Civil Rights Cases
109 U.S. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1879

Nos. 1, 2 and 4

UNITED STATES

—vs.—

MURRAY STANLEY.

UNITED STATES

—vs.—

MICHAEL RYAN.

UNITED STATES

—vs.—

SAMUEL NICHOLS.

CIVIL RIGHTS CASES

BRIEF FOR THE UNITED STATES

CHARLES DEVENS,
Attorney General,
EDWIN B. SMITH,
Assistant Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 26. UNITED STATES *v.* MURRAY STANLEY.
No. 37. UNITED STATES *v.* MICHAEL RYAN.
No. 105. UNITED STATES *v.* SAMUEL NICHOLS.

CIVIL RIGHTS CASES.

BRIEF FOR THE UNITED STATES.

The first and last of the above-entitled causes are indictments for denying to colored men the accommodations of an inn.

No. 37 is an *information* against Ryan for depriving a colored man of the right to a seat in the parquet of a theater in San Francisco.

Though the main question of the constitutionality of the civil rights act approved March 1, 1875, is the same in these three cases, which are therefore submitted together, the court below divided upon the question whether the indictment in the first case stated an offense, and a demurrer to the information was sustained in the second; so the first indictment and the information against Ryan must be here printed in full. In the last case the division of the court below presents only the question of the constitutionality of the statute aforesaid so that indictment will not be reprinted.

No. 26. UNITED STATES *v.* MURRAY STANLEY.

STATEMENT.

At the term of the district court of the United States of America in and for the said district of Kansas, begun and held at Topeka, in said district, on the 10th day of April, in the year of our Lord one thousand eight hundred and seventy-six, the grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire of offenses committed within the district of Kansas, upon their oaths do find and present that one Murray Stanley, late of the district of Kansas aforesaid, on the tenth day of October, in the year of our Lord one thousand eight hundred and seventy-five, at the district of Kansas aforesaid, and within the jurisdiction of this court, being then and there in charge and having management and control of a certain inn, did then and there unlawfully deny to one Bird Gee, then and there a citizen of the State of Kansas and of the United States of America, full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said inn by then and there denying to said Bird Gee the privileges of then and there partaking of a meal, to wit, of a supper, at the table of said inn, for such purpose then and there provided, he, the said Murray Stanley, having then and there so as aforesaid denied to said Bird Gee the aforesaid full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said inn, for the reason that he, the said Bird Gee, was then and there a person of color and of the African race, and for no other reason whatever, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. (Record, 1, 2, and 3, 4.)

The foregoing indictment was demurred to; and, upon argument of the demurrer, the judges were divided in opinion upon these questions:

1. "Does the indictment state an offense punishable

by the laws of the United States, or cognizable by the Federal courts"?

2. "Is the act of Congress entitled 'An act to protect all citizens in their civil and legal rights,' approved March 1, 1875, constitutional"?

That statute is prefaced with a preamble, and reads as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five

hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States or Territorial court as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person whatever by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall,

for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be receivable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court. (18 Stats., 335 to 337.)

No. 37. UNITED STATES *v.* MICHAEL RYAN.

STATEMENT.

This was an information in the circuit court of the United States, ninth circuit, district of California, in the form following:

Be it remembered that on this 12th day of February, A. D. 1876, comes into court, in his own proper person,

Walter Van Dyke, esq., United States attorney for the aforesaid district of California, and in the name and on the behalf of the United States gives the said court to understand and be informed that on the 4th day of January, A. D. 1876, at the city and county of San Francisco, State of California, and within the district aforesaid, and within the jurisdiction of this court, Michael Ryan, then and there being, did then and there wilfully, knowingly, and unlawfully, deny to a citizen of the United States the full and equal enjoyment of the advantages, accommodations, facilities, and privileges of a public theatre, such denial being for reasons by law not applicable to citizens of every race and color, to wit, the said Michael Ryan, on said day, at said city and county, did knowingly, wilfully, and unlawfully deny to George M. Tyler, a citizen of the United States, the full enjoyment of the accommodations, advantages, facilities, and privileges of Maguire's new theatre, situate on Bush street between Montgomery and Kearney, being on the southerly side of said Bush street, in the city and county of San Francisco, State of California, aforesaid, the same being a place of public amusement, as follows, to wit, that is to say, on the said 4th day of January, A. D. 1876, the said George M. Tyler did purchase a certain ticket of admission to said theatre of the ticket-seller or authorized agent of said theatre, for the sum of one dollar, which sum said Tyler duly paid to said agent, to wit, said ticket-seller, a certain printed ticket of admission to the said theatre, and to the part thereof known and designated as the dress-circle or parquette, and orchestra seats, which said dress-circle, otherwise known as the parquette, and said orchestra seats, did possess superior and better advantages, facilities, and privileges to any other portion of said theatre; which said ticket did purport to admit, and did entitle said George M. Tyler to admission to the said portion of said theatre known and designated "the dress-circle," otherwise called the "parquette," and to that portion of the said theatre known and designated the "orchestra" seats.

And on said fourth day of January, A. D. one thou-

sand eight hundred and seventy-six, in the evening of said day, and about or between the hours of seven and eight o'clock p. m., while the doors of said theatre were open for the purpose of admitting the public to, and about the time of the hour of the commencement of the performance in said theatre, said George M. Tyler, then and there being a citizen of the United States, and under the jurisdiction thereof, did then and there present said ticket in his own person to said Michael Ryan, who was the doorkeeper to admit persons with tickets, and ticket-taker of said theatre, standing at the proper entrance thereof, and did, upon said ticket, ask and demand admission to said theatre, and to the part and portion thereof designated as the dress-circle, otherwise called the parquette, and the orchestra-seats thereof; and thereupon said Michael Ryan, then and there being as aforesaid, did then and there wilfully, knowingly, wrongfully, and unlawfully, by force and arms, deny to said George M. Tyler, as aforesaid, admission to said theatre, or to any part thereof, and did then and there deny as aforesaid, to said George M. Tyler, the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the said theatre, said denial and refusal not being for reasons applicable by law to citizens of every race and color, and regardless of any previous condition of servitude; that said refusal and denial as aforesaid was solely and entirely on account of and for the reason that said George M. Tyler was and is of the African or negro race, being what is commonly known and called a colored man, and not a white man. That said George M. Tyler was then and now is a person of the African or negro race, being what is known and commonly called a colored man.

And so the said attorney of the United States, in the name and behalf of the United States, gives the said court to understand and be informed that said Michael Ryan did then and there as aforesaid, on said day, in the manner aforesaid, commit the crime of unlawfully denying and refusing to a citizen of the United States the full enjoyment of the accommodations, advantages,

facilities, and privileges of a theatre (the same being a public place of amusement), for reason not by law applicable to citizens of every race and color, regardless of any condition of previous servitude, contrary to the form of the statutes of the United States of America in such case made and provided, and against the peace and dignity of the people thereof. (Record, 4.)

A demurrer was filed to this information, together with a motion to dismiss it. (Record, 4, 5.)

The court sustained the demurrer and ordered the information to be dismissed. (Record, 5.)

ASSIGNMENT OF ERROR.

The United States assign for error the sustaining of the demurrer and the dismissal of the information.

No. 105. UNITED STATES *v.* SAMUEL NICHOLS.

A demurrer was filed to the indictment in this case; "and the demurrer to the indictment herein coming on now to be heard, and the judges of this court being divided in opinion on the point of the validity under the Constitution of the United States of the statute under which said indictment is drawn, * * * it is ordered on the request of said parties that said point be certified under the seal of the court to the Supreme Court of the United States," &c. (Record, 6.)

BRIEF.

As no informalities have been pointed out in the indictment and information, we shall confine this brief to the main question, common to the three cases, of the constitutionality of the statute upon which they are founded.

Inns are provided for the accommodation of travelers; for those passing from place to place. They are essential instrumentalities of commerce (especially as now carried on by "drummers"), which it was the province of the United States to regulate even prior to the recent amendments to the Constitution.

The relation of innkeepers to the State differs from that of a man engaged in the more common avocations of life. The former is required to furnish the accommodations of his inn to all well-behaved comers who are prepared to pay the customary regular price.

This business and that of conducting a theatre are carried on under a license from the State, through the intermediate agency of municipal authority, which is part of the machinery of the State, being delegated to this extent with the power of the State. This is because the business to be carried on is quasi public in its nature, and for the general accommodation of the people.

For this reason Congress has the right to prohibit any discrimination against persons applying for admission to an inn or theatre based upon race, color, or previous condition of servitude.

The early amendments to the Constitution were added further to limit the Federal power. The last three, the result of bitter, costly experience, were intended to en-

large that power. Such enlargement must necessarily be pro tanto a diminution of, or an encroachment upon, the power previously exercised by the State. These amendments also interfered, for the first time, with the relation borne by the citizen to his State, and with those institutions and regulations of a (so called) domestic character.

This innovation was not so dangerous to liberty as many theorists imagine. Both State and National Governments are mere machinery by which the individuals composing the nation secure life, liberty, rights, and privileges. From time to time, as experience demonstrates the necessity or expediency of so doing, the people may change the mutual adjustment, or even the essential character, of this machinery to accomplish the desired purpose.

It was thought that the lately emancipated portion of our fellow-citizens could more safely depend for the security of their newly acquired rights upon the government which conferred them than upon that which had so long denied them. It may be remarked, in passing, that the greatest freedom is only attainable through the agencies and operation of the Federal Government. In one State, discriminations are made on account of religion; in another, upon the acquisition of land or other property; in a third, upon the basis of color; and in another, by reason of Mongolian birth. It is in Federal legislation and in the action of Federal courts alone that these discriminations are wholly disregarded.

Equality before the law, then, is the privilege of American citizenship, conferred by the national Constitution; therefore, to be protected by national legislation.

(16 Wall., 79; United States *v.* Reese, 92 U. S., 214, 217, where the court say that appropriate legislation "may be raised to meet the necessities of the particular right to be protected.")

The exclusion complained of in the causes at bar were because of the race and recent servile condition of the persons excluded. The law forbidding such exclusion, for such motive, is "appropriate to efface the existence of any consequence or residuum of slavery." (Hon. F. T. Frelinghuysen in debate on this bill; vol. 2, Cong. Rec., pt. 4, first session Forty-third Congress, p. 3453, end of first column.) At the bottom of the same page he cites the Slaughter-House cases as holding "that freedom from discrimination is one of the rights of United States citizenship."

What the United States had the right to give, it necessarily has the right and duty to preserve and protect.

We cannot proceed against or deal with the States to procure needed legislation; nor compel action by the grand juries of a State. We must necessarily prosecute directly those offenders who deny, on account of race or color, that equality which the Constitution guarantees.

The fourteenth amendment made native-born colored men citizens of the State in which they were resident. Their State citizenship originated in the national Constitution. Therefore Congress may legislate to compel the concession to them of such rights, whatever they may be, as are conceded to other citizens of the State, without dictating what those privileges may be; except that, in discharge of the duty imposed by other articles of the Constitution, the Federal Government must see

that there is no denial of liberty, nor such legislation as will deprive the State of its republican form of government. The fundamental right to liberty, and to participate in the choice of rulers, and to be equal to every other citizen in the enjoyment of lawful privileges, is secured to the colored man by recent amendments. As Mr. Edmunds remarked, these amendments did not mean to leave the Constitution just as it was before; so "that every man, woman, and child in a State shall have whatever rights the laws of that State choose to give every man, woman, and child in that State." (Cong. Rec., vol. 2, pt. 5, Forty-third Congress, first session, page 4172, second column.)

Power to *enforce* by appropriate legislation these constitutional amendments, giving liberty and equality, does not mean simply to re-enact their prohibitions. It means to legislate as to those particular matters and things in which equality is denied.

Their meaning and purpose must be gathered from "the history of the times." (Slaughter-House cases, 16 Wall., 67, 68.)

Upon that same page first cited (67) the court say that, "in the construction of those articles" they have only considered them as applicable to the case then in hand, which did not involve the rights of colored citizens; to which these amendments, as the court say, in the succeeding pages of that report, particularly relate.

In the enumeration of privileges by Judge Washington, in Corfield *v.* Coryell (4 Wash., 380, 381), quoted in the Slaughter-House cases, he speaks only of the rights of citizens of *States*, because that was the only question before him. The enumeration, however, is of those privileges belonging to the citizen of any free, well-consti-

tuted, republican State—and not as peculiar to those forming the American Union. Therefore they belong to citizens of the United States, as such, as well as to citizens of the several States, as such citizens.

The distinction noted by Mr. Justice Bradley (16 Wall., 117, bottom), that Judge Washington was speaking of the privileges of citizens *in* a State, not of citizens *of* a State, is peculiarly pertinent here.

It is purely accidental and immaterial that the several persons denied access to inn or theatre in the cases now pending were residents of the States in which the offences were committed. Their right to equal accommodations would have been the same had the travellers been citizens of New York or of this District, temporarily in Missouri or Kansas. This suggestion shows that the right secured by the legislation in question accrues to one as a citizen of the United States, and not as the citizen of a State.

As noticed by Mr. Justice Field, in his opinion in the Slaughter-House cases, the fourteenth amendment "was adopted to obviate objections which had been raised and pressed with great force to the validity of the civil-rights act," &c. (16 Wall., 93, near bottom.)

Upon a subsequent page he says: "This act, it is true, was passed before the fourteenth amendment was adopted, as I have already said, to obviate objections to the act; or, speaking more accurately, I should say, to obviate objections to legislation *of a similar character*, extending the protection of the national government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act, under the belief that, whatever doubts may have

previously existed of its validity, they were removed by the amendment." (16 Wall., 96, 97.)

The correctness of this statement will be seen by reading the debate upon the proposition to submit that amendment for adoption. Though the language of legislators in debate cannot be used to control the legal effect of the phraseology employed, as to any single clause or sentence, the universal acquiescence of all the speakers as to the general scope and purpose of an act may be read, as part of the history of the times, to determine the meaning to be attached to the words employed—the sense in which they are used, and the force to be given them.

The first civil-rights act was passed April 9, 1866. (14 Stats., 27–30.) Though not identical in phraseology with that above printed, not containing this provision as to inns, &c., it is "of a similar coaracter". The debates upon the passage of that bill will be found in volume 70 of the Congressional Globe, for the first session of the Thirty-ninth Congress, pp. 1160–1833. Doubts were then expressed as to the constitutionality of that measure, which Mr. Bingham, of Ohio, and others, thought should be remedied by further amendment of the Constitution. (*Ib.*, 1291.)

Upon the 8th of May, 1866, the proposed fourteenth amendment was first discussed in the House of Representatives. (71 Cong. Globe, 2459, *et seq.*) Hon. Mr. Boyer said: "The first section embodies the principle of the civil-rights bill. * * * The fifth and last section of the amendment empowers Congress to enforce by appropriate legislation the provisions of the article." (*Id.*, 2467.) Mr. Broomall said that, while he did not

agree with those who thought the civil-rights act unconstitutional, "yet it is not with that certainty of being right which would justify me in refusing to place the law *unmistakably* in the Constitution." (*Id.*, 2498.) Other declarations to the same effect can easily be found in the report of the House proceedings.

Similar expressions are found in the Senate debate: *e. g.*, Mr. Doolittle said: "The celebrated civil-rights bill, which was the forerunner of this constitutional amendment, *and to give validity to which this constitutional amendment is brought forward*," &c. (*Id.*, 2896.)

It would be strange if language avowedly chosen to effect a desired object, and deemed apt for that purpose by a large majority, if not by everybody, in each house of Congress, should now be held by the court not such as to accomplish the end contemplated. The intent of the legislator would not then be the law.

The case brought up in debate against the enactment of the existing law, under the fourteenth amendment, was the Slaughter-House case. It seems as if, but for that case, the sole opposition to this measure would have been directed to the question of expediency and not of constitutionality. Yet that case was decided upon issues entirely outside of any which those now submitted present. It involved only the determination of the proper limits of the *police power* of the State. Every member of the court held that *if* the law of Louisiana, giving to one corporation certain rights as to the landing and slaughter of cattle for the markets of New Orleans and adjacent parishes, was an exercise of police power *merely*, it was valid. Upon the question of its being such an exercise of police power, the court divided; a bare majority held it was within that power and the minority that it exceeded that power, or was not an exercise of it. All agreed, too, if it were not an exercise of that power, the law was invalid.

No question of police power arises in the present cases, or under the legislation upon which these cases are based. Leaving out that element, and the opinion of every member of the court in the Slaughter-House case sustains the validity of this act.

In the course of a speech in the Senate by Mr. Stockton against the bill he alluded to the opinion in that case, and Mr. Morton interrupted him with this question: "I ask him if Judge Miller did not say in the same opinion that whatever rights and obligations were conferred or created by the fourteenth amendment belonged to citizenship of the United States as such, and were under the control and guardianship of Congress?" To which Mr. Stockton replied that he had no doubt that such language was used, though he had not the volume of reports by him to determine it. (Vol. 2 Cong. Rec., Pt. 5, first session Forty-third Congress, p. 4147.)

At the close of Senator Stockton's speech, Mr. Howe, of Wisconsin, took the floor, and said:

I admit that when the Constitution was framed originally, there was committed to the Government of the United States no power to do the things we propose to do in this bill. I admit when that Constitution was framed its makers committed the status and condition of individual citizens to the control of the States within which they lived. What they pleased to do with the individual, that they did. There was a malign power reserved to the government of every State to deprive any one or any number of its citizens of every the commonest rights of the commonest man, and they did it. The time was when every State did it. The time is, thank God, when no State can do it. That malign power no longer exists in any government in this land acknowledging the supremacy of the Constitution of the United States. The Constitution has been changed. Some prerogatives have been withdrawn from the States; some new faculties or powers have been given to the Government of the United States. Three whole chapters have been added to the organic law. One of them, I say in

the face of the country, as well as in the face of the Senate, was made on purpose to transfer the control of citizens to the Government of the United States; and if Congress does not possess to-day the power to snatch from the oppression of unequal laws every colored citizen of the United States, it is not because the people did not mean to clothe us with that power; but it is unmistakably because the draughtsman who framed the fourteenth amendment did not know enough to construct a clause which would give us that power. 2 Cong. Rec., Pt. 5, first session, Forty-third Congress, p. 4147, May 22, 1874.)

In the progress of his speech, as reported upon the next page of the Congressional Record, the same gentleman thus referred to the citation of the Slaughter-House case by the opponents of the bill:

And yet we are told that that very point has been already decided. We are told that the Supreme Court of the United States have declared in advance that we have not authority to pass this bill. That is a mistake, in my judgment. The Supreme Court of the United States never have told me any such thing. I stand here to deny that they have ever said any such thing. * * * The only point which the court asserted was that a statute passed by the State of Louisiana was not in contravention of the fourteenth amendment. That act made no discrimination between a white man and a black man. It made, I think, broad discrimination between the rights of white men—a discrimination which, upon my soul, I believe the fourteenth amendment condemns—but not a syllable of discrimination between the two colors. The court undertook to say that it was but an exercise of the ordinary police powers, which belonged to every State before the fourteenth amendment was adopted, and were not taken from the States by the fourteenth amendment, and then the court went on—or the judge who delivered the opinion of the court goes on—to defend that conclusion, entering upon an

argument to prove that such an act did not contravene that one clause of the fourteenth amendment which declares that no State shall impair the privileges and immunities of citizens of the United States. (*Id.*, 4148, second column.)

In closing the Senatorial debate upon the bill, just before the vote was taken, February 27, 1875, Mr. Edmunds, of Vermont, said:

The Constitution of the United States, as was stated in an opinion of the Supreme Court once by an eminent Democratic judge, is a bill of rights for the *people* of all the States, and no State has a right to say you invade her rights when under this Constitution and according to it you have protected a right of her citizens against class prejudice, against caste prejudice, against sectarian prejudice, against the ten thousand things which in special communities may from time to time arise to disturb the peace and good order of the community. That is all which this bill undertakes to do. Now let us see what this bill is.

The first section of it simply provides that all persons shall be entitled to certain common rights in public places, in the streets if they were in—they are not in, but that illustrates it—that no State shall have a right, and no person shall have a right, to interrupt the common use by citizens of the United States of the streets of a town or city. Where is the authority for that, Senators ask; where is the authority for saying that a State shall not have a right to pass a law which shall declare that all citizens of the German race shall go upon the right-hand side of the streets, and all citizens of the French race shall go upon the left, and so on; and that all people of a particular religion shall only occupy a particular quarter of the town, and all the people of another religion another side? Is it possible, with a national constitution which creates fundamentally a national citizenship, that anybody can say a State has a right to make laws of that kind? I should be

amazed to hear it stated. If that can be stated, then I should be glad to know what there is in being a citizen of the United States that is worth a man's time to devote himself to defend for a single instant.

What is it to be a citizen of the United States, if, being that, a citizen cannot be protected in those fundamental privileges and immunities which inhere in the very nature of citizenship? And there is the fault into which my honorable friends on the other side have fallen in arguing this constitutional question. The question is not whether citizens of a particular character, either as to color or religion or race, shall exercise certain functions; but the question is the other way. It is that no citizen shall be deprived of whatever belongs to him in his character as a citizen; and what belongs to a man in his character as a citizen has been long in a great many respects well understood. There was the old Constitution, the fourth article, you remember, which said that citizens of each State should be entitled to the privileges and immunities of citizens of the several States. What did that mean? That has received a judicial interpretation.

By common consent of all parties, before this gravest question arising out of the rebellion and the war had been forced upon us, the courts had held, with universal acceptance, I believe, that there did belong to citizens certain inherent rights which could not be denied to them; and that you could not, under the Constitution of the United States, either through State or other authority, set up distinctions which interfered with these fundamental privileges. Perfectly consistent with that, as everybody knows, you may say that in order to fulfill a certain function in the State, or to hold a certain office, all citizens alike must conform to certain qualifications. * * * The only thing that the Constitution says is that there shall never be a distinction in respect to the rights which belong to a citizen in his inherent character as such. Now, what are those rights? Common rights, as the common lawyers used to say; common rights, as the courts of the United States have said,

under the fourth article. Among those may be enumerated—it may be that you cannot make a precise definition, but you can always tell, when you name an instance, whether it falls within or without it—the right to go peaceably in the public streets, the right to enjoy the same privileges and immunities, without qualification and distinction upon arbitrary reasons, that exists in favor of all others. That is what it is. Then apply it to this bill, and what have you? You say it shall not be competent for any person, either under the authority of a State or without it, to exclude from modes of public travel persons on the ground that they have come from Germany, like my distinguished friend behind me, or that they have come from Ireland, as some other Senators here may have come, or that their descent is traced from Ham, Shem, or Japhet. And yet Senators seem to be greatly alarmed when this simple proposition of common right inherent in everybody is put into a statute-book, which carries out a constitution which declares that every privilege and every immunity of an American citizen shall be sacred and protected by the power of the nation. That is all there is to it; and those, therefore, who go fishing and talking dialectics about attorneys and about slaughter-house cases and police regulations find themselves entirely wide of the mark.

The real thing, Mr. President, is that there lies in this Constitution, just as in Magna Charta, and in the bills of rights of all the States, a series of declarations that the rights of citizens shall not be invaded. These bills of rights do not say that A or B or C or any class shall hold an office or be a witness or a juryman, or walk the streets. They only say that these common rights, which belong necessarily to all men alike, shall not be invaded on the pretense that a man is of a particular race or a particular religion.

At this point the designated time for taking the vote upon the bill arrived. (Vol. 3 Cong. Rec., Part 3, second session Forty-third Congress, page 1870.)

It is thought unnecessary to try to add anything to what was said in support of the law in question.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1882

No. 1, 2, 3 and 204

THE UNITED STATES
—vs.—
STANLEY. [Kansas]

THE UNITED STATES
—vs.—
RYAN. [California]

THE UNITED STATES
—vs.—
NICHOLS. [Western Missouri]

THE UNITED STATES
—vs.—
HAMILTON. [Middle Tennessee]

BRIEF FOR THE UNITED STATES

S. F. PHILLIPS,
Solicitor General.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
STANLEY.
[*Kansas.*] } No. 1.

THE UNITED STATES
vs.
RYAN.
[*California.*] } No. 2.

THE UNITED STATES
vs.
NICHOLS.
[*Western Missouri.*] } No. 4.

THE UNITED STATES
vs.
HAMILTON.
[*Middle Tennessee.*] } No. 460.

BRIEF FOR THE UNITED STATES.

These are cases of criminal proceedings for violations of the civil rights act of 1875 (below). The cases of *Stanley* and *Nichols* present *indictments* for refusing to admit colored persons into *inns;* that of *Ryan* is an *infor-*

mation for refusing to admit a colored person to the *parquette of a theater*, and that of *Hamilton*—an indictment for excluding a colored person from *the first-class cars of a railroad train.*

The *information* was dismissed below; the other records present certificates of division.

The Thirteenth amendment of the Constitution and so much of the Fourteenth as is applicable here, are as follows:

XIII.

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 their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

XIV.

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Upon the 9th of April, 1866 (14 Stat., 27), Congress enacted certain provisions in the civil rights act of that year; these, in connection with additional provisions of like nature (sections 16 and 17), were formally re-enacted by the eighteenth section of the enforcement act of May

31, 1870 (16 Stat., 144), and are now contained in sections 1977, 1978, 1979, and 5510 of the Revised Statutes, from which they are here taken:

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SEC. 1978. All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects or causes to be subjected any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties on account of such inhabitant being an alien or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars or by imprisonment not more than one year, or by both.

The act now directly under consideration, that of March 1, 1875 (18 Stat., 335, Richardson's Supplement, 148), is as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of

government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted, &c.

[SECTION 1]. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings either under this act or the criminal law of any State. *And provided further*, That a judgment for the penalty in favor of the party aggrieved or a judgment upon an indictment shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offences against; and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found without regard to the other party; and the district attorneys, marshals,

and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned and bailed, as the case may be, for trial before such court of the United States or Territorial court, as by law has cognizance of the offence, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution, respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States, shall be reviewable by the Supreme Court of the United States without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

It may be proper to submit here a doubt which occurs in connection with the form of proceeding in *Ryan's* case; *i. e.*, whether the above act of 1875 can be enforced by an *information*?

That act (section 2, proviso 2) gives a choice of remedy, *either* a *civil* one or a *criminal*,—*not both.*

The *form of remedy* in the former case is *expressly* given; *i. e.*, *an action of debt.* Nothing is said directly as to the form of proceeding for the misdemeanor.

But an implication may perhaps be gathered from the 2d proviso of section 3 that this proceeding also is *fixed*, and is to be *by indictment* alone. Probably Congress did not intend by the language of that proviso that a judgment for the criminal "prosecution" shall be a bar to the civil "prosecution," only when the former is *by indictment*, leaving such judgment upon *an information* unprovided for. The suggestion, on the contrary, seems to be, that *indictment is to be the only form of the criminal prosecution* under consideration; *i. e.*, that judgment upon any criminal proceeding shall be such a bar; "indictment" and "criminal proceeding" being used in the statute as equivalent.

If the form of proceeding in *Ryan's* case is inadmissible, the questions certified therein to this court, were, of course, coram non judice, so that the question as to the Federal rights of persons to seats in theaters does not now arise.

In the other cases, which concern Federal rights in *inns* and upon *railroad trains*, it seems that the proceedings are sufficient to raise the questions proposed.

In the indictment against *Stanley* the description of the party *denied* possibly may not show that he had applied to the defendant *for such accommodations as he was entitled to receive.* An innkeeper is not bound to furnish supper to all persons who demand it, but only to travelers, or at all events, to "guests. (Calye's case, 8 Co., 32, and 1 Smith Lead. cas.) [194]. It may be that as regards others he can exercise choice or caprice as to the race of persons to be admitted to his table; *i. e.*, may deny this one, and admit that.

Submitting this suggestion without more words, because the constitutional question involved there is identical with that in the case of *Nichols*, and is like that in *Hamilton's* case, the proceedings in both of which appear to be valid, I proceed to the indictment against *Nichols*, which in form is as follows:

The grand jurors * * * present that * * * one Samuel Nichols, late of said district, was the keeper and proprietor of a public inn for the accommodation of travelers and the general public—that is to say, a certain common inn called the Nichols House * * * that one W. H. R. Agee was then and there a citizen of the United States of America and of the State of Missouri, and a person of color, and one of the Negro race, within the jurisdiction of the United States, and he, the said W. H. R. Agee, being then and there a traveler, was then and there an applicant to the said Samuel Nichols * * * for the accommodations, advantages, facilities, and privileges of said inn as a guest therein; but he, the said Samuel Nichols, then and there did deny to the said W. H. R. Agee admission as a guest in said inn, and the full and equal enjoyment by him, the said W. H. R. Agee, as such guest, of the accommoda-

tions, advantages, facilities, and privileges of said inn * * * for the sole reason that he, the said W. H. R. Agee, was a person of color and one of the Negro race, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

I premise that upon the subject of *inns* the common law is in force in Missouri, except as regards the matter [unimportant here] of *responsibility for baggage*, &c.

The only questions upon *the form* of the above indictment that have occurred to me are, (1) is it alleged that *Agee* applied for such entertainment as an innkeeper is bound to give; and (2) should it have been alleged that he *tendered pay*, or, at least, that he was *ready and willing to pay*. (Rex *vs.* Ivens, 7 C. & P., 213, Eng. ed., n.; and Fell *vs.* Knight, 8 Mees. & Welsby, 269.)

(1.) As to the first point, I submit that the allegation that *Agee* applied for the accommodations, &c., "*as a guest*" is sufficient. In this connection the term of "guest" is one *of art*, well known in law as a correlative of "innkeeper." (Norcross *vs.* Norcross, 53 Maine, 163; Fell *vs.* Knight, 8 Meeson & Welsby, 269; Walling *vs.* Peter, 23 Conn., 183; Shoecraft *vs.* Bailey, 25 Iowa, 553.) It denotes one who receives food, lodging, &c., *under the special dealing incident to innkeeping;* and, therefore, in pleading, is a sufficiently *certain* statement of all the matters which it includes. (Stephen's Plead., 354.)

(2.) As regards *tender*, &c., the denial in question was so explicit as to the grounds thereof that any tender, and, of course, allegation of tender, became unnecessary.

I come now to the principal question in this case:

Is the above act of 1875 constitutional?

This is understood to depend upon its conformity to the provisions of one or other of the *constitutional amendments* quoted above.

Several weighty judgments upon each of these amendments have been delivered by this court, and to these, as greatly facilitating the present investigation, it will be proper to advert in the first place.

In the Slaughter-house Cases (16 Wall., 36), it was held that a legislative grant by Louisiana of certain exclusive rights of slaughtering cattle within a territory of 1,154 square miles, including New Orleans, was valid as a *police regulation*, and was not within the prohibitions of either of the above amendments. In discussing this question, the Opinion of the court holds that the thirteenth amendment, although intended primarily to abolish *African* slavery, equally forbids any other form of involuntary servitude, however named; also, that the first clause of the fourteenth amendment protects against hostile State legislation such privileges and immunities only as belong to citizens of the United States *as such; ex. gr.*, such as those that arise out of the Federal Constitution, the nature and essential character of the National Government, &c.

Four justices dissented from that judgment and Opinion, and held (waiving a decision upon the thirteenth amendment) that the fourteenth amendment protects citizens of the United States against deprivation by State action of their *common rights*, meaning thereby those

privileges and immunities which of right belong to the citizens of *all free governments; ex. gr.*, that of immunity from disparaging and unequal enactments whilst in the pursuit of the ordinary avocations of life.

By Bradwell *vs.* The State (16 Wall., 130), a refusal by the supreme court of Illinois to grant a woman license to practice law, on the ground of the ineligibility of females *under the law of that State, i. e., the common law*, violated no right of the applicant under either the thirteenth or the fourteenth amendment.

The Opinion of the court affirms the above-cited argument in the Slaughter-house Cases. Concurring in the *judgment* of the court, four justices place themselves solely upon the ground that the right to practice law is not one of the immunities or privileges of women *as citizens in general.*

By Bartmeyer *vs.* Iowa (18 Wall., 129), a right to sell intoxicating liquors is not one of the privileges, &c., of citizens of the United States, or protected by the fourteenth amendment against the usual and ordinary legislation by States regulating or prohibiting such sales.

Concurring in that judgment, because such usual legislation is proper as a police regulation, three justices (a vacancy having occurred in the seat of Chief Justice Chase, one of the four *dissentients* above) again dissented from the argument of the court.

By Minor *vs.* Happersett (21 Wall., 162), the fourteenth amendment does not confer upon a *woman* a right to vote, and therefore the provision of the Illinois State constitution confining the right to vote for electors for President, &c., to *males*, is not invalid.

The Opinion goes upon the ground that such right was not coextensive with "citizenship" in the State at the

time of the adoption of the amendment, and that the latter did not *add* to the rights previously included in such citizenship.

Walker *vs.* Sauvinet (92 U. S., 90) was a case in which a licensed coffee-house keeper in New Orleans had refused refreshments to a colored person, and the latter had brought suit thereupon in a State court, under a State statute providing that, if upon the trial of such a case the jury should not agree, the same should be immediately submitted to the judge, upon the pleading and evidence already on file, whereupon he should decide the same at once.

Held, that States have a right to regulate trials in their own courts in their own way; and therefore that a jury trial, in suits at common law in such courts, is no *privilege* or *immunity* of national citizenship within the fourteenth amendment.

In United States *vs.* Reese (92 U. S., 214), it is held that an inspector of a municipal election in Kentucky was guilty of no offense against the United States for refusing to receive the vote of a citizen of the United States of African descent, on account of his race, &c., the third and fourth sections of the enforcement act of 1870, upon which the charge in question was drawn, having failed to create an offense *because of race*, &c.; as specified in the constitution, and also in the indictment.

In Kennard *vs.* Louisiana (92 U. S., 480), it is held that a State statute, providing certain speedy and peremptory proceedings to determine contests for judgeships therein, did not violate the fourteenth amendment by depriving persons of property *without due process*.

By United States *vs.* Cruikshank (92 U. S., 542), the fourteenth amendment, in *guarantying* persons against action by the States, depriving them of life, &c., without due process, or of the equal protection of the laws, does not empower the United States to enforce rights to life, &c., *generally; ex. gr.*, against infringement by private persons.

In Munn *vs.* Illinois (94 U. S., 113), it is held that a State statute regulating charges for the use of *grain elevators* does not violate the fourteenth amendment by *depriving* persons of their property, &c.; because such elevators are devoted to a public use, and so are affected with a public interest in the same way as *ferries*, *inns*, *warehouses*, *&c.*

The case of the Chicago, &c., Railroad Company *vs.* Iowa (94 U. S., 155), applies the same rule to a railroad company, and is followed by four other cases; (reported 94 U. S., 164, 179, 180, and 181, n.).

[In Blyew *vs.* The United States (13 Wall., 581), an indictment against *whites* for the murder of a *colored* person in Kentucky, in which the colored witnesses for the prosecution were incompetent by the State law: *Held*, that the case was not one "affecting" either the *deceased*, or the *witnesses* excluded, within the meaning of the Civil Rights act of 1866: giving jurisdiction to courts of the United States over "all causes civil and criminal *affecting persons* who are denied" certain rights.]

[By Brown *vs.* Railroad (17 Wall., 445), in a case where a train consisted of two passenger cars alike comfortable, the foremost of which upon the down trip became hindmost upon the return, a regulation that in going down the first should be set apart for colored persons and the last for whites, such use to be reversed upon the return,

was held to be a violation of an amendatory provision in the charter (A. D. 1863) "that no person shall be excluded from the cars on account of color."]

[In Hall *vs.* De Cuir (95 U. S., 485), a Louisiana statute required common carriers to make no discrimination on account of race or color as regards passengers. Thereupon the supreme court of the State, in a case where a colored person traveling from New Orleans to another place within Louisiana, upon a steamboat *which plied betwixt the former place and Vicksburg in Mississippi*, had been excluded by the captain on account of her race and color from a cabin reserved for whites, decided that the captain was amenable to the statutory penalty: *Held, upon error*, that such provision was a regulation of *inter-State commerce*, and therefore unconstitutional.]

In Strauder *vs.* West Virginia (100 U. S., 303), a colored man had been convicted of murder by a jury drawn under a State law which rendered colored men ineligible as jurors. Before the trial he had duly applied for removal of the case into the circuit court of the United States, and—upon this being refused,—to quash the venire, &c., because of the above legislative provisions: *Held, upon error*, that the fourteenth amendment entitled the prisoner to trial by a jury drawn without regard to race or color, &c.

The Opinion of the court in this case declares that although in form the fourteenth amendment is only *prohibitory*, in effect it creates *a positive immunity* for the party in whose behalf its prohibitions exist—*i. e.*, a constitutional interest in having the action of the State (through all its agencies) *undiscriminating* in respect of race, &c., and of the *protection* which it affords.

In ex parte Virginia (100 U. S., 339) it is held that

the provisions of the act of 1875 (above), making it a misdemeanor in State officers charged with any duty in selecting jurors to exclude any citizen on account of race, &c., is constitutional, and applies to the case of officers charged with that *ministerial* duty even although *in other respects* they may be State judges, entrusted with *discretion*, &c.

In Missouri *vs.* Lewis (101 U. S., 22) it is held that the fourteenth amendment, in guarantying equal protection of the laws, does not forbid or qualify the power of the States to regulate the jurisdiction of their own tribunals by *geographical lines*, as, for instance, to give an exclusive jurisdiction over appeals from certain counties to one tribunal, and over others to another, even although the latter tribunal be for certain purposes the *superior* of the former.

The court, however, *reserves*, in this connection, the consideration of any cases that may arise in which such geographical lines are resorted to for the purpose of indirectly discriminating against *races*, &c.

In Neal *vs.* Delaware (103 U. S., 370), it is held that the mere retention upon the face of State constitutions and statutes, of provisions limiting the right of suffrage to whites, that were in force before and at the time of the adoption of the fifteenth amendment, *no subsequent State legislation to like effect existing*, does not make a case of State violation of that amendment; also, that in case citizens are excluded as jurors on account of race and color by State jury commissioners, the refusal of the State court to grant a motion to quash an indictment found by such jurors, is *error* for which a judgment against the defendant will be reversed.

Upon the whole, these cases decide that—

(1.) The thirteenth amendment forbids all sorts of involuntary personal servitude (except penal) as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the fourteenth and fifteenth amendments, which must be construed as *advancing* constitutional rights *previously existing:*

(2.) The fourteenth amendment expresses prohibitions (and consequently implies corresponding positive immunities), limiting *state action only*, including in such action, however, action by all State agencies,—executive, legislative, and judicial,—of whatsoever degree:

(3.) The fourteenth amendment warrants legislation by Congress punishing violations of the immunities thereby secured when committed by agents of States in the discharge of ministerial functions.

Referring once more to the indictment against *Nichols*, it appears—

(1.) That the right violated by him [being indeed of the same class as that violated by *Stanley* and by *Hamilton*] is *the right of locomotion.*

(2.) That in violating this *Nichols* did not act in a capacity exclusively *private*, but in one *devoted to a public use, and so affected with a public* [*State*] *interest.*

Upon behalf of the United States it is therefore submitted, also, that—

(3.) Restraint upon the right of locomotion was a well-known feature of the slavery abolished by the thirteenth amendment.

(4.) Granting that by *involuntary servitude*, as prohibited in the thirteenth amendment, is intended some *institution*, viz, custom, &c., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations to create an *institution*.

(5.) Therefore, the above act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances for any reason turning merely upon the race or color of the latter, *partakes of the specific character of certain contemporaneous solemn and effective action by the United States to which it was a sequel*—and is constitutional.

Discussing these topics in the order named:

1. It seems obvious that "the power of locomotion," mentioned by Blackstone (Book 1, chap. 1), is a power which draws to itself all corresponding "facilities" which being from time to time devised by human ingenuity are progressively taken up amongst the *common* needs and *common* rights of any existing generation. To make use of language employed by the court in the Telegraph Company case, 96 U. S., p. 9: this *personal* power, like the powers of government there referred to, keeps pace with the progress of this country and adapts itself to

the new developments of time and circumstances, appropriating all new agencies successfully brought into use to meet the demands of increasing population and wealth. Its earliest illustrations may have been only such as relieved persons from confinement within four walls, or established that freemen were not adscripti glebae, appendages to manors or districts of country; but successively, beginning in common-law countries before the memory of man, it has vindicated the right of everybody to the *highway*, to the use of inns, and more lately to that of *passenger carriers*, and it stands ready to advance along the path of civilization and appropriate from time to time whatever of that sort human ingenuity may devise, and common sense may pronounce to be *an advantage which must be made common to all, or otherwise the "pursuit of happiness" will degenerate into a monopoly.*

I submit, therefore, that in accordance with a general law of progressive civilization, to the effect that the luxuries of one generation become the necessities of the next, the right to use an inn or a train of cars (certain reasonable conditions common to everybody being observed), is one of the rights of locomotion, and therefore a high constitutional right.

In the passage already referred to, Blackstone speaks as follows:

> Next to personal security the law of England regards, protects, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article [Personal Security]; that it is a right strictly natural; that the laws of England do not assume to abridge

it without sufficient cause: and that in this Kingdom it cannot ever be abridged without the express permission of the laws. (Book 1, ch.1.)

It is true that, in discussing this proposition, Blackstone does not refer to the topic now under discussion, turning attention mainly to topics in connection with the writ of *habeas corpus*. Considering the state of travel one hundred years ago and before, this may be accounted for upon other grounds than by supposing that such topic was not meant to be included.

Hundreds of thousands of persons are probably at every moment of time *travelers* at some point or other within the United States. In course of the year probably *billions* of passengers make use of public conveyances here. The American Almanac for the year shows that by late returns 600 millions of passengers used conveyance by railway trains alone in Great Britain during a year; whilst in the State of New York the number of *passenger-miles* traveled by trains was more than a billion. The development occasioned during the century by a revolution in manners thus glanced at has occasioned perhaps the principal cotemporaneous expansion of jurisprudence. Attempts to digest the rights and powers of certain artificial persons created in the same connection into a system that shall not conflict with the constitutional rights of natural persons, has, in the mean time, become one of the chief troublers of the thoughts of statesmen—on the bench, in the legislature, and in the closet.

If Blackstone had written a century later, the chapter in question would no doubt have had illustrations and speculations pertinent to "the power of locomotion" more appropriate to the present topic; but as things

have turned out, the duty of filling up a part of the picture may have been devolved upon this court.

(2.) The circumstance that in violating *Agee's* right of locomotion *Nichols* did not act in a capacity exclusively private, but in one devoted *to a public use, and so affected with a public* [State] *interest*, seems proper to be mentioned here. The phrase here employed will be recognized as taken from the *Elevator* cases, in 94 United States, already cited.

It is submitted that if State law appropriates inns to public use, then innkeepers, being persons invested with the duty of distributing this use, possess to a certain extent the character of public officers, *i. e.*, officers or agents of the State. So that if they obstruct in practice that enjoyment of which by law they are the ministers, inasmuch as in the nature of the case such obstruction is practically privation of the rights (there being no way in which a *remedy in specie* can be administered), the allegations in this indictment make a case directly under the fourteenth amendment.

I submit this view, although it is to be admitted that the statute of 1875 does not limit its action to agents of the State, and may not be susceptible of division into parts, any one of which has such limitation. If so, the government here is confined to a contention that the legislature, in dealing about *institutions*, or *action* forbidden *to States*, can forbid any action by private persons *which may reasonably be apprehended as tending to such institution or action.*

It is in such matters that courts will probably be most reluctant to interfere with the legislature. The faculty

required to pass upon the situation being so peculiarly *legislative*, as distinguished from judicial, that a court, impressed otherwise with the wisdom of the maxim *obsta principiis*, would probably be more than ordinarily disposed to solve every doubt in favor of the law.

I come now to discuss more expressly the *Federal questions involved* in these cases.

(3.) Restraint upon the rights of locomotion was a characteristic feature of the particular form of slavery abolished by the thirteenth amendment.

Under either of the two theories suggested in the Opinions in the Slaughter-house cases, and traceable subsequently in the reports of the decisions of this court, the establishment of this proposition would render plainly unconstitutional any *State action* authorizing the action reprobated by this indictment; and therefore, as I have already submitted, would warrant, and even *demand*, legislation by Congress having in view the suppression of action *by anybody* which reasonably tends to bring about such State action.

It seems unnecessary to elaborate this point. It is, as has been said by this court in another connection, "too recent to be history,"—that a first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law, to require the whole community to be *upon the alert* in aiding the master to restrain that power. By a travesty upon ordinary

and constitutional modes of speech, "locomotion" became—"running away"; and "entertainment,"—"harboring." This incident was of the very essence of the institution. Every slave State was compelled to enforce it by statutes progressively more and more stringent—striving thereby to meet a tide of hostility to the institution that was rising from year to y ear under, amongst other matters, the powerful influence of *locomotive machinery and steam.* This legislation was treated by the courts as *remedial*, and therefore to be interpreted with favor. The State Reports present many cases to this general purpose.

In the State of Missouri, from which the case of *Nichols* comes, we have in the year 1846 the case of *Eaton s. Vaughan* (9 *Missouri*, 734), the head-note to which is as follows:

In an action of trespass against the captain of a steamboat for taking away a slave on his boat, it is not necessary to show that he knew the person to be a slave.

2. Ordinary diligence used in attempting to ascertain if he were a slave is no justification to the person carrying the slave away.

The facts of that case are too elaborate to be inserted here. But it appeared that the runaway had *free papers*, to *the description* in which he bore resemblance, and which were shown to the *captain* to be genuine, before the slave (a mulatto) was received. Suspicion having arisen the man was examined several times during the voyage the result being a conviction that he was the person represented in the free papers.

The court said:

Every negro [overruling in this connection a suggestion that, as held in several other States in this respect, there was a distinction betwixt *pure* and *mixed* blooded persons: the runaway in question being of the latter sort] asserting his right to freedom is presumed

a slave, and it devolves on him to show his right to the condition which he claims. It is true that slaves have volition; they may leave the service of their masters, and may impose themselves on others for free men, but it is necessary for the security of the owners of such property that they who treat them as such should do it at their peril.

The court below having instructed the jury that they might give smart money, the Supreme Court said that it was a mistake so to charge, but that as there were expenses in endeavoring to recover him, the excess of damages was not so great as to warrant them in setting the verdict aside. They add:

We do not feel assured, all things considered, that such a course would ultimately prove an advantage to the defendant. There is nothing in this transaction which throws the least suspicion upon the purity of Capt. Eaton's conduct. That some diligence was employed by him cannot be denied, but that a greater degree of diligence would in all probability have prevented the loss to the plaintiff candor compels us to avow. We think that the hope of making his escape on the boat manifestly induced the slave to run away. The facility of escaping on the boats navigating our waters will induce many slaves to leave the service of their masters. Their ingenuity will be exerted to invent means of eluding the vigilance of captains, and many ways will be employed to get off unnoticed. One escape by such means will stimulate others to make the attempt. The greater portion of our eastern frontier, being only separated by a navigable stream from a non-slaveholding State, inhabited by many who are anxious, and leaving no stone unturned to deprive us of our slaves, our interior being drained by large water-courses, by means of which its commerce in steamboats is maintained with the city on our frontier, render it necessary that the strictest diligence should be exacted from all those navigating steamboats on our waters, in order to prevent the escape of our slaves. Our citizens, aware of the circumstances by which they are surrounded, will not weigh in golden scales the damages that may result to the owners of slaves from a relaxation of that

degree of diligence which is necessary to secure them against losses. This determination they will carry with them in their jury rooms, and it is not for the courts to weaken or destroy the force of a determination necessary to protect a species of property which, whether for weal or for woe, has been entailed upon us by those who are now making the most clamor about it.

I call attention to this passage as a temperate expression of the law as received in the States in which slavery prevailed.

Inasmuch, then, as in times of slavery legislation like the act of 1875 would have touched that institution at the quick, its *specific* relation thereto can readily be recognized.

(4.) I now submit that, granting that by "involuntary servitude" as prohibited in the Thirteenth Amendment, is intended some *institution* of that sort, and, primarily at least, *not* mere scattered trespasses against personal liberty committed by private persons, yet, it is "appropriate legislation," under the second section of that Amendment to forbid any action by private persons which a legislature, in view of history or otherwise, may reasonably apprehend as threatening to result in State recognition of such an institution.

It seems that the circumstance that the sort of action forbidden by the act of 1875 is action *in the course of certain business transacted with the public* makes a substantial difference as regards such action and *crimes against life and liberty*, such as were before this court in Cruikshank's case, and as to which it is said (92 U. S., p. 553, bottom): "It is no more the duty or within the power of the United States to punish for a conspiracy, to falsely imprison or murder within a State, than it

would be to punish for false imprisonment or murder itself." There is no reason to apprehend that acts of mere violence may become a political institution. But as regards innkeepers and passenger carriers, whose conduct is so much *a mere reflection of the views of the community*, it is probably otherwise. The action of such persons testifies to, and at the same tends to enlarge, a particular current in *public opinion*, and this in its turn is fruitful of *public, i. e., State* institutions.

Is it not a mere matter of legislative discretion to decide upon the stage of growths at which it will be best to suppress such vegetation?

The significancy of the action of *Nichols* is that it is *representative.* It shows not only his private views as to accommodating this race in inns, &c., but the views of whole communities of citizens, upon whom their history has naturally imposed these views.

Congress has taken notice of this, and courts *also* will take notice of it, or, at all events, will admit that notice thereof may well be within the reach of *legislative* organs of perception, and therefore is a matter not to be criticised by themselves. It is to notice so taken by Congress that the preamble of the statute of 1875 indirectly refers. I submit that the phenomenon thus indicated points not remotely to a birth of corresponding State institutions, and that it is in the interest of national peace and good feeling to nip such institutions in the bud.

(5.) It follows that the act of 1875 is constitutional in the feature now in question.

I will add in this connection no more than that in some points of view it will be an extraordinary result

if that feature shall be found to be unconstitutional; for therein it conforms to a series of acts (as above), which began in 1866, and has received the express sanction of Congress upon four different occasions during nine years, some of the concurring members of that body at the same time being not only distinguished as constitutional lawyers, but being also persons who were in public life contemporaneously with the whole contest, in war and subsequent peace, which ended in destroying slavery; and were also active parties in considering and settling the particular terms of the constitutional provisions under which they afterwards legislated. If in respect to a great feature like this, to wit, repressing all action *by persons* that savors of an enforcement of odious characteristics of the slavery which they have met, vanquished, and abolished, they have erred fundamentally time and again during years, it is, I submit, a circumstance much to be wondered at.

In the mean time it may be believed that their Statutes are in accordance with their Amendments and with the logic of the Events of the war which they supported; that they have been right in apprehending that every rootlet of slavery has an individual vitality, and, to its minutest hair, should be anxiously followed and plucked up; and that as to scattered disparagements of persons on account of race and color, incidental to certain public callings, and by persons who notably are sensitive registers of local public opinion, the epigrammatic proposition of Junius is applicable, to wit, that what upon yesterday was only "fact" will become "doctrine" tomorrow.

S. F. PHILLIPS,
Solicitor-General.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1882

No. 28

RICHARD A. ROBINSON AND SALLIE J., his wife,
Plaintiffs in Error,

—VS.—

MEMPHIS & CHARLESTON RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

WM. M. RANDOLPH,
Of Counsel for Plaintiffs in Error.

In Supreme Court of the United States

AT OCTOBER TERM, 1882.

No. 217.

RICHARD A. ROBINSON AND SALLIE J., his wife, *Plaintiffs in Error*,
vs.
MEMPHIS & CHARLESTON RAILROAD COMPANY, *Defendant in Error.*

Statement of Case,

ASSIGNMENT OF ERRORS, AND BRIEF

FOR PLAINTIFFS IN ERROR.

This is an action to recover the penalty prescribed in section 2 of the Supplementary Civil Rights Act passed by Congress March 1st, 1875.

The questions arising in the case are presented by a bill of exceptions, to be found in the record ap. pp. 7–18.

The declaration contained two counts: The first alleged in substance that the plaintiffs, who are husband and wife, were citizens of the State of Mississippi, and that the defendant, an incorporated railroad company of the State of Tennessee, was a common carrier of passengers and freight for compensation. That on the 22d of May, 1879, Mrs. Robinson, wishing to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia, purchased tickets entitling her to be so transported and carried as a first-class passenger over the defendant's railway and the various

railways connecting with it between the said points, with all the rights and privileges of the other passengers traveling over the said lines of railroad. That under the act of Congress passed the 1st of March, 1875, Mrs. Robinson was "entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of any race or color, regardless of any previous condition of servitude." That being so entitled Mrs. Robinson got upon defendant's train of cars at Grand Junction, Tennessee, for the purpose of being transported to Lynchburg, Virginia, and attempted to go into the ladies' car, being the car provided for ladies and first-class passengers by the defendant, when the conductor of the train refused to admit her into the car. That in so refusing her admission to the car the conductor took Mrs. Robinson by the arm and jerked her roughly around. That by the second section of the said act of Congress any person violating the first section by denying to any citizen, except for reasons by law applicable to citizens of every race and color and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said first section enumerated, or by aiding or inciting such denial, forfeits and is required to pay $500 to the person aggrieved, to be recovered in an action of debt, with full costs. That Mrs. Robinson was excluded from the ladies' car without any legal reason, and was thereby denied the full enjoyment of the accommodations, advantages, facilities and privileges to which she was entitled by virtue of the tickets purchased by her and by the act of Congress. Wherefore she was damaged $500, and therefore the plaintiffs sue.

Record pp. 1–2.

The second count was: That the plaintiffs were born within the United States and had always been subject to

its jurisdiction and were citizens of the United States and of the State of Mississippi wherein they resided. That Mrs. Robinson was formerly held in a state of slavery, not as a punishment of crime whereof she had been convicted, but had been emancipated therefrom by law and by the Constitution of the United States. That the plaintiffs also were persons of African descent. That by reason of the premises the plaintiffs were entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of public conveyances on land and water, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. And being on the journey stated in the first count, and having purchased and paid for the ticket entitling her to a first-class fare or passage over the defendant's railroad as alleged in the first count, Mrs. Robinson was denied by the defendant for reasons not applicable by law to citizens of every race and color, and regardless of any previous condition of servitude, but because she was a person of African descent, the full enjoyment of the accommodations, advantages, facilities and privileges of the defendant's railroad and coaches and which the ticket held by her entitled her to, all as was more fully set forth and stated in the first count, to which reference was made.

And therefore the plaintiffs sued for $500 to be forfeited and paid by the defendant for the said offence as provided in the act of Congress.

Record p. 4.

A demurrer to the declaration was interposed (record p. 4–5), and overruled by the court. Record p. 6. Three pleas were then filed, (1) *nil debit*, and (2) not guilty, and (3) that Mrs. Robinson was not excluded from the ladies' car as she alleged. Issue was joined on all these pleas.

Record pp. 5–6.

By the Code of Tennessee, sec. 2910, "all allegations in the declaration, not denied in the plea, shall be taken as true for all the purposes of that issue."

The case was tried before a jury and a verdict was rendered for the defendant and a judgment pronounced on it.

Record pp. 7, 18–19.

The plaintiffs then moved for a new trial, and their motion was overruled, and they tendered a bill of exceptions, which was allowed and filed.

Record p. 19.

The questions now to be presented arise on the rulings of the court during the trial, and more especially in giving and refusing instructions to the jury.

ASSIGNMENT OF ERRORS.

(1)

The court erred in ignoring the cause of action stated in the first count of the declaration, and in treating the cause of action set out in the second count as the only one to be considered by the jury.

(2)

The court erred in admitting the evidence objected to by the plaintiffs, as appears in the printed record pp. 8 and 9.

(3)

The court erred in refusing to charge the plaintiffs' instructions asked, numbered from 1 to 6, and set out in the printed record pp. 14–15, and in charging the reverse of the said instructions so asked.

(4)

The court erred in giving the five instructions, numbered from 1 to 5, asked on the part of the defendant, and in the printed record pp. 16–17.

(5)

The court erred in giving the portions of its charge to which the plaintiffs entered exceptions, to be seen in the printed record pp. 11–14.

(6)

The court erred in telling the jury that the plaintiffs could not recover in the action unless they found Mrs. Robinson was excluded from the ladies' car on account of her color.

(7)

The court erred in telling the jury that the unfounded suspicions of the defendant's conductor were a sufficient ground for excluding Mrs. Robinson from the ladies' car, and that such exclusion was not an exclusion on account of Mrs. Robinson's color, though the suspicions of the conductor for which she was excluded arose solely out of the fact that Mrs. Robinson was a colored woman, and was erroneously supposed by the conductor to be traveling with a white man.

BRIEF.

I.

It will be observed that the act of Congress, 18 Statutes at Large, ch. 114, p. 336, Supplement to Revised Statutes, U. S, vol. 1, p. 148, assumes in words to confer on "all persons within the jurisdiction of the United States," the full and equal enjoyment of the accommodations, advantages, facilities and privileges therein embraced, "subject only to the conditions and limitations *established by law*, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Sec. 1.

So far, then, as persons are within the jurisdiction of the United States, whatever other right they may have thereto, they may rely upon the act of Congress as the source of their title to "the full and equal enjoyment of the accommodations, advantages, facilities and privileges" enumerated in the act, including among them those of "public conveyances on land and water." And the persons upon whom "the full and equal enjoyment" is conferred are not limited to a class or race, but are "*all persons* within the jurisdiction of the United States." And the only "conditions and limitations" that can be imposed on such "full and equal enjoyment" by the persons who derive their title from the act of Congress, are such as are "established by law." In this case Mrs. Robinson was born in the United States, and was residing in the State of Mississippi, and by the Fourteenth Amendment to the Constitution was a citizen of the United States and of the State of Mississippi. She was on a journey from Grand Junction, in Tennessee, to Lynchburg, in Virginia, and the defendant, as a common carrier of passengers between those points, sold her the ticket whereby it agreed to transport her from the one place to the other,

and the fact out of which the cause of action sued for arose, occurred while the defendant was in the assumed performance of its agreement so to carry Mrs. Robinson.

(1)

If the act of Congress bears the broad construction I have put upon it, the first question that arises is, whether Congress had the power under the Constitution to pass it. I do not propose to argue how far Congress, under the Fourteenth Amendment, may regulate commerce or travel confined to the limits of a single State and concerning only the citizens or inhabitants of that State. My case involves the rights of a citizen of one State traveling "by a public conveyance on land" through another State, for the purpose of reaching a place in a third State. I will maintain that so far as the act of Congress applies to such a case, the power to pass it is beyond question. Independently of "the power to enforce by appropriate legislation" the Fourteenth Amendment, there are, as I conceive, at least two other clauses of the Constitution on either of which the act may rest. The first is the power in Congress "to regulate commerce with foreign nations, and among the several States," article I, section 8, clause 3; and the other is the provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Article IV, sec. 2. These provisions, taken in connection with the grant of "all legislative powers" to Congress, article I, sec. 1, and the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and *all other powers* vested by this Constitution in the Government of the United States, or in any department or officer thereof," article I, sec. 8, clause 18, I submit leave very little room for argument.

In Prigg v. Commonwealth of Pennsylvania, 16 Peters 539, 615, etc., it was decided that where the Constitution

guarantees a right, Congress is empowered to pass the legislation appropriate to give effect to that right.

And see Ableman v. Booth, 21 Howard, 506.

The same principle was affirmed in the more recent case of U. S. v. Reese, 92 U. S. 214, 217, where the court said, "the form and manner of the protection may be such as Congress in the legitimate exercise of its discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." It is true that in that case the words of the Chief Justice are, "rights or immunities *created by* or *dependent upon* the Constitution of the United States can be protected by Congress." But in Strauder v. West Virginia, 100 U. S. 303, 310–311, Justice Strong, delivering the opinion, quoted the language of the Chief Justice in U. S. v. Reese, quoted above, and then took pains to say: "A right or an immunity, whether *created by* the Constitution, or only *guaranteed* by it, even without any express delegation of power, may be protected by Congress."

But whether Mrs. Robinson's rights in this case were created by the Constitution or only guaranteed by it, I submit, in either event, that the act of Congress, so far as it protects them, is within the Constitution. I think this result necessarily follows from the case of Hall v. DeCuer, 95 U. S. 485. In that case the legislation involved was enacted by the State of Louisiana. It undertook, according to the opinion of the court, to fix the duties of carriers of passengers engaged in commerce between different States, and to prescribe and provide for the enforcement of the relative rights of the passengers carried. Mrs. DeCuer had been denied by Hall, the carrier, the rights the legislation attempted to confer on her, and she brought her action against him, and had a recovery in the court of original jurisdiction which was affirmed in the Supreme Court of the State. Hall prosecuted a writ of error to this court, and though Mrs. DeCuer was a citizen of Louisiana,

and was traveling *only within the State*, the court held that the legislation of Louisiana was void as in conflict with the Constitution of the United States, because Hall was engaged in carrying between different States, and the legislation was an attempt to regulate commerce between the States. The necessary inference from that decision is, that Congress exclusively had power to pass such legislation as the State of Louisiana had passed, and as the act of March 1, 1875, now under consideration, is such legislation, it must necessarily be valid.

See in this connection

Pensacola Tel. Co. v. Western Un. Tel. Co., 96 U. S. 1.

Chief Justice Taney said in the Passenger Cases, 7 Howard 422, and the court repeated the language in Crandall v. The State of Nevada, 6 Wallace, 35, 48–49: "For all the purposes for which the Federal Government was founded, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it, without interruption, as freely as in our own States." Since the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, the language is true in a much broader sense than the Chief Justice intended it.

My position, in short is, that a person circumstanced as Mrs. Robinson is in this case, is "a person within the jurisdiction of the United States," within the meaning of the act of Congress of 1st March, 1875, as limited by the Constitution of the United States, and that whatever may be the effect of the act as to persons circumstanced differently, as to her it was effectual, without reference to her race, color or previous condition of servitude, to vest "the full and equal enjoyment of the accommodations, advantages, facilities and privileges" specified in the act, and to subject any person denying to her the full and equal en-

joyment of them, without a lawful excuse, to the penalty denounced.

And I do not understand that my position at all contravenes anything which has been decided by this court. In the Slaughter House Cases, 16 Wallace 36, it was held that the second clause of the Fourteenth Amendment protected from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, and that this latter class of privileges and immunities remain, with certain exceptions, under the care and subject to the regulation and control of the State governments, respectively.

The court referred to Corfield v. Coryell, 4 Washington C. C. 371; Paul v. Virginia, 8 Wallace 180, and Ward v. Maryland, 12 Wallace 430, and said generally that "the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of the Constitution, or its laws and treaties made in pursuance thereof."

16 Wallace 74–83.

It is within the class of legislation for the protection of the privileges and immunities of citizens of the United States, generally, that I seek to bring the act of Congress now in question, so far as it affects Mrs. Robinson's rights as they are presented by this record. If I have failed to show that the act, so far as it applies to her, being a citizen of Mississippi, traveling through Tennessee to reach Virginia, is within the Constitution, without reference to her race, color or previous condition of servitude, then I confidently insist that these latter circumstances, under the provisions of the Fourteenth Amendment, render the act, so far as it has application to her case, a constitutional law.

Minor v. Happersett, 21 Wallace 162, decided that the Fourteenth Amendment to the Constitution did not confer or add to the right of suffrage of a citizen of a State, but simply furnished additional guaranty for the protection of such as the citizen already had. And U. S. v. Reese 92 U. S. 217, decided the same as to the Fifteenth Amendment. United States v. Cruikshank 92 U. S. 542, decided that the right of the people peaceably to assemble for lawful purposes, and the right to bear arms were not granted by the Constitution, but existed before and independently of it. It also decided, as in effect had been decided in the Slaughter House Cases, that the effect of the Fourteenth Amendment to the Constitution was to limit the powers of the States, but did not add anything to the power of Congress over the rights of one citizen as against another. The same principle was affirmed in Virginia v. Rives, 100 U. S. 313. Applying the principles settled in Minor v. Happersett and United States v. Reese, 92 U. S. 214, the court, in U. S. v. Cruikshank, declared that the right to vote in a State came from the State, but the right of exemption from the prohibited discriminations in the exercise of the elective franchise came from the United States. While the principle established in U. S. v. Cruikshank, and recognized in Virginia v. Rives, was fully admitted in Virginia, *ex parte* 100 U. S. 339, it was there held that Congress had power, in legislating for the purpose of giving effect to the provisions of the Fourteenth Amendment, to act directly upon the individuals who, as the officers or agents of a State, deny or impair the rights guaranteed by the Amendment. And see Neal v. Delaware, 103 U. S. 370.

I have referred to these cases only to repeat that I find nothing in them contradicting the positions I have stated.

In Munn v. Illinois, 94 U. S. 113, the following propositions were affirmed:

"Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward

each other, and, when necessary for the public good, the manner in which each shall use his own property."

"It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc."

"When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."

Undoubtedly, if Congress could legislate on the subject at all, its legislation by the act of 1st March, 1875, was within the principles thus announced.

(2)

It is next necessary to examine the second section of the act of Congress already referred to—18 Statutes at Large, ch. 114, p. 336, sec. 2.

It declares that any person who shall violate section 1 by denying to any citizen, "*except* for reasons *by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offence forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs."

Now, I observe that the penalty denounced is incurred by denying to *any citizen* "the *full enjoyment of any* of the accommodations, advantages, facilities or privileges" enumerated in the first section, and that it is wholly immaterial whether the citizen whose rights are denied him

belongs to one race or class, or another, or is of one complexion or another. And again, the penalty follows every denial of the full enjoyment of any of the accommodations, advantages, facilities or privileges, except and unless the denial was "*for reasons by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude."

In other words, the plaintiffs' case in a suit under the statute is made out by proof of the denial only, and the defendant, if he wishes to justify the denial, must allege and prove that the denial was for *some reason*, and that *such reason* was in its nature applicable to citizens of every race and color, and regardless of any previous condition of servitude, and further, that such reason was by law applicable to all such citizens.

In this connection I call attention to the phrase in section 1, "subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color," and the phrase in section 2, just referred to, "except for reasons by law applicable to citizens of every race and color," the one used in defining the rights conferred, and the other in providing a remedy for their infringement, and to suggest that the one phrase means substantially what the other does—that is to say, that in an action under sec. 2, in order to show *a reason* justifying a denial of the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated in section 1, it must be made to appear that the facts going to make up such reason constitute by law *a condition of* or *limitation upon* the right of enjoyment of the person whose enjoyment has been denied.

II.

The first question presented in the record arises on the action of the court, admitting certain evidence offered by the defendant against the objection of the plaintiffs. The evidence was that one Reagin, the conductor at the time of excluding Mrs. Robinson, who was a young, good-looking woman, from the ladies' car, which was at night, supposed Joseph C. Robinson, a young man, her nephew, traveling with her, also colored, to be a white man traveling with her, and having been a conductor a long time, Reagin's experience as such was that when young white men traveled in company with young colored women, it was for illicit purposes, and that white men so traveling with colored women generally conducted themselves in a manner objectionable to other passengers. The evidence adduced by the defendant, in connection with that so objected to, was that the conductor saw nothing objectionable in the conduct of either Joseph C. Robinson or Mrs. Robinson, and that his only reason for supposing her to be an improper character was that she was a good-looking colored woman traveling with what he supposed to be a young white man. The conductor, Reagin, as a witness, was then asked by the counsel of the defendant how white men, traveling with colored women, generally conducted themselves, and he answered they generally laughed, and drank, and smoked, and acted disorderly. The plaintiffs objected to the question and the answer, and to all the evidence of what the conductor supposed, and of his experience, and of what white men traveling with colored women generally did, because such evidence was incompetent and irrelevant, and established no excuse or justification of the defendant's conduct towards Mrs. Robinson. But the court overruled the objection, and admitted the testimony, and the plaintiffs excepted.

Record pp. 8 and 9.

As the same arguments will apply, the questions presented by the foregoing exceptions will not be noticed separately, but will be considered in discussing the giving and refusal of instructions on the trial.

The judge told the jury:

"If you find from the evidence that at the time the admittance was denied, the conductor suspected Mrs. Robinson of being a prostitute traveling with a paramour, and required them to remain out of the ladies' car until he could investigate that matter, and immediately on finding out his mistake permitted her to occupy the ladies' car for the remainder of the journey, the company is not liable for this penalty."

Record pp. 12–13.

The jury was then told that if the plaintiff was excluded because the conductor in fact in good faith believed she was a prostitute traveling with her paramour, then whether such belief was well or ill-founded, the defendant was not liable for the penalty.

Record p. 13.

The court further instructed the jury that the defendant had the right temporarily to exclude the plaintiff on mere suspicion that she would be disagreeable in her conduct, till such time as the defendant could satisfy itself that such suspicions were ill-founded, and that if the plaintiff was excluded permanently on ill-founded suspicion, she could not recover. That the fact for the jury to determine was, whether the plaintiff was excluded because of her color, or because the conductor supposed her to be an improper character, and feared she and her companion would so conduct themselves as to annoy the other passengers, impair their comfort, or in some way injure the business of the defendant. If the plaintiff had been excluded on the former ground, she could recover, but if on the latter she could not.

Record p. 13.

And further on the judge told the jury that if they found as a matter of fact that the conductor did believe Mrs. Robinson and her nephew were improperly associated, and, therefore, improper characters, and for that belief excluded them, the defendant was not liable.

Record p. 14.

The same ideas are included in the 2nd, 3rd and 4th instructions, specially asked by the defendant and given by the court.

Record p. 17.

When the jury came back into court the judge told them that the law permitted a carrier or his agent to temporarily exclude persons suspected by him of being improper characters until he has a reasonable time to investigate or satisfy himself of their real character, so far as is necessary to enforce the rules of the carrier requiring good conduct of the passengers. And that if the exclusion was anything more than a temporary one for the purposes of investigation, the carrier was liable for damages at common law for wrongful suspicions, but not under the statute. That the defendant was liable only for excluding a person on account of color, and the question of fact for the jury was whether Mrs. Robinson was excluded because of color, or for some other cause. Record p. 17. After excepting to the instruction so given the plaintiffs asked the court to charge: That before the defendant could justify its excluding Mrs. Robinson from the ladies' car on the occasion in question on the ground that such exclusion was temporary and merely for the purpose of enabling it to investigate and ascertain whether or not she was an improper character, the evidence must establish affirmatively that such was the character and ground of the exclusion. This the court refused.

Record p. 18.

The errors committed in admitting the evidence objected to above, and in giving the instructions stated, are almost too numerous to mention.

(1)

It was error to permit evidence of the suppositions and belief of the conductor, who excluded Mrs. Robinson from the ladies' car. The defendant admitted, that as a fact, the suppositions were not true, and that the belief based on the suppositions was ill-founded. That the conductor's experience led him to the belief he formed, basing such belief on the fact he erroneously supposed to be true, that Mrs. Robinson was colored and her nephew was white, does not mend the matter. I wholly deny that the conductor's suppositions or belief were of the remotest consequence after the admission that they were not true. But, supposing the false suppositions and the unfounded belief to be matters of substance, as the district judge considered them to be, then the conductor could no more discriminate against Mrs. Robinson on account of her color, when he came to form an opinion of her chastity, than he could when he came to allow her the "full and equal enjoyment of the accommodations, advantages, facilities and privileges" guaranteed to her by the act of Congress. What is the difference between denying her "the full and equal enjoyment" because of her color, and denying the same thing to her because of a belief, that she being colored and her traveling companion white, therefore, she must necessarily be a woman wanting in virtue? In either case the substantial ground of the denial was because of Mrs. Robinson's color, which must be regarded as the proximate cause of her exclusion.

Insurance Co. v. Seaver, 19 Wallace 531.

The first instruction asked by the plaintiffs and refused by the court, was in substance that no law forbade colored women and white men traveling together, and that there was no presumption of law that improper relations existed between white men and colored women who traveled together, and if the conductor excluded Mrs. Robinson from the ladies' car because he believed she was a colored woman

traveling with a white man, then such exclusion was simply on account of race.

Record pp. 14–15.

The third of the plaintiffs' instructions, also refused by the court, carried the same proposition a little further, saying that if the conductor believed Mrs. Robinson was a colored woman, and believed her nephew was a white man, and from the fact that he supposed they were of different races, he believed they would be guilty of improper conduct, and for that reason excluded her from the ladies' car, then no reason for Mrs. Robinson's exclusion, in the sense of the act of Congress, existed, and her exclusion was on account of race.

Record p. 15.

While it is true that in Tennessee marriages between colored and white persons, and their living together as man and wife in the State, are prohibited, (Constitution of 1870, article XI, sec. 14, Acts of Tennessee of 1870, ch. 39, p. 69,) their traveling together has not been prohibited, nor their personal association. Even in the State, no presumption against the character of either party can be drawn from the fact of the association of colored and white persons, and certainly none from their traveling together. But however it may be in Tennessee, many States of the Union permit marriages between colored and white persons, and legalize their living together as husband and wife. Therefore, a National Court, in a case involving the rights of a citizen of the United States, as contradistinguished from the rights of a citizen of a State, certainly cannot recognize the principle which required the refusal of the instructions asked.

The court, in the portion of the charge to which the second exception was noted, told the jury that the sole test of the statutory offence was the defendant's motive in making the exclusion, and that the defendant was not liable unless the jury found, as a fact, that the defendant

denied the plaintiff the accommodations on account of her race, color, or previous condition of servitude.

Record p. 11.

There is the same objection to this portion of the charge as to that which was the subject of the first exception. The general words used in the body of the statute, defining the grounds of the action, are declared to mean nothing, and words which Congress employed for the purpose of qualifying or limiting the defence which the act permitted to the action it authorized to be brought, are substituted for those general words, and are made to curtail the very cause of action itself.

And, again, instead of telling the jury, as he should have done, that the question they were to try was whether the defendant had or had not excluded the plaintiff from the ladies' car, "for reasons applicable by law to citizens of every race and color," the district judge told them they were to say, as a fact, what the motive of the defendant in excluding the plaintiff was, and that upon that motive, as they found it, their verdict was to depend. The same idea that the conductor's motive was the question the jury was to try, is repeated again towards the close of the charge. Record p. 14. Now, I submit "motive," as the Judge used the word, was not the equivalent of "reason by law applicable," the phrase used in the statute. On the contrary, as other portions of the charge show, the judge referred to, and the jury must have understood him to have referred to, the personal motive or impulse prompting the action of Reagin, the conductor, who excluded Mrs. Robinson from the ladies' car, without reference to the question whether such motive or the reason furnishing the ground of Mrs. Robinson's exclusion was, or was not, one "of the conditions or limitations established by law (regarding the right to travel) and applicable (under like circumstances) to citizens of every race and color," or was or was not "a reason by law applicable to citizens (situated as

Mrs. Robinson was) of every race and color." In other words, the requirements of the statute that the defendant in order to excuse itself for excluding Mrs. Robinson from the ladies' car, must show that her exclusion was for a reason which *by law* would have been a good ground for excluding any person whomsoever, were wholly disregarded by the judge. In his opinion no reason at all was just as good as a reason founded on the law. A whim, caprice, prejudice or chimera of the mind of the conductor was equally as effectual as a justification of the defendant for the exclusion, as would have been the fact that Mrs. Robinson was afflicted with small-pox or some contagious disease. That this was so is apparent when the portion of the charge which is the subject of the third exception, is considered. There, after saying that the denial complained of must have been exclusively on account of race, color, or previous condition of servitude, the judge continued: Any other reason furnishing the motive "may be frivolous, it may be cruel, it may be aggravated wrong in its most revolting form, yet it is not actionable under this statute."

Record p. 12.

This was saying any pretense, or subterfuge, or falsehood whatever, though involving a foul and groundless imputation upon the chastity of a pure and virtuous woman, put forward as the reason for the exclusion of Mrs. Robinson from the ladies' car, so it had no reference to her race, color or previous condition of servitude, would be or might be a justification to the defendant. I submit such a construction not only ignores the purpose of the statute, but even its words, and is an insult to the intelligence of the Congress which enacted it. It is a well known fact that the passage of the act in question created much excitement, particularly in the States which formerly tolerated slavery. In Tennessee, for the purpose of counteracting its effect, an act was passed on the 24th March, 1875, within less than twenty days after the passage of the act of

Congress, which, among other things, abolished the rule of the common law requiring common carriers to carry all persons who applied to be carried, and declared that thereafter no common carrier should be obliged to carry any one, and should be at liberty to refuse to carry every one, with or without cause.

Acts of Tennessee of 1875, ch. 130, sec. 1, p. 216.

It needs no argument to prove that the act of Congress, construed as the court below construed it, is a dead letter in communities where public sentiment demands the enactment of legislation such as that enacted in Tennessee. What would be said of such a pretext as that the district judge allowed the defendant to give evidence of as the ground for the exclusion of Mrs. Robinson from the ladies' car, if sought to be made the basis of a defence to an action for excluding the wife of some distinguished white citizen? Leave Mrs. Robinson's color out of the case, and suppose the conductor had said that his experience was that when young white men traveled with young white women, it was for illicit purposes, and that young men and women so traveling generally conducted themselves in a manner objectionable to the other passengers, and that fearing or believing the wife of the distinguished white citizen supposed and her traveling companion would conduct themselves in a manner objectionable to the other passengers, he excluded her. I say, in such a case, is there a court in the country that would listen with patience to such an absurdity? And is there any difference between the case supposed and Mrs. Robinson's case, except in the fact that she is colored?

(2)

Mrs. Robinson was entitled to stand on her own character and conduct as a lady, and the fact, if true, that the conductor had come in contact with other colored women traveling with white men who had misbehaved, even though the instances had been so frequent as to impress his mind with the belief that the rule was a general one that colored

women and white men traveling together misbehaved, did not justify the conductor in excluding Mrs. Robinson from the ladies' car, and should not have been allowed to go before the jury. In the first place, Mrs. Robinson's companion was not a white man. In the second place, she was a virtuous woman and her companion was her nephew. And thirdly, neither of them misbehaved in any respect whatever. Had the conductor suspected her guilty of murder or any other crime, and had arrested her on the charge, or had excluded her from the car because of the suspicion, and she was not guilty, would any one contend that the suspicion, however well-founded in appearances, was a justification or an excuse for the act of the conductor?

(3)

I deny that the conductor of a railroad train can inquire into the chastity or virtue of women who offer themselves as passengers to be carried by the company. I deny that he can require a woman, suspected of being a prostitute, to remain out of the ladies' car until he can investigate the matter. So long as a woman behaves with propriety, I deny that the conductor has anything to do with her moral or social status. Indeed, I should go further, if necessary for my case, and submit that even if a woman be a known prostitute, she cannot, on that ground, be excluded from the ladies' car, if she behaves herself properly. In instructing the jury that the conductor, because of a suspicion he entertained of Mrs. Robinson's virtue, could exclude her from the ladies' car, the court below certainly erred.

What Judge Story said in Jencks v. Coleman, 2 Sumner 221, is to be understood with reference to the case he was considering. The exclusion in that case had not been on account of any objection to the moral or personal character of Jencks, but because he was interfering with the carrier's business. By way of argument only, the judge said a carrier is not bound to admit a passenger who is guilty of gross and vulgar habits of conduct; or who makes disturb-

ances; or whose character is doubtful or dissolute or suspicious; and *a fortiori* whose characters are unequivocally bad. In this case Mrs. Robinson was not guilty of gross or vulgar habits or conduct, nor did she make any disturbance, nor was her character doubtful or dissolute or suspicious or questionable in any respect whatever. And were I to admit the correctness of Judge Story's generalities, they would not affect her case.

In Vinton v. Railroad Co., 11 Allen 304, it was held that the conductor of a street railway car may exclude or expel therefrom a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to the other passengers therein, although he has not committed any act of offence or annoyance.

But after stating the rule, Chief Justice Bigelow laid down the qualification of it in the following language:

"The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it."

11 Allen 307.

The very judge who gave the charge of which I am now complaining, in a subsequent case, declared the law to be as follows: "A railroad company may rightfully exclude from the ladies' car a female passsenger whose reputation is so notoriously bad as to furnish reasonable grounds to believe that her conduct will be offensive, or whose demeanor at the time is annoying to other passengers; but she cannot be excluded for unchastity not affecting her conduct, or furnishing reasonable ground to believe she

will misbehave herself in the car, when her demeanor at the time was lady-like and unexceptionable."

Brown v. Memphis & Ch. R. R. Co., 7 Federal Reporter 51, and same case, 5 Federal Reporter 499.

(4)

The conductor's *belief* that Mrs. Robinson was a prostitute, traveling with her paramour, when such was *not* the fact, could not have been a justification to the defendant for excluding her from the ladies' car, as the district judge told the jury it was. As already intimated, if the fact had been that Mrs. Robinson was a prostitute, and was traveling with her paramour, it is altogether probable she could not have been excluded from the ladies' car so long as there was nothing improper in his and her conduct. But, conceding this position not to be true, if she was *not* a prostitute, and was *not* traveling with her paramour, neither the conductor nor any one else, whatever his grounds of belief may have been, could exclude her from the ladies' car, or from any other right or privilege because of a contrary belief. In ordinary social intercourse, every woman is presumed virtuous. The same presumption exists in all the many relations and transactions of life where the character of women come under consideration. And the presumption of the law is the same. There is surely no reason why a different rule should prevail as to women traveling by public conveyances. Why should Mrs. Robinson's "accommodations, advantages, facilities or privileges" be made to depend on what every railroad conductor she might come in contact with from Grand Junction to Lynchburg, however ignorant, however prejudiced, however brutal, might think or believe, falsely or truly, about her private character?

But had the conductor's belief as to Mrs. Robinson's character been a sufficient ground for excluding her from the ladies' car, that ground should have been insisted on before the ticket was sold her entitling her to a seat in the

ladies' car, or, at least, before she was received on the train. After receiving her as a passenger, no discrimination against her could be made.

This principle is thus stated in Pearson v. Duane, 4 Wallace 615–616: "Although a railroad or steamboat company can properly refuse to transfer a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey. Duane conducted himself properly in the boat until his expulsion was determined, and when his fare was tendered to the purser, he was entitled to the same rights as other passengers. The refusal to convey him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it."

And in the subsequent case of Hannibal Railroad Co. v. Swift, 12 Wallace 262, the court decided that "if a common carrier of passengers and goods and merchandise has reasonable grounds for refusing to carry persons applying for passage, and their baggage and other property, he is bound to insist at the time upon such ground, if desirous of avoiding responsibility. If, not thus insisting, he receives the passengers and their baggage and other property, his liability is the same as though no ground for refusal existed."

(5)

The defendant had not the right, as the district judge instructed the jury it had, on mere suspicion that Mrs. Robinson would be disagreeable in her conduct, to exclude her till such time as the defendant could satisfy itself that such suspicions were ill-founded. It is admitted that Mrs. Robinson did not misbehave, and was not disagreeable to any body in her conduct, and it is not claimed that any reasonable ground in fact existed for the suspicion that she would be disagreeable in her conduct.

Now, upon this state of facts, the defendant had no right to exclude her from the ladies' car, or from anything else she was entitled to, either permanently or temporarily.

The conduct of the conductor in excluding Mrs. Robinson, if he did so on the ground supposed in the instruction referred to, was in the very teeth of the rule laid down by Chief Justice Bigelow in Vinton v. Railroad Co., 11 Allen 307, already quoted.

(6)

The court erred in confining the right of the plaintiffs to recover, to the case of Mrs. Robinson's exclusion from the ladies' car because she was colored. In arguing the construction of sec. 2, of the act of Congress, in a former part of this brief, attention has been called to the fact that the penalty is incurred by denying to any citizen the full enjoyment of any of the accommodations, advantages, facilities or privileges conferred by the act of Congress, and that it is wholly immaterial whether the citizen whose rights are denied belongs to one race or another, or is of one complexion or another, and to the further fact that the penalty follows every denial of the full enjoyment, unless it is made to appear that there was reason for such denial which, by law, would have been applicable to citizens of every race and color, and regardless of any previous condition of servitude. Of course, the language excludes, and was intended to exclude, from the category of reasons that might be urged for the denial of the full enjoyment, any reason based on the race, color or previous condition of servitude of the person whose full enjoyment has been denied. Now, I think it is apparent, that in a suit under the statute for the penalty, the race, color or previous condition of servitude of the plaintiff does not necessarily enter into or form a part of the plaintiff's case. His right to recover may be established and yet it may not be shown what particular race he belongs to, or what his color is, or that he was ever in a condition of servitude. It is only when the

defendant comes to make his defense that the race or color of the plaintiff is to be, or may be, considered. If he undertakes to prove a reason for denying the plaintiff the full enjoyment of the accommodations, advantages, facilities and privileges conferred by the act of Congress, he must show that such reason would, *by law*, be applicable to citizens of every race and color as well as to the plaintiff, or his reason will not be a sufficient one. Recurring to the case in hand, Mrs. Robinson's color, race, or previous condition of servitude were of importance only in testing the validity of the defence set up to her action by the defendant. If the reason relied on for her exclusion from the ladies' car, was not such that by law it would have been a good reason for excluding persons of any and every race and color from the ladies' car, then it was not a good reason for excluding her therefrom. If these positions are correct, it was manifest error to tell the jury that the plaintiffs could not recover the penalty sued for, unless they found Mrs. Robinson was excluded from the ladies' car because of her color.

By referring to the first count of the declaration it will be seen that the breach was framed on this idea. Record p. 2. It is, that Mrs. Robinson was excluded from the ladies' car without any *legal reason*. And no allusion is made in the count to the race or color of either of the plaintiffs. The defendant was left to set up the reason for the exclusion by way of defence, if it saw proper, and with the burden of proving it.

"It is a general rule of pleading that a matter which should come more properly from the other side, need not be stated. In other words, it is enough for each party to make out his own case or defence. He sufficiently substantiates the charge or answer for the purpose of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and, therefore, is not compelled to notice and remove, in his declaration or plea,

every possible exception, answer or objection which may exist, and with which the adversary may intend to oppose him."

1 Chitty's Pl., * p. 222.

The plaintiffs could safely rest their case on proof of Mrs. Robinson's exclusion from the ladies' car, and the absence of any reason for such exclusion. They were not required to go into the reasons that may have actuated the defendant, because they were not presumed to have known such reasons.

A well understood exception to the rule requiring proof of every fact necessary to establish a right of recovery, even though such fact involve the proof of a negative, is, "that where the subject matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor." The exception applies to both civil and criminal proceedings, and the instances of its application are very numerous.

1 Taylor's Evidence, 6th edn., sections 347, 348; 7th edn., sections 376 and 377, and cases referred to.
See Apothecary Co. v. Bentley, Ryan & Moody, 159.
Morton v. Copeland, 16 Common Bench, 517.
1 Greenleaf's Evidence, sec. 79, and cases referred to.

The first exception noted to the charge is to these words: "The gravamen of the action is exclusion from the full and equal enjoyment of the accommodations on account of race, color, or previous condition of servitude. No other cause of exclusion, however wrongful or unjust, is denounced by the statute, all other causes being left for redress to such other remedies as the law may afford to the party aggrieved."

If the construction I have placed upon the statute is correct, or if the demurrer to the first count of the declar-

ation was properly overruled, this instruction is inevitably wrong. The ground of action created by the statute is not confined to exclusion from the full and equal enjoyment guaranteed by the statute on account of race, color, or previous condition of servitude. The statute does not say so, and does not mean any such thing. The statute gives the action to any citizen for the denial of the equal enjoyment, without reference to the ground of such denial, and allows the party denying to defend the action successfully only by showing that he made the denial "for a reason *by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude." In other words, the plaintiff is not obliged to allege and prove the reason for his exclusion, and that such reason was within the prohibition of the statute as an element of his cause of action, but he may rest upon the simple fact of exclusion, and then the burden is upon the defendant, if he relies upon such a ground of defence, to allege and prove that the reason for which he excluded the plaintiff "was by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." If any additional argument for this construction is required, it may be found in the words of the title and preamble to the act. The title is, "An act to protect *all* citizens in their civil and legal rights." The preamble is, "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government, in its dealings with the people, to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact fundamental principles into law: therefore." If Congress has accomplished by the act only what the district judge conceives it has, if we may judge from his charge, then the grandiloquent title and preamble are ridiculously out of place, if it may not truly be said of them that they are mere fustian.

(7)

After the district judge had told the jury that the suspicion or belief of the defendant's conductor that Mrs. Robinson was an improper character, or was a prostitute, traveling with her paramour, was sufficient reason for her exclusion from the ladies' car, the plaintiffs asked the court to tell the jury that before the defendant could justify the exclusion of Mrs. Robinson from the ladies' car, on the occasion in question, on the ground that such exclusion was temporary and merely for the purpose of enabling it to investigate and ascertain whether or not she was an improper character, the evidence must establish affirmatively that such was the character and ground of the exclusion.

The refusal to give this instruction was a disregard of one of the established rules of evidence, namely, that a defendant confessing the fact constituting the gist of the action against him, and seeking to justify or excuse it by some other fact avoiding its effect, is obliged to prove the latter fact. In England the rule has been enacted in a statute. 1 Taylor's Evidence, secs. 257 and 284 (6th edn.). Indeed, the ordinary rule requiring the party asserting the affirmative to prove it, required that the instruction as asked by the plaintiffs should have been given.

Greenleaf's Ev., sec. 74.

(8)

The fifth instruction asked for by the plaintiffs and refused by the court was, in effect, that it is no sufficient reason to impute a want of virtue to a woman of African descent that she is traveling in company with a white man in railroad cars. And the defendant's conductor was not justified by the fact that Mrs. Robinson was a colored woman, and the supposition, even if true, that her nephew was a white man, and the circumstance that the two were traveling together, in suspecting or concluding that Mrs. Robinson was a woman without virtue, or that improper

relations existed between her and him. And if the jury found from the evidence that the defendant s conductor did entertain the suspicion that improper relations existed between Mrs. Robinson and her nephew, and that such suspicion was based on the circumstance that he believed the one to be of African descent and the other to be white, then such suspicion was no sufficient reason in law for excluding Mrs. Robinson from the ladies' car of the defendant's train. And if the jury found from the evidence that the conductor excluded Mrs. Robinson from such car because of the said suspicion, they would find for the plaintiff.

Record p. 16.

The sixth instruction asked for by the plaintiff and refused by the court, Record p. 16, was intended to present the substance of the plaintiffs' case, leaving out of view the fact that she was traveling from one State to another through a third State. It was, in substance, that if Mrs. Robinson had a ticket entitling her to travel on the ladies' car, and when she attempted to go into that car, she was refused admittance and excluded by the conductor, the burden of proof was upon the defendant to show that Mrs. Robinson's right was denied her for a sufficient reason, applicable by law to citizens of every race and color; and if the defendant had failed to prove affirmatively such sufficient reason, the jury would find for the plaintiffs. And the instruction as asked added that if Mrs. Robinson was a decent person, and conducted herself with propriety, no suspicion of the conductor that she was not (the word "not" is omitted from the printed record by mistake) a virtuous woman, whether such suspicion was without foundation or was based on circumstances appearing to justify it, could warrant the conductor in refusing Mrs. Robinson admission to the ladies' car, if she had a ticket entitling her to such admission.

The fourth instruction asked by the plaintiffs and refused by the court, Record p. 15, was that if Mrs. Robin-

son was a person of African descent, and was formerly a slave, and was the wife of her co-plaintiff, and was a citizen of the State of Mississippi, and was on a journey in company with Joseph C. Robinson, also a person of African descent, from the State of Mississippi to the State of Virginia, and had purchased, and paid for, and was possessed of a ticket entitling her to a first-class passage over the defendants' railroad in the ladies' car of the train going east from Grand Junction, Tennessee, and if Mrs. Robinson attempted to get into such ladies' car at Grand Junction at the proper time and place in order to proceed on her journey, and was refused admittance into the said car, and was excluded therefrom by the conductor because he erroneously supposed Joseph C. Robinson, with whom she was traveling, was a white person, not of African descent, and supposed from the fact that Mrs. Robinson, a woman of African descent, was traveling in company with such supposed white man, that improper relations existed between them, and because of such suspicion, and for no other reason, refused admittance to and excluded Mrs. Robinson from the said car, then the jury would find for the plaintiffs.

These three instructions, I submit, presented the law of the case as the court should have charged it. They were asked separately, and the court could have given any one or more, and have refused the others. The fifth instruction had immediate reference to the suspicions of the conductor as a ground for the exclusion of Mrs. Robinson from the ladies' car. The sixth instruction related more directly to the burden of proof. The fourth insuruction was broader than the other two, and presented Mrs. Robinson's rights as a citizen of one State traveling through another to reach a third. As the questions arising upon these instructions have been discussed already, they will not be noticed further.

(9)

The fifth instruction asked for by the defendant and given by the court, was, that if the car into which the conductor put Mrs. Robinson was as comfortable, convenient, commodious, and of the same character in its seats, material, light, etc., as the ladies' car, putting her in that car was not a violation of the act of Congress.

Record p. 17.

In connection with the instruction so given, the court refused the plaintiffs' second instruction, which was to the effect that if Mrs. Robinson was excluded from the ladies' car, and such car was in any way superior to the car into which she was forced to go, then this was a denial of Mrs. Robinson's general right, and she was entitled to recover.

Record p. 15.

The word "inferior" is used in the printed record in the above instruction in place of the word "superior," but the mistake is apparent upon reading the instruction.

In giving and refusing the above instructions, the court refused effect to the express requirement of the act of Congress that Mrs. Robinson should have the "full and equal enjoyment of the accommodations, advantages, facilities and privileges" of the defendant's conveyances. It is very plain that if she was entitled to ride in the ladies' car, and desired to do so, and was refused the right and excluded therefrom against her will, that she did not have the full and equal enjoyment she was entitled to.

In Railroad Company v. Brown, 17 Wallace 445, an act of Congress declared that "no person shall be excluded from the cars on account of color." The court held that the act meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of

color, though they were as good as those which they assigned exclusively to white persons, and in fact the very cars which were, at certain times, assigned exclusively to white persons."

The same rule must be applied here. It is not for the courts to say Mrs. Robinson was not denied any substantial right. If she was a sensitive, intelligent woman, as she is, I do not understand how any one possessing a proper appreciation of such a woman's feelings could fail to see that Mrs. Robinson was grossly wronged and insulted by the treatment she was subjected to. But it is enough to say that the act of Congress has not commissioned the courts to exercise a discretion in determining whether persons coming within the act have had the benefit of "accommodations, advantages, facilities and privileges" *equal* to those enjoyed by other persons similarly circumstanced. The right is to "the full and equal enjoyment" of the *very same* "accommodations, advantages, facilities and privileges," and the courts no more have the power to dispense with the requirements of the act than the offending party himself has.

In Gray v. Cincinnati Southern Railroad Co., 11 Federal Reporter, p. 683, Swing, district judge, held

That "a colored lady who had purchased and held a first-class ticket, was entitled to admission into the ladies' car, if there was room for her therein; and if she was refused admission, and the railroad company declined to carry her except in the smoking car containing only men, some of whom were smoking, she had the right to decline to accept such accommodations, and it is liable to her in damages."

The doctrine of Chicago and N. W. Railroad Co. v. Williams, 55 Illinois 185, and Coger v. N. W. U. P. Co., 37 Iowa 148, is substantially the same.

And see W. C. & P. R. Co. v. Miles, 55 Penn. St. 209.

The case of Bennett v. Dutton, 10 New Hampshire 481, approved in Pearson v. Duane, 4 Wallace 615, shows that common carriers of passengers are bound to receive all who require a passage, so long as they have room, and there is no *legal excuse* for a refusal, and that they must treat all passengers alike. Such undoubtedly is the rule of the common law.

WM. M. RANDOLPH,
Of Counsel for Plaintiffs in Error.

MEMPHIS, TENN., November 21st, 1882.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1882

No. 28

RICHARD A. ROBINSON & SALLIE J. ROBINSON,
Plaintiffs in Error,

—VS.—

MEMPHIS & CHARLESTON RAILROAD CO.,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

HUMES & POSTON,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1882.

RICHARD A. ROBINSON & SALLIE J. ROBINSON,
Plaintiffs in Error,

—vs.—

MEMPHIS & CHARLESTON RAILROAD CO.,
Defendant in Error.

ARGUMENT AND BRIEF OF HUMES & POSTON,

For Defendant in Error.

STATEMENT OF CASE.

This is an action of debt to recover the penalty prescribed by section 2, of chapter 114, act of Congress, approved March 1st, 1875, for "denying to any citizen, except for reasons applicable by law to citizens of every race and color and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges of public conveyances by land," etc.

The undisputed facts of the case showed that the wrong complained of, was the exclusion of the plaintiff Sallie J. from the ladies' car of a train on defendant's road, and requiring her to go into the next car, where she remained for about fifteen minutes, while the train was traveling a distance of six miles, when the conductor allowed her to

go back into the ladies' car and complete her journey in that car.

It was claimed by the defendant and proved by its conductor and other corroborating witnesses that said temporary exclusion of plaintiff from the ladies' car was because he believed her to be a prostitute and her companion to be her paramour, and not because of her color, race or previous condition of servitude, and that upon discovering that he was mistaken in this belief he promptly and at once, without further application or request from her, told her that she might go back into the ladies' car, which she thereupon did. It was shown also on behalf of the defendant by the evidence of the conductor that he habitually excluded prostitutes, whether white or black, from the ladies' car.

There was no evidence whatever offered tending in the least degree to show that this exclusion from the ladies' car was because of her color, race or previous condition of servitude, unless it be the bare fact that she was a colored woman and had been previously a slave.

ARGUMENT.

We think that upon this proof the circuit judge might well have instructed peremptorily a verdict for the defendant.

This is a highly penal law, and by well settled law to be construed strictly.

U. S. v. Wildberger, 5 Wheaton 93.
U. S. v. Morris, 14 Peters 464.

The evidence to show its violation must not only preponderate, but establish it beyond reasonable doubt.

U. S. v. Brig. Burdett, 9 Peters 682.

The case last cited was a proceeding to enforce a forfeiture of the vessel for a violation of the revenue laws. It was held that while the evidence offered on behalf of the Government aroused a strong *suspicion* that the offense was committed, yet it was not sufficient. This court said:

"The object of this prosecution against The Burdett is to enforce a forfeiture of the vessel and all that pertains to it, for a violation of a revenue law. This prosecution is a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt."

The plaintiffs had the benefit of a trial where only a preponderance of the evidence was required for them to recover—yet they failed to establish even a preponderance.

We think it hardly needs argument to show that the forfeiture imposed by this act, and the misdemeanor created by it, were for refusing the equal accommodations, &c., of the carrier *because of color, race and previous condition of servitude.*

That such is the spirit of the act is clearly manifested in its title, preamble and entire body. Section 2, declaring the forfeiture, uses such apt, unambiguous words as to leave no doubt on this point; * * "denying to any citizen except for *reasons* by law applicable to citizens of every race, &c."

Under the very terms of the act the *reason* for denying the accommodations is of the essence of the offense prohibited. The 2nd assignment of errors of plaintiff insists that the court below erred in admitting evidence to show defendant's *reason* for denying plaintiff admittance to the ladies' car of its train.

This evidence was clearly competent under the very terms of the act to determine whether the denial was "for *reasons* applicable to citizens of every race," &c.

That defendant's reason for the denial or exclusion, to-wit, that he believed plaintiff a prostitute, was well or ill founded, cannot force upon defendant a reason never thought of nor acted upon, namely, to deny because of race, color, &c.

The plaintiff had the full benefit of the claim that the defense set up of believing the plaintiff a prostitute was a pretence, in the following charge of the court:

"If you find from the evidence that the conductor supposed the plaintiff an improper character because she was traveling with a man supposed at the time to be a white man, and for no other reason whatever, you may look to the facts that she is conceded to be a woman of respectable character, that her companion was in fact a colored man, and that their conduct was irreproachable, as throwing light on the question of the conductor's motive."

See record, page 14.

And the position of the defendant asserting an unfounded belief against a woman's virtue, was not calculated to impress either judge or jury favorably to defendant's cause, but rather to make them wary and willing to find that this asserted belief was a sham and pretence.

Whether, at common law, a belief or actual knowledge that a proposed passenger is a prostitute or otherwise of bad character, is, or not, sufficient grounds for a carrier to refuse admission to the ladies' car or apartments, is not here involved, and need not be discussed. The common

law remedies for such wrongs, when committed, are ample. So ample, and redressed so liberally indeed, by courts and juries where legal rights are denied because of unfounded suspicions against female virtue, as to render it extremely improbable that defendant would, in order to save the comparatively small penalty of this statute, have *untruly* set up as the reason for exclusion, what, in a common law action, would have almost inevitably resulted in a much larger judgment against it.

The charge of the judge is in a small compass, and we deem it unnecessary to discuss it, believing and insisting that it correctly expounded this act of Congress, and gave plaintiffs the benefit of all the law applicable to their case.

We think it is not necessary in this case to argue the constitutionality of the act of Congress, as, in our opinion, the case will be disposed of upon the grounds that it is not within either the letter or spirit of said act.

HUMES & POSTON,
Counsel for Defendant in Error.