It is very certain that if relator shall prove in this prosecution that he did not, as charged, "insist on going into a coach to which by race he did not belong," an erroneous assignment by the conductor would not stand in the way of his acquital or exempt the officer and the railway from an action for damages, whatever defenses might lie open to them based on good faith and probable cause.

It is therefore ordered that the provisional writ of prohibition herein issued be now dissolved and set aside, and that the relief sought be denied, at relator's cost.

(*Syllabus.*)

1. Act 111 of the legislature of 1890, regulating accommodations of the races on railways, does not violate the XIII Amendment of the United States Constitution, because
54 such accommodations involve no badge of slavery or involuntary servitude, which is the sole subject of that amendment. Civil Rights cases, 109 United State, 3.
2. A long line of decisions, State and Federal, maintain that statutes or regulations enforcing the separation of the white and colored races in public conveyances and in public schools, so long at least as the facilities or accommodations provided are substantianlly equal, do not abridge any privilege or immunity of citizens or otherwise contravene the XIVth Amendment of the United States Constitution.
3. In such matters equality and not identity or community of accommodations is the extreme test of conformity to the requirments of the amendment.
4. The regulation of domestic commerce is as exclusively a State function as the regulation of interstate commerce is a Federal function This statute is an exercise of the police power and expresses the legislative conviction that

the separation of the races in railway conveyances, with proper sanctions for substantial equality of accommodations, is in the interest of public order, peace and comfort. It is a matter of legislative power and discretion with which courts cannot interfere.

5. A proper construction of the statute does not (as contended by relator) authorize a conductor to assign a passenger to a coach to which his race does not belong, nor does it bind the passenger to accept such wrongful assignment nor exempt the officers from action for damages in case of such wrongful assignment and refusal to carry when disobeyed. The discretion vested in the conductor to decide primarily the coach to which each passenger belongs is only the
55 necessary discretion, attending every imposition of any duty, to determine whether the circumstances under which the duty arises exists. He exercises such discretion at his peril and that of his employer.

We earnestly maintain that the act in question, No. 111 of 1890, is a legitimate exercise of the police power; that it does not violate the 14th amendment or any other part of the Constitution of the United States; and that plaintiff in error is not entitled to the relief asked.

Respectfully submitted,

M. J. CUNNINGHAM,
Attorney-General of Louisiana,
LIONAL ADAMS,
ALEXANDER PORTER MORSE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 210

HOMER A. PLESSY,
Plaintiff in Error,

—VS.—

J. H. FERGUSON, JUDGE, ETC., ETC.,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

ALEXANDER PORTER MORSE,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1895.

HOMER A. PLESSY,
PLAINTIFF IN ERROR,
v.
J. H. FERGUSON, JUDGE, &c.

No. 210.

Writ of Error to the Supreme Court of Louisiana.

Brief on Behalf of Defendant in Error.

There may be a preliminary inquiry, whether, in the stage of this cause in and under the proceedings had in the criminal court and in the supreme court of Louisiana, a Federal question is disclosed in the records sufficiently to bring the controversy in this cause before this court at this time. (R., pp. 2–4, 8–10, 16–18, 19, 23.)

It is conceded by counsel of plaintiff in error (brief, p. 2) that the rule under which this case is to be heard may be that laid down in *Ex parte* Easton (95 U. S. 68, 74), and therefore that nothing material to the determination of the cause can be looked for, except in the record of the criminal court. It is proper, therefore, to notice that

neither the information nor the plea contains any statement or allegation in respect of the color of the plaintiff in error. There is no averment that there was discrimination violating any of his constitutional privileges and immunities on account of his color; and there is no suggestion that the cars which he was, by the conductor, directed to enter were not of the *same class and of equal accommodation* as those to which he had been refused admittance.

The jurisdiction of the court over this cause must rest upon the ground of the existence of a Federal question in the record, which it is assumed has been sufficiently disclosed to the satisfaction of the court to authorize a hearing of the cause.

But, as the plaintiff in error represents himself as a "*citizen of the United States*," and asserts rights under the *Constitution of the United States*, and as the decision of the supreme court of Louisiana is adverse to the rights, privileges, and immunities asserted, it may be that this case is properly here under the decisions of this court, and under the view that as a principle of State constitutional law has now been made a part of the Constitution of the United States, the effect is to make this court the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in this court on appeal. (Cooley, Constitutional Limitations, pp. 357, '8.)

I proceed, therefore, to a consideration of the merits of this case.

On behalf of the defendant in error I submit:

That a State has the power to require that railroad trains

within her limits shall have separate accommodations for the two races, and this provision, as it affects only commerce within the States, is no invasion of the powers given to Congress by the commerce clause.

That the act of the State of Louisiana was one within its competency to enact, and that its provisions herein assailed are not in violation of the Constitution of the United States.

That the denial to any person to the admission and accommodations and privileges of an inn, a public conveyance, or a theatre, does not subject him to *any form of servitude*, or tend to fasten upon him *any badge of slavery*, even though the denial be founded on the race or color of that person, and does not, therefore, constitute a violation of the XIIIth Amendment.

That the first section of the XIVth Amendment is violated only when the State attempts by legislation to establish an *inequality* in respect to the enjoyment of any fundamental civil rights and privileges.

That the provisions of the act of Louisiana herein assailed were enacted by virtue of the police power of the State.

That in the exercise of this police power the State may enact laws requiring separate accommodations for the different races by common carriers, provided they be equal.

That the privilege and immunity herein asserted on behalf of the plaintiff in error, a domestic passenger on a railway limited to intra-state traffic and territory, is not one of the privileges and immunities embraced in the constitutional provisions relied on.

I.

The constitution of Louisiana ordains that every law enacted by the general assembly shall embrace but one

object, and that shall be expressed in the title. (Art. 29.) While this provision was in force act No. 111 of 1890 was enacted. It is entitled "*An act to promote the comfort of passengers on railway trains, requiring all railway companies carrying passengers on their trains, in this State, to provide equal but separate accommodations for the white and colored races, by providing separate coaches or compartments so as to secure separate accommodations, defining the duties of the officers of such railways,*" &c., &c. (R., pp. 6, 7.)

The question here is whether the statute of 1890 of Louisiana does as a matter of fact abridge any of the constitutional privileges and immunities of the plaintiff in error.

It does not:

First. Because it does not create any *inequality* between the citizen of the State and the citizen of the United States, or between citizens of differing race and color. By its terms it provides equal privileges to all on all the railroads engaged in intra-state transit.

Second. It does not discriminate unfairly between citizens of the United States, or between citizens of the State, of whatever color or race.

Third. It was legislation which it was competent for the State to enact, *as within the police power.*

The Power of States Over Police Regulations is Supreme.

The act in question of the State of Louisana was a police regulation, as appears by its title and provisions. What considerations of public policy, or order, or well-being, or

comfort of the travelling community may have led to the enactment of this statute by the State of Louisiana, may not be fully known; but the court, in taking judicial notice of the history of the times in that State and of the relative inequality in numbers of the colored and white races in sparsely settled rural districts, may see sufficient reason to presume that existing conditions justified the legislator in its enactment. The power of the State to regulate domestic travel having been recognized, the policy or expediency for its exercise is a question for the State. It is to be observed that "street railroads" are exempt from the operation of this statute. Sufficient reason for the exemption of this mode of transit appears from the fact, which will be noticed, that street railroads are only possible in thickly populated centres, where the white and colored races are numerically in a ratio of equality, enjoy a more advanced civilization, and where the danger of friction from too intimate contact is much less than it is in the rural and sparsely settled districts.

This court has said, "The legislature determines necessity for, and the courts the proper subject of the exercise of, the police power." (Slaughter-house cases, 16 Wallace, 394; Boston Beer Co. *v.* Mass., 97 U. S., p. 989.) "Neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes called its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people." (Barbier *v.* Connolly, 113 U. S. 27; Escanaba, &c., Trans. Co. *v.* Chicago, 107 U. S. 678.)

While it may not be possible to give an exact definition of "police" or "police power," this court has repeatedly enumerated the GENERAL SUBJECTS OF THIS POWER.

"The police power of States extends to the *protection of lives, limbs, health, comfort, morals, and quiet of society, private interests being subservient to public.*" (Slaughter-house cases, *supra;* Boston Beer Co. *v.* Mass., *supra;* Munn *v.* Illinois, 94 U. S. 77.) "This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the State." (Thorp *v.* Rutland & Burlington R.R. Co., 27 Vt. 40.) "*Police of interior communications*" is one of the branches into which Bentham distributes the police power.

The XIVth Amendment does not limit the subject in relation to which the police power of the State may be exercised. (Barbier *v.* Connolly, 113 U. S. 27; Minneapolis & St. Louis Ry. Co. *v.* Beckwith, 120 U. S. 26, and cases cited.)

II.

A SINGLE QUESTION INVOLVED.

Here is an important agency, which the State has constituted for a great public purpose, whose operations *being limited to the State's territory*, it can regulate at will, *except* as restrained by its own constitution and the supreme law of the land; and all rules and regulations necessary to promote the comfort, safety, and well-being of the community may be enacted by its legislature.

There can be but a single question involved in this case, which is, whether a State statute requiring railroads, operating wholly within a State, to furnish separate but equal ac-

commodations for the two races and requiring domestic passengers to confine themselves to the accommodations provided for the race to which they belong, violates the XIVth Amendment.

The *first branch* of the above question—as to the binding effect of such a statute on railways—has been definitely decided by this court on a statute almost identical, holding the provision requiring railroads to furnish separate but equal accommodations was valid.

Louisville & C. R.R. Co. *v.* Missi., 133 U. S. 587 (A. D. 1889).

The *second branch* of the question remains to be decided.

It is not contended that the plaintiff in error was *excluded* from the train which he boarded, or from the car to which by assignment of the conductor he appropriately belonged. And it only remains to inquire, Were the regulations which were sought to be enforced by the conductor in obedience of the State statute proper and reasonable?

They may be held to be unreasonable *only* on two grounds:

First. Because of the inequality of the accommodations offered the plaintiff in error on his proposed passage.

Second. Because of the discrimination as against him as passenger, or as individual, or in both aspects, *on account of his color.*

As to the *first*, there is *no averment* on the part of the plaintiff in error that the car that he was directed to enter was not *equal in point of accommodation or convenience* to the car which he was directed to leave. And as the law which governs the common carrier *by its terms requires equal accommodations*, in the absence of proof to the contrary, it must be assumed that the accommodations were in every respect equal.

As to the *second*, it cannot be said that there was any discrimination against him as a passenger or individual; because, if discrimination there was, from the fact that separate cars were provided for white and colored persons, it applied equally to white as to colored persons.

Discrimination which would be violative of the constitutional provision would occur in cases that may be instanced: If a different and higher rate for tickets for transportation was charged to colored persons than those charged over the same route and by the same conveyance to white persons, or *vice versa*, or if different and inferior accommodations were provided to colored persons who paid the same rates as white persons, or *vice versa*.

But *equal accommodations* do not mean *identity* of accommodations; and separation may not, under the decisions cited, be considered as discrimination which violates any constitutional privilege and immunity. The statute here in question is an exercise of the police power, and expresses the conviction of the legislative department of the State of Louisiana that the separation of the races in public conveyances with proper sanctions, enforcing the substantial equality of the accommodations applied to each, is in the interest of public order, peace, and comfort. (Opinion of supreme court of Louisiana, R. 28.)

III.

The object of the recent amendments has been repeatedly defined by this court. (*Ex parte* Virginia, 100 U. S. 344; Strander *v.* West Virginia, 100 U. S. 306; The Slaughterhouse cases, 16 Wall. 36.) In the Civil Rights cases (109 U. S. 38), the following language was used by Mr. Justice

Bradley in announcing the opinion of the court: "That the XIIIth Amendment relates solely to slavery and involuntary servitude, which it abolished; and although by its reflex action it establishes universal freedom, and although Congress may probably pass laws directly enforcing its provisions, yet such *legislative power* does not extend beyond the subject of slavery and its incidents, and the denial by *individuals* of equal accommodations in inns, public conveyances, and places of public amusements *imposes no badge of slavery* or involuntary servitude, but at most infringes rights which are protected from State aggression by the XIVth Amendment."

It would seem from the concluding language just cited that it may be fairly concluded that under the XIVth Amendment the rights of citizens of the United States, without reference to color or race, would be satisfied by *equality* of accommodations in inns, public conveyances, and places of public amusement.

The XIVth Amendment is violated only when the States attempt by *legislation* to *establish* an inequality in respect to the enjoyment of any rights or privileges. It has therefore been held by the U. S. Supreme Court that certain provisions of the Civil Rights Bill are unconstitutional, as applied to the States, because they invade the police jurisdiction of the States. (Civil Rights cases, 109 U. S. 3; U. S. *v.* Cruikshank, 92 U. S., p. 543.)

The XIVth Amendment does not interfere with the "police power" of the States—"a regulation designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good." (Barbier *v.* Connolly, 113 U. S. 27; Civil Rights cases, 109 U. S. 3.)

It is submitted that the privileges and immunities of citizens of the United States which are in contemplation in the first section of the XIVth Amendment, while difficult of exhaustive definition, do not include the particular immunity or privilege set up by plaintiff in error in this case. And that is, that the domestic common carrier within the State of Louisiana shall not be authorized to provide separate, although equal, accommodations for the two races.

What these immunities are, *in general*, have been indicated in several cases before this court, which are collected and set out in the opinion of Mr. Justice Miller in the Slaughter-house cases, p. 36. After considering the extent of the constitutional provision, it was said in that case that, within certain exceptions and restrictions which had been considered, " the entire domain of the privileges and immunities of citizens of the States, as above defined, *lay within the constitutional and legislative power of the States and without that of the Federal Government.*" And it was further indicated that the purpose of the XIVth Amendment was not to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal Government.

When propositions were first discussed looking to the formulation of the new amendments, one of the clauses submitted for adoption was, as I am informed, in these words:

"*All national and State laws shall be equally applicable to every citizen; and no discrimination shall be made on account of race and color.*"

See Journal of the Committee of Congress, printed in 1884.

But this language must have been considered too far-reaching and indefinite, for it was not favorably received. The result of its adoption would have been to obliterate the boundary line between State and Federal jurisdiction as to person and subject-matter.

It appears from the argument of counsel for the plaintiff in error that there are two grounds upon which plaintiff in error insists that the statute of Louisiana violates the XIVth Amendment in respect of himself: *first*, in that his privileges and immunities as a citizen of the United States are abridged as the result of subjecting him to police on account of color; *second*, in that his freedom of action in going to or from permanent public offices of the United States for the transaction of his business is unlawfully obstructed. As to the first, it may be said the privilege or immunity claimed is not one of the privileges and immunities protected by provivions of the XIVth Amendment. (Slaughter-house case, 16 Wall. 36; Corfield *v.* Coryell, 4 Wash. C. C. 371.) If it constitute a privilege or immunity, it is of that class which remain under the care of the State government. As to the second, it seems clear from the record that there was no interference with plaintiff in error's *liberty of lawful action, or any obstruction* placed in his way, either by the authorities of the State or of the railroad company, which prevented his access to any permanent public office of the Federal Government.

And it is not understood how the plaintiff in error could, under the circumstances of this case, be so enveloped with the "Federal quality" (brief for plaintiff in error, p. 14) as to exempt his person or business from State law and jurisdiction. That no such exemption exists in matters of domestic commerce or transactions seems to be established by the jurisprudence of this court. (Cruikshank's case, 92 U. S. 542; Civil Rights cases, 109 U. S. 3.)

The cases of Railroad Co. *v.* Brown (17 Wall. 445), and Crandall *v.* Nev. (6 Wall. 35), which are referred to as "cases sanctioning constitutional principles by this court,

and that perhaps come nearest to the one in question," are easily distinguished from the case in hand. The former was a case of *exclusion* from a car by railroad company on account of color, operated by a corporation, organized under the laws of Virginia and the United States, which contained a provision in its charter that "*no persons should be excluded from the cars of the company on account of color.*" It appears from the opinion in Brown *v.* the Railroad (17 Wall.) that a ground for the conclusion reached was that the railroad company *was bound to a faithful compliance with all the terms accompanying the grant of the charter.* In that case there was no conflict between Federal and State jurisdiction. The other was a case where the State attempted to impose a burthen upon outgoing and incoming travellers in the form of a tax upon the individuals. What appears in the opinion of the court must be read in reference to the facts of the case. Such a law was clearly a violation of individual rights and freedom of motion which it is not competent for the State to impose, and in violation of the commerce clause of the Constitution.

IV.

It is said on behalf of plaintiff in error that while the institution of *marriage*, including *the family*, has always been amenable to the laws of police for reasons of state, which are there given, *separate cars* and *separate schools* come under different orders of consideration. That "a conclusion as to one of these does not control determinations as to the other any more than the gift heretofore of a common freedom and citizenship" concluded to "inter-*marriage.*" But the reasoning which, under the American system, justifies State control of the former seems to apply with corresponding force to the latter.

In several States it has been held that colored children may be required to attend separate schools, if impartial provision is made for their instruction. (State *v.* Duffy, 7 Nev. 342; s. c. 8 Am. Rep. 713; Cory *v.* Carter, 48 Ind. 327; Ward *v.* Flood, 48 Cal. 36; State *v.* McCann, 21 Ohio St. 198; People *v.* Gallagher, 93 N. Y. 438; Bertonneau *v.* School Directors, 3 Woods, 177; West Chester R.R. Co. *v.* Miles, 55 Pa. State, 209.)

It is argued (brief for plaintiff in error, 10) that *color* is no ground for *discipline or police.* But color and race have been frequently the subject of police regulation in many of the States. And provisions in the laws and in the ordinances of municipalities have, from time immemorial, recognized and upheld the exercise of police power *on the basis of color and race.* (Pace *v.* Alabama, 106 U. S. 583.)

The separation of the colored and white races in schools and cars has been held by courts of high authority in many States, as well as by several of the United States circuit courts, to be justified *on grounds of public policy and expediency*, whether this separation be provided for by legislative or municipal authority. And the weight of authority seems to support the doctrine that, to some extent at least and under some circumstances, such a separation is allowable at common law. (Hall *v.* Decuir, 95 U. S. 485.) It appears from the reasoning in several of the cases that this power is committed to the authority of the local State governments for the reason that they are the appropriate judges of the policy, occasion, and extent of its exercise.

(West Chester R.R. Co. *v.* Miles, 55 Pa. State, 209; State *v.* McCann, 21 Ohio, 210; People *v.* Gallagher, 93 New York, 438; Cory *v.* Carter, 48 Ind. 337; People *v.* Gaston, 13 Abb., N. Y. 160; Louisville & C. Ry. *v.* State, 66 Mis-

sissippi, 662; Lehew *v.* Brummell (Mo.), 15 S. W. Rep. 765; Dawson *v.* Lee, 83 Ky. 49; Ward *v.* Flood, 48 Cal. 36; Chesapeake R. Co. *v.* Wells, 85 Tenn. 613; Bertonneau *v.* Directors, 3 Woods (C. C. R.), 177; The Sue, 22 Federal Reporter, 843; Logwood *v.* Memphis, 23 *ib.* 318; Murphy *v.* Weston R. Co., 23 *ib.* 637; Roberts *v.* Boston, 5 Cush. 206.)

In the District of Columbia, race and color are made the basis of distinction in Federal legislation, and statutory provisions have existed for many years which provide for the separation in the public schools of the children of "white" and "colored" residents (Revised Stat., District of Columbia, sec. 282), and the constitutionality of this provision has not been questioned.

Exclusive (*public*) schools for the education of the colored race were originally established in the District of Columbia by Congress in 1862, since which time that body has, by repeated amendments to the original act, sanctioned and approved not only the constitutionality of such legislation, but also the policy of such a system of education.

(Chap. 151, Laws of Congress, 1862; ch. 83, same, 1863; ch. 156, *ib.*, 1864; ch. 217, same, 1866; ch. 308, same, 1873.)

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