SUPREME COURT OF THE UNITED STATES.

No. 294.

ELIZA JANE HALL, ADMINISTRATRIX OF JOHN G. BENSON, PLAINTIFF IN ERROR,

versus

JOSEPHINE DECUIR, DEFENDANT.

Brief and Argument for Plaintiff in Error.

John G. Benson was master and owner of the "Governor Allen," a steamboat enrolled and licensed for the coasting trade, advertised and plying as a regular packet, carrying passengers and cargo, between the ports of New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi.

Josephine DeCuir, a colored woman, of African descent, desired to go from New Orleans to Hermitage, a landing place in the Parish of Pointe Coupee, in the State of Louisiana, on the Mississippi River, on the route of the boat, about 160 miles distant, and not more than sixteen hours run from New Orleans.

On the 20th of July, 1872, the day of the departure

of the boat from New Orleans, one of the counsel who represented defendant in error, in this litigation, and who went to Hermitage on the same trip, went on board the "Governor Allen," and attempted to engage a state-room for her in the ladies' cabin. He was informed by the clerk of the boat that his client could not be accommodated in the ladies' cabin, but that she could be accommodated in the bureau, a part of the boat specially provided and set apart for colored passengers.

After this, defendant in error went on board. Nothing shows that her presence was known to any officer of the boat, until after the departure from the wharf. She refused to accept accommodations in the bureau, which were offered to her, and chose to remain in the recess, in the rear of the ladies' cabin, where she took her meals, and was furnished such other accommodations as could be afforded there.

The boat arrived at Hermitage about 9 o'clock next morning, and defendant in error paid the price of passage demanded of her, which was two dollars less than that charged passengers in the ladies' cabin; and she went ashore at the place of her destination, having spent one night, and had two meals, supper and breakfast, on board. On the 29th of July, a week after, this suit was brought to recover $25,000 actual damage, and $50,000 exemplary damages.

In her petition, printed Record 1 and 2, defendant in error does not allege that the accommodations in the bureau were inferior to those in the ladies' cabin, and

the fact was proven, as stated by Justice Wyly, R., 93, that there was no difference in the comforts of the two apartments; nor does she charge that any officer of the boat was guilty of any rudeness or indecency towards her, or offered to her any personal indignity beyond the refusal to allow her accommodations in the ladies' cabin. She bases her action on the ground that "she was denied the equal rights and privileges granted to all persons under the provisions of Article 13, of the Constitution of Louisiana, in regard to the equal rights and privileges of all persons, irrespective of race and color, and under the laws of the United States, and the provisions of Act No. 38, of the General Assembly of 1869, on the sole ground of her being a person of color;" and, "by this denial, she was greatly insulted and wounded in her feelings."

Plaintiff in error excepted to the jurisdiction, on the ground that the cause of action relied upon was cognizable only in Admiralty, touching which no argument will be offered here. Other matters were plead by way of exception, which it is not necessary to notice in this connection, because, in the judgment overruling the exception, the right was reserved to plead the same matters in the answer; and they are set up in the answer to the merits. Record, 3–5.

The defenses are substantially:

1. The general issue.

2. That the steamboat "Governor Allen" was, on the 20th of July, 1872, and had been for many years before,

enrolled and licensed, under the laws of the United States, to pursue the coasting trade, and was, in the month of July, actually engaged in commerce and navigation, between the ports of New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi; and that Article 13 of the Constitution of Louisiana, and the Act No. 38 of 1869, of said State, so far as they attempt to regulate steamboats, are in conflict with Article 1, Section 8, of the Constitution of the United States, which gives to Congress exclusive power to regulate commerce among the several States, and are consequently, null and void.

3. That plaintiff in error has by law, a right to regulate and prescribe rules for the accommodation of passengers on the steamer "Governor Allen;" that said boat is private property, and does not belong to the public; and that any law attempting to prevent him from regulating and managing said steamboat to the best advantage, and for the interest of her owner, would be in violation of Article 14, Section 1, of the Amendments to the Constitution of the United States, which prohibits any State from depriving a person of his property without due process of law.

4. That there is, and always has been, a well known regulation on the steamer "Governor Allen," as well as all other boats engaged in commerce and navigation between the port of New Orleans and the various ports and places on the Mississippi and tributary rivers, that colored persons are not placed in the same cabin as white

persons, or allowed to eat at the same table with them; that this regulation is reasonable, usual and customary, and is made for the protection of their own business, and was well known to defendant in error, in July, 1872, and had been known to her for many years previous.

5. That the steamboat "Governor Allen" has a cabin called the "bureau," for the exclusive accommodation of colored persons, provided with staterooms and all the conveniences of the cabin, appropriated for the exclusive use of white persons; that defendant in error was tendered a stateroom in the bureau cabin, appropriated for the exclusive use of colored persons, according to the well known rules and regulations of the boat, and instead of accepting it, she preferred the recess in the rear of the ladies' cabin, where she remained during the voyage.

6. That defendant in error was distinctly informed before she went on the boat, by the clerk, through a person who applied to him on her behalf, that she could not be accommodated in the cabin for white persons, but would be in the bureau, or cabin for colored persons; and that she went on board with that understanding, and without complaint, and paid $5, the price charged in the bureau cabin, while other cabin passengers were charged $[illegible] to Hermitage Landing. R., 5, 6, 85, 86.

The judgment of the court, of first instance, was in favor of defendant in error, for $1000. R., 80. On appeal, the Supreme Court of Louisiana decided that Article 13 of the Constitution, and Act No. 38 of 1869,

are not regulations of commerce; that they are not in conflict with Article 1. Section 8, of the Constitution of the United States, and that they do not violate Article 14, Section 1, of the Amendments to the Constitution. Opinion of the majority, by Ludeling, C. J., R., 86, 87. The judgment of the inferior court was affirmed, R., 94, Justice Wyly dissenting, R., 88 to 94; and Benson, after an ineffectual application for a rehearing, R., 94, 95, took this writ of error. R., 96, 97.

Article 13 of the Constitution of Louisiana, of which the clause in italics alone is applicable to carriers, is as follows:

"*All persons shall enjoy equal rights and privileges upon any conveyance of a public character;* and all places of business or of public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color."

The Act of the General Assembly of the State of Louisiana, No. 38, approved 23d February, 1869, is entitled: "An Act to enforce the Thirteenth Article of the Constitution of this State, and to Regulate the Licenses mentioned in said Thirteenth Article."

This Act consists of five sections, of which the first and fourth alone are applicable to carriers. Section 2 relates exclusively to public inns, hotels, or places of public resort. Section 3 relates exclusively to licenses granted

by the State, and by parishes and municipalities *therein*, " to persons engaged in business, or keeping places of public resort ;" and it provides that such licenses shall contain the express condition that such " places of business or public resort shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color ;" and Section 5 simply repeals all inconsistent laws. The sections which are in question, are as follows :

" Section 1. All persons engaged within this State, in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats, or other water crafts, stage coaches, omnibuses, or other vehicles, or to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known ; *provided*, said rules and regulations make no discrimination on account of race or color ; and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodations ; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers, are

forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever.

"Section 4. For a violation of any of the provisions of the first and second Sections of this Act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction." See Acts of 1869, p. 37; Revised Statutes of 1870, p. 93; Opinion in this case, R., 86, 87.

Plaintiff in error complains, and assigns for error, apparent on the face of the Record, that the Supreme Court of Louisiana ruled and decided erroneously, to his prejudice in these particulars:

FIRST. In maintaining the validity of Article 13, of the Constitution and Act No. 38, of the Legislature of 1869, of the State of Louisiana, as interpreted and applied by said Court to the cause of action propounded in this case.

SECOND. In deciding that the said Article of the Constitution and Act of the Legislature, as interpreted and applied by said Court, in so far as they relate to steamboats enrolled and licensed for the coasting trade, and plying between ports and places in different States, are not regulations of commerce.

THIRD. In deciding that said Article of the Constitution and Act of the Legislature, as interpreted and applied by said Court in this case, are not in conflict

with Article 1, Section 8, clause 3, of the Constitution of the United States.

FOURTH. In deciding that the said Article of the Constitution and Act of the Legislature, as interpreted and applied by the said court in this case, do not violate Article 14, Section 1, of the Amendments to the Constitution of the United States.

It is not alleged that there was, and it is manifest that there was not, any special contract which required plaintiff in error to furnish defendant in error accommodations in the ladies' cabin; nor was there any implied contract forbidding him to assign to her accommodations in the "bureau" cabin. Indeed, the simple fact of embarking, after having been informed that certain specified accommodations would not be furnished, and with full knowledge that certain other specified accommodations alone would be furnished, would be an acceptance of the accommodations thus offered, and would constitute a special contract, entitling the passenger to the accommodations so specified, offered and accepted, and obliging him to pay the price.

Where the passenger embarks without having made any special arrangement, and without knowledge as to the accommodations which will be afforded him, the law implies a contract obliging the carrier to furnish suitable accommodations, according to the room at his disposal; but such passenger is not entitled to any particular apartments or special accommodations.

There is no law of the United States, there is no law of Louisiana, there could be no law under any other government than an absolute despotism, forbidding the carrier to offer and the passenger to accept, either expressly or impliedly, accommodations which might not be so desirable in all respects as other accommodations in the same conveyance; and if it had been the fortune of defendant in error to have been born a white woman, she could not reasonably have expected to recover damages for not having been furnished, after she embarked, accommodations which she knew, before she embarked, that she would not have.

The defendant in error chose to put her case upon the Constitution of Louisiana and the Act of 1869, and the laws of the United States, granting to all persons equality of rights and privileges.

So far as the laws of the United States are concerned, there is nothing to prohibit discrimination, by carriers, in the accommodations afforded to passengers, on account of race and color, unless the Civil Rights Act, approved 1st March, 1875, be interpreted to have that effect; and a male passenger, basing his right on the laws of the United States, might have complained that he was not allowed a stateroom in the ladies' cabin, with as much force and propriety as a colored passenger could have complained that he was furnished apartments and accommodations not inferior to, but different in locality, from those furnished to white passengers. It may be seriously questioned whether this Act of 1875, prohibits a reasonable separa-

tion of passengers; but it cannot affect the rights of defendant in error; because it was passed nearly three years after the cause of action propounded by her arose.

The prohibitions of the Amendments to the Constitution of the United States protect individuals against violations of their rights by the States and by the Federal Government, that is, by organized power. The right to accommodations in the ladies' cabin of a steamboat does not appertain to any one otherwise than in virtue of a contract, nor do the prohibitions of the recent Amendments to the Constitution reach the acts of individuals. This is clear from the very language of the prohibition: No STATE shall, etc.; and the decisions of this Court in the Slaughter-House cases; in the Kentucky election case, and in the Louisiana Grant Parish case, have settled this interpretation beyond doubt or controversy.

Equality of rights is the law of the United States, and of the State of Louisiana; but *equality* does not mean *identity*; and, in the nature of things, *identity* in the accommodations afforded to passengers is not possible. The passenger, according to his contract, is entitled to proper lodging and diet; but there is no law which requires the master of a boat to put in the same apartments persons who would be disagreeable to each other, or to seat, at the same table, those who would be repulsive, the one to the other. The master is bound to exercise certain discipline, which the comfort and safety of his passengers, as well as his own interest, indispensably require. The law makes him a common carrier; but it

does not forbid him to provide separate apartments for his passengers. All the passenger boats which have been built for the lower Mississippi, within the last ten years, have provided separate apartments for colored passengers ; and this arrangement is not only reasonable, but it is wise. It is to no purpose to say that the unwillingness of most white people to occupy the same apartments with colored people, and to eat at the same table with them on steamboats and at hotels, is a prejudice. We must deal with things as they are, not as we may imagine they ought to be. Laws cannot change human nature. This feeling exists ; it is almost universal ; it is natural ; and the master of a steamboat, on the Western and Southern waters, who should attempt to place white and colored passengers promisciously in the same apartments, or require them to sit, confusedly, at the same table, would incur the risk of constant disorder and conflicts, and drive from his boat the greater part of the traveling community, to the ruin of his business.

What the passenger has a right to require, is such accommodation as he has bargained for, or, in the absence of a special contract, such suitable accommodations as the room and resources at the disposal of the carrier enable him to afford ; and in locating his passengers, in apartments and at their meals, it is not only the right of the master, but it is his duty, to exercise such discretion and control as will promote, as far as practicable, the comfort and convenience of all. Most people would prefer not to force themselves, and not be forced into asso-

ciation and contact with those whose tastes, and habits, and walk in life are widely different from their own ; and in most cases it would be a cruelty to both parties to compel people to occupy the same apartments with their cooks, or to be seated at the same table, on a boat or at a hotel, with their menial servants, more particularly where these persons are marked, indelibly, by characteristic distinctions, indicating so wide a difference in their respective social positions.

Kindred questions have arisen in several of the States ; and a recurrence to them may not be out of place.

The law of Ohio authorized the trustees or directors of the public schools to establish separate schools for the colored children ; and, in 1850, the Supreme Court of Ohio decided that this was reasonable and just, and not in conflict with the constitutional rights of the colored people : State vs. Cincinnati, 19 Ohio, 178. The same doctrine was maintained in Van Camp's case, 9 Ohio State Reports, 406.

So well was the Legislature of Ohio convinced of the propriety of keeping the colored children and white children separate in the schools, that it provided, by section 31 of the school law, as amended in 1864, that where the number of colored children was so small, or their distance from each other so great, as to render the establishment of separate schools impracticable, the full amount of the school money raised on the number of colored children should be set apart and appropriated

each year for the education of such colored children, under the direction of the Board of Education.

A suit was brought in 1871 to test the right of those having charge of the public schools to make a classification and separation of scholars on the basis of color; and it was urged that the Fourteenth Amendment forbids any such discrimination. The Supreme Court said:

"At most, the Fourteenth Amendment only affords to colored citizens an additional guaranty of equality of rights to those already secured by the Constitution of the State."

After stating that, in the schools established for colored children, there is no substantial inequality of school privileges, the Court goes on to say:

"The plaintiff, then, cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children, nor can he dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves, substantially, equal school advantages, is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either. There is, then, no ground upon which the plaintiff can claim that his

rights under the Fourteenth Amendment have been infringed." State *ex rel.* Garnes vs. McCann, 21 Ohio State Reports, 211, December term, 1871.

So, in New York, the establishment of separate schools for colored children, by the directors of the public schools at Buffalo, was held to be just, reasonable and legal. 40 Howard's Practice Reports, 249.

In Massachusetts, the school laws made no discrimination with respect to race or color. Nevertheless, the School Committee of Boston established separate schools for the colored children, and that had been the practice for more than half a century. Roberts, a colored girl of suitable age, applied for admission in the primary school nearest her place of residence. Being refused on no other ground than that of color, after ineffectual attempts to obtain a ticket of admission, she went into the school nearest her residence, and was ejected by the teacher. Thereupon, she brought suit by her father and next friend, against the city of Boston, to recover damages under a statute of 1845, which authorized any child, unlawfully excluded from a public school, to recover damages against the city or town by which the school is supported.

The colored citizens of Boston, in 1846, had petitioned the School Committee to abolish the separate school system, and the committee had refused to do so, on the ground that the continuance of the separate schools for colored children "is not only just, but it is best adapted to promote the education of that class of our population."

The case was argued for plaintiff by Charles Sumner, who, among other points, made the following:

1. "According to the spirit of American institutions, and especially of the Constitution of Massachusetts, Part First, Articles I and VI, *all men, without distinction of color or race, are equal before the law.*

2. "The Legislature of Massachusetts has made no discrimination of color or race, in the establishment of the public schools. The laws establishing public schools speak of *schools for the instruction of children* generally, and *for the benefit of all the inhabitants of the town*, not specifying any particular class, color or *race*.

5. "The separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality.

6. "The School Committee have no power under the Constitution and laws of Massachusetts, to make any discrimination on account of color or race, among the children in the public schools." Roberts vs. City of Boston, 5 Cushing.

Dealing with the doctrine of equality before the law, so earnestly pressed upon the court by Mr. Sumner, Chief Justice Shaw, delivering the opinion of the court, says, page 206:

"This, as a broad, general principle, such as ought to appear in a declaration of rights, is perfectly sound. It is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free govern-

ment. But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions, and be subject to the same treatment, but only that *the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law.* What those rights are, to which individuals in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions."

The Chief Justice takes care, however, immediately to concede "in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, *to equal rights, constitutional, civil and social.*"

Again, page 209: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-seated prejudice in public opinion. *This prejudice*, if it exists, *is not created by law*, and probably, *cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted.*"

On the whole, the conclusion of the court was, that the committee had the power to establish separate schools,

and that the action could not be maintained. November term, 1849.

In Nevada, the court held, under a statute similar to that of Massachusetts, that it was perfectly within the power of the trustees of public schools "to send all blacks to one school and all the whites to another, or, without multiplying words, to make such classification, whether based on age, sex, race or any other existent condition, as may seem to them best." State vs. Duffy, 7 Nevada, 340; 10 American Reports, 713; January term, 1872.

In Michigan, under a statute which declares that all residents of any district shall have an equal right to attend any school therein, it was held that no discrimination could be made by reason of race or color; but this decision turned solely upon the wording of the statute.

In Indiana, a statute prohibits the marriage of colored persons with white persons, under severe penalty. Gibson, a colored man, was indicted under the statute, the indictment was quashed, and the State appealed. The case for the accused was put upon the single ground, that all State laws prohibitiug the intermarriage of negroes and white persons were abrogated by the Fourteenth Amendment and the Civil Rights Bill. The court held that marriage, being a civil contract, falls under the exclusive dominion of the State. The language of Justice Agnew, in 55 Pennsylvania State Reports, which will be quoted hereafter, is cited and fully concurred in and endorsed by the court. The judgment appealed from was reversed, and the case remanded, with directions to the

court below to put the accused on his trial for the crime charged in the indictment, marriage with a white woman. State vs. Gibson, 36 Indiana, 389 ; November term, 1871.

In Pennsylvania, a suit was brought by a colored man for damages for having been expelled from the body of a car by the conductor, in accordance with the rule and regulation of the railroad company, restricting colored passengers to the front platform. The defendant set up this regulation, and the court held it to be a good defense.

Judge Hare, delivering the opinion, says :

"When a nation suffers, as ours does, from the misfortune of having two races within its bosom, one long civilized, the other just emerging from the shades of barbarism, and each marked by diversities of manners, color and physiognomy, there is much in the relation between them, which must be left to the lessons of experience and the tribunal of public opinion, which cannot be arbitrarily forced or hastened, without producing or augmenting repulsion and endangering a collision, which must, necessarily, prove disastrous to the weaker party." Goines vs. McCandless, 4 Philadelphia Reports, 257, decided in 1861.

Miles, a colored woman, entered a car at Philadelphia, bound for Oxford. She took a seat near the middle of the car. A rule of the company required the conductor to make colored people sit at one end of the car. The conductor got a seat for her at the place fixed ; but she positively and persistently refused to take it. After repeated efforts to get her to take the seat provided for

her; and warning her of the rule of the company, which required him to put her out if she refused, the conductor finally put her out, using no more force than was necessary for that purpose. She brought suit for damages, and the company plead the rule in defense.

Among other things, the defendants asked the court to charge that, "if the jury find that the seat which the plaintiff was directed to take was, in all respects, a comfortable, safe and convenient seat, not inferior in any respect to the one she was directed to leave, she cannot recover." This was refused; and the court charged: "That a regulation which prohibits a well behaved colored woman from taking a vacant seat in a car simply because she is colored, is not a regulation which the law allows." And the court further charged, "that defendants could not compel plaintiff to change her seat simply on account of color."

There was a verdict for plaintiff; and defendants appealed, assigning the instruction of the court for error. Delivering the unanimous opinion of the court, Justice Agnew said:

"It is admitted, no one can be excluded from carriage by a public carrier, on account of color, religious belief, political relations, or prejudices. * * * The simple question is, whether a public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers by any other well defined characteristic than that of sex. The ladies' car is known upon every well regulated railroad,

implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none.

"The right of the carrier to separate his passengers, is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. The private means he uses, belong solely to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers, so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well regulated separation of passengers. An analogy and an illustration are found in the case of an inn-keeper, who, if he have room, is bound to entertain proper guests; and so a carrier is bound to receive passengers. But a guest at an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin, or a berth, at will, or refuse to obey the reasonable orders of the captain of a vessel. But, on the other hand, who would

maintain, that it is. a reasonable regulation, either of an inn or vessel, to *compel* the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public by the use of private means, to fulfill their duty to the public, but not a whit beyond.

"The public also has an interest in the proper regulation of public conveyances for the preservation of the public peace. A railroad company has the right, and is bound to make reasonable regulations to preserve order in their cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasions, stop his train and eject the unruly and tumultuous. But he has not the authority of a peace officer to arrest and detain offenders. He cannot interfere in the quarrels of others, at will, merely. In order to preserve and enforce his authority, as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro take his seat beside a white man, or his wife or daughter, the law cannot repress the anger, or conquer the aversion which some will feel. How-

ever unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterward the breach of the peace it may have caused. These views are sustained by high authority. Judge Story, in his law of Bailments, stating the duty of passengers to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests, says: "The importance of the doctrine is felt more strikingly in cases of steamboats and railroad cars." § 591. See, also, § 476, *a;* Angell on Carriers, § 528; 1 American Railway cases, 393, 394.

"The right to separate being clear, in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not. But the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural

boundaries He has assigned to them. The natural law, which forbids their intermarriage, and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men, by race and color, is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact; and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness, is not to declare an inferiority in either. It is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact, is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality

of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator Himself, and not to compel them to intermix contrary to their instincts."

The judgment was reversed because of the erroneous instruction to the jury; and a *venire facias de novo* was awarded. W. C. and Philadelphia R. R. Co. vs. Miles, 55 Pennsylvania State Reports, 211, decided in 1867.

In Michigan, a colored man brought suit against the owner of a steamboat, plying between Detroit and Toledo, to recover damages. The first count charged the refusal of defendant to give plaintiff a cabin passage, although there was room, and plaintiff offered to pay for the same. The second count charged that defendant refused to carry plaintiff in the cabin, although he demanded to be so carried. and tendered the fare, and the vessel was not full of passengers; and the third count charged refusal to carry generally, the defendant setting up no ground of refusal except that plaintiff was a colored man.

Defendant plead the general issue; and gave notice of special matter—to be shown at the trial, as follows:

"1. That plaintiff was a colored man and not a white man; and that, by the custom of navigation, and the usage prevailing among steamboats, employed in carrying passengers on Detroit River and Lake Erie, colored persons were not allowed the privileges of cabin passengers.

"2. That by regulation and established course of business of said boat, colored persons were not received as

cabin passengers, and were not allowed to use the cabin; and said regulation and usage were averred to be reasonable.

"3. That plaintiff, by his color and race, was excluded from the ordinary social and familiar intercourse with white persons by the custom of the country; and that his admission into the cabin of said steamboat would have been offensive to the other cabin passengers."

Plaintiff demurred; the demurrer was overruled; there was judgment for defendant, and plaintiff took a writ of error.

Manning, J., delivering the opinion of the Court, affirming the judgment, said:

"The last (third) count is bad, as it contains no averment that plaintiff offered, or was ready and willing to pay fare. The right to be carried is a superior right to the rules and regulations of the boat, and cannot be affected by them. If defendant had refused to carry plaintiff generally, he would be liable unless he could show some good excuse relieving him from the obligation. While this is a right that cannot be touched by rules and regulations, *the accommodations of passengers while being transported is subject to such rules and regulations as the carrier may think proper to make*, provided *they be reasonable. The right to be carried is one thing; the privileges of a passenger on board of the boat, what part of it may be occupied by him, or he have the right to use, is another thing. The two rights are very different.* The latter, and not the former right, is subject to reasonable rules and regulations, and,

where such rules and regulations exist, is to be determined by them. Hence the allegation in the second count, as it relates to the accommodation of passengers while being transported, must be understood as a statement of a right that is subject to rules and regulations, where they exist.

"The refusal to allow the plaintiff the privilege of the cabin on his tendering cabin fare, was nothing more nor less than denying him certain accommodations while being transported, from which he was excluded by the rules and regulations of the boat.

"All rules and regulations must be reasonable; and to be so they should have for their object the accommodation of the passengers. Under this head we include everything calculated to render the transportation most comfortable and least annoying to the passengers generally, not to one or two, or any given number carried at a particular time, but to a large majority of the passengers ordinarily carried. Such rules and regulations should also be of a permanent nature, and not to be made for a particular occasion or emergency.

"As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large. He may do so if he chooses; but the law does not impose it upon him as a duty. It does not require the carrier to

make any rules whatever; but if he desires to do so, looking to an increase of passengers from the superior accommodations he holds out to the public, to deny him the right would be an interference with a carrier's control over his own property, in his own way, not necessary to the performance of his duty to the public as a carrier." Day vs. Owen, 5 Michigan, 525.

In Jencks vs. Coleman, 2 Sumner, 224, Judge Story says:

"The right of the passenger to a passage on board of steamboats, is not an unlimited right; but it is subject to such regulations as the proprietors may prescribe for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests, in the management of such boats, as a common incident to their right of property." See, also, Angell on Carriers, § 525; Parsons on Contracts, Vol. 2, p. 226, *et seq*.

Now, if it is reasonable and right, a social necessity, in Massachusetts, in New York, in Ohio, in Nevada, where the colored population is comparatively small, to have the colored and the white children educated in separate schools, how much more reasonable it must be, how much greater the social necessity in the States in which the colored people are so much more numerous, and where they have so recently ceased to be slaves.

Public schools, however, are the creatures of the law, and they belong to the public. The law which alone

gives the right to be educated at the public expense, may well impose conditions on the enjoyment of the benefaction ; and it may either have the children separated by sex or by race and color ; or, however unwise and inexpedient such a measure might prove to be in the existing state of public sentiment, it may have them all, male and female, black and white, taught, confusedly, in the same schools, and in the same classes.

Carriers of passengers occupy a position altogether different. The vehicles and vessels which they use in their business do not belong to the public ; they are private property. The law did not create property. There is no period in man's history at which this right did not exist ; and it owes its origin to the very nature of man, to his instincts, to his wants, and his necessities, and to that Divine edict which gave him dominion over the earth and its other inhabitants and its fruits. One great object of law is the protection of this natural right ; and while the use and enjoyment of property may well be subject to such regulations and conditions as the common good may require, the law cannot invade the right of dominion, the right of ownership, by arbitrary restrictions, limitations, impositions, which would virtually strip it of its value, its utility to the owner.

Accordingly, it was properly held in Pennsylvania and in Michigan, and the rule rests upon principles which cannot be questioned, that the carrier not only has the right, in virtue of his ownership, and as an incident to his right of property, but it is also his duty, to separate

his passengers by sex and by color, in accordance with the prevailing public sentiment, and the requirements of peace, good order, decorum, the comfort and convenience of the public and his own interests. How much more reasonable, how much more necessary must such a regulation be in the States in which the colored people have so lately been released from a servile condition ; where they are so numerous, where they are, necessarily, inferior intellectually, socially, morally, to the educated colored people of Massachusetts, Ohio, New York, Pennsylvania, Michigan, most of whom were never slaves, and whose opportunities for cultivation and improvement, moral, social, and intellectual, have been so greatly superior to those of the masses of the colored people of the South, born slaves, and many of them ignorant even of the alphabet.

It is idle, it is utterly inconsequential, to call the feeling which makes this regulation necessary a prejudice. It is the *fact*, the *existence* of this feeling, which is to be dealt with ; and its wide-spread prevalence elevates it far above mere prejudice. It is, indeed, one of the noblest instincts of humanity, pride of race. All the repulsion, all that keeps the colored and the white races apart in the United States, is the effect, the consequence of that natural instinct, that pride of race, without which no people can ever become truly great ; without which degrading illicit connections, or marriages scarcely less degrading, would soon fill the the land with a degenerate progeny, possessing neither the best physical qualities

of the black race, nor the best moral and intellectual qualities of the white race; and whatever tends to bring the two races, so clearly distinguished, so really distinct, into such intimate association as would facilitate and encourage amalgamation, would soon prove destructive of the best interests of society, and would be most disastrous to prosterity.

Misguided professors of a false philanthropy may talk about equality before the law, and from an unquestioned truth, which they do not comprehend, and which they continually misapply, may deduce consequences, the most absurd and mischievous; but statesmen, the true friends of social advancement, and of the rights and privileges of citizens, judicial tribuuals and enlightened legislative bodies, will not turn a deaf ear to the teachings of such men as Chief Justice Shaw, Justices Agnew and Manning, and Judge Hare, nor will they exclude the light of reason and experience. They must and will deal with the difficult and most momentous social problems, now forced upon us for solution, in a broad and catholic spirit, in all kindness and charity, with proper respect for the natural, constitutional and statutory rights of all; and will seek to adjust the delicate race relations by wise and comprehensive measures, adapted to the actual condition of things. and designed to conserve and to promote the best interests, the prosperity, the security, the happiness of all.

God made the white and the black races distinct; and He separated them geographically, as plainly as He has

done by instincts, habits, color and physiognomy. This great law of separation cannot be violated with impunity; and the attempt to abrogate it, if persisted in, may have the story of its failure told in mournful characters, and in the expulsion or extermination of the weaker race.

The transportation of passengers in the United States is an immense business, in which millions of capital are invested. Rival boats, and numerous lines of railway which touch the rivers and navigable waters, and tap the currents of travel at all important points, keep up the most active and powerful competition, which has already secured to the public all that seems attainable in speed, safety and comfort, affording facilities and accommodations which are far in advance of any possible requirements of the law, and have made it a luxury to travel. Proprietors of vessels and vehicles are compelled to conform to the taste and covenience of travellers; and no carrier of passengers can afford, in the conduct of his business, to do violence to, or to disregard the feelings, the sentiments, even the prejudices of the community at large. Whenever and wherever the state of public opinion and the condition of society may require that colored passengers and white passengers shall be accommodated promiscuously, in the cabins and at the tables of steamboats, pecuniary interest, always sensitive, and stimulated by a sleepless competition, will not be slow to perceive and to adapt itself to the change. In the meantime, it is not only safe, but it is wise to leave all that pertains to the mere details of accommodations to be afforded to passen-

gers to the salutary influence of competition, and to the control of public opinion, which even legislation cannot long oppose, and which, ultimately, shapes the law in accordance with its imperious behests.

Passengers on steamboats are not huddled together, male and female, in the same apartments; and separation on the basis of sex is a requirement of common decency. The ladies' cabin is set apart for the accommodation of female passengers; and they, and their attendants, take their meals at a separate table, or at one end of a common table. No one pretends that this uniform separation violates the law of equality; nor can it be tortured into an assertion of the superiority of the one sex or the other.

It is equally a necessity of the existing condition of society that separate apartments should be provided for the accommodation of white and colored persons at hotels and on steamboats and other conveyances, more particularly on boats navigating the Western and Southern waters, where the voyages are frequently of several days duration, and the passengers are lodged and dieted on board. Equality of comfort is all that any law can possibly require. Anything beyond this would be a lawless invasion of the right of private property; and the fact is established, as stated by Justice Wyly in his dissenting opinion, that there was no difference in the comforts of the two apartments on the "Governor Allen." No law of the United States applicable to this case forbids such separation; and no law of Louisiana has any such effect, unless it be Article 13 of the Constitution, and Act No. 38 of the Legislature of 1869.

Equality requires that all the rights which belong by law to citizens, should be equally under the protection of the law, without any distinction whatsoever. If the law gives to every citizen, white or black, the right to go on board a passenger steamer and to choose his apartments and accommodations at pleasure, then that right is under the protection of the law, and it may be legally enforced. But it has been shown that no such right exists. On the contrary, the owner of a boat, while he is compelled by law to carry the passenger if he have room and suitable accommodations, is under no legal obligation to furnish him a spacious stateroom, much less to seat all his passengers at one table, or to supply them with luxuries and elegancies, to which the great mass of travellers are strangers at home.

What may be the meaning of the words in the first section of Act No. 38, "*or shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known,*" can only be matter of conjecture. If it be admissible, in construing a statute, to guess at the idea which the Legislature intended to express, it might not be difficult to supply words which would express that idea. But there would always be the risk that the *guess* might be merely the result of the impressions and ideas of the guesser, and not in accordance with the legislative will, which the words actually used have failed to develope and express. If the intention of the Legislature was to authorize carriers to protect themselves

against the acts and conduct of passengers injurious to their business, the words used in the act, as just quoted, might be associated with other words, which the Legislature did not choose to use, so as to make the clause read thus: "Or shall commit any act tending to injure the business of the carrier, *or shall refuse to obey the rules and regulations* prescribed *by the carrier* for the management of his business."

The words italicised are not in the text, as originally promulgated in 1869, nor are they in the re-enactment, Revised Statutes of 1870, both of which are identical; so that the supplied words, if they do express a very good meaning, were not omitted accidentally. The Revised Statutes were enacted as a body of laws, signed by the Speaker of the House, the Lieutenant-Governor, as President of the Senate, and approved and signed by the Governor, on the 14th of March, 1870. See last page of Revised Statutes.

It would be a very dangerous precedent for a judicial tribunal, in construing a statute, especially one involving such serious consequences as this does, to supply words which the Legislature, dealing with the same subject twice in consecutive years, has not chosen to use; and the words used on these two occasions must be taken to express all that the Legislature desired and intended to enact as law.

It will be observed that the whole of the first section preceding the proviso, relates exclusively to causes for which the carrier may refuse to admit a person to, or may

expel him from his conveyance ; and that there is not a single one of the several causes enumerated which would not authorize the carrier, in any part of the civilized world, to refuse to admit a person as a passenger, or to expel him after admission. This right of the carrier does not depend upon any law of Louisiana, nor yet upon any law of the United States ; but it is inherent, resulting from the relations existing between the carrier and his passengers and the public generally, and the carrier's right of dominion and control over his own property—a right given to man by the Creator, which codes and statutes are bound to respect, and are designed to protect. The proviso relates only to rules and regulations making discrimination on account of race and color ; and the remainder of the section differs, in no respect, from the general, unwritten law applicable to carriers of passengers.

Now, the defendant in error was not refused admission to the conveyance, the boat ; nor was she expelled therefrom after admission. The statute undertakes to enumerate and define the causes which authorize the carrier to refuse to admit a person as a passenger, or to expel him after admission—a right which exists by the general common law, the great unwritten law of the civilized world, independently of this statute, or of any law of Louisiana. The only wrongs which the statute contemplates and provides for, are, the refusal of the carrier to admit a person as a passenger, and the expulsion of the passenger after admission, where no one of the several enumerated causes exists.

As the statute stands, all that is said about rules and regulations is without meaning ; but, eking out the meaning by supplying words which the Legislature might have used if it really intended to enact what these words express, all that would be expressed about rules and regulations, would be that the refusal to obey the rules and regulations, prescribed by the carrier for the management of his business, would authorize the expulsion of the passenger, provided such rules and regulations make no discrimination on account of race or color. The first clause of the first section of the act contemplates and recognizes two acts of lawful authority by the carrier : One the refusal to admit a person as a passenger for the several causes enumerated, the other, the expulsion of the passenger for the same causes. The proviso is not a general prohibition of discrimination by the carrier on account of race or color. It cannot be stretched beyond the design to limit the right to expel a passenger, for a violation of the rules and regulations prescribed by the carrier for the management of his business, to those cases in which such rules and regulations make no discrimination on account of race or color.

This is too obvious to justify discussion ; and it would have sufficed merely to make the statement but for the extraordinary decision of the Supreme Court of Louisiana, under review.

The statute provides for two wrongs only :

1. The unlawful refusal of the carrier to admit a person as a passenger.

2. The unlawful expulsion of the passenger after admission.

The case stated in the petition, the complaint, falls under neither of these categories. Defendant in error was not refused admission as a passenger, nor was she expelled after admission. On the contrary; she went on the boat, and remained on board, and she was conveyed to her place of destination. Her complaint is, that a discrimination was made against her, on account of her race and color, and that she was refused accommodations in the ladies' cabin. She does not pretend that the accommodations which were offered to her in the bureau were not equal in comfort to those afforded in the ladies' cabin. If she cannot recover under the Article of the Constitution and Act of the Legislature of Louisiana, which do not seem to meet the exigencies of her case, she must be remitted to the general law applicable to carriers of passengers, no principle of which was violated in this case. She went on board with full knowledge of the accommodations which would be afforded her. There was no violation of any contract between her and the carrier, and no wrong was done to her which could support a claim for vindictive damages. If she occupied a rocking chair in the recess, and took there the two meals, supper and breakfast, all that she required on her short voyage, it was her deliberate choice—her preference for these accommodations, rather than the stateroom, and the accommodations which she might have had in the bureau. Passengers on steamboats, especially in hot

weather, do not usually remain in their staterooms, except when they go there to sleep. They prefer to be on the guards, or in front, or in the cabin, or in the recess; and a seat in a rocking chair, during a short July night, on a steamboat, cannot be very uncomfortable to a person in ordinary health. There is not the slightest foundation for actual damage in this case; and it is difficult to perceive how the defendant in error, could have been entitled to $1000, punitive damages. She did not ask for an increase of the judgment of the lower court, as the Chief Justice significantly remarks. If she had done so, there is no telling what amount might have been allowed her by the Supreme Court.

The object of the discussion, thus far, has been to establish these propositions:

1. That the regulation, by which separate apartments were assigned to colored passengers on the "Governor Allen," was, in all respects, reasonable, wise, and necessary for the due performance of the public duty of the carrier to the community at large, and for the proper protection of his own property and interests, and for the management of his own business.

2. That the right of the carrier to make and enforce this regulation is an incident to his right of property, of which the law cannot deprive him, any more than it can deprive him of the property itself.

The Supreme Court of Louisiana applies the Article of the Constitution and Act of the Legislature to the case

made by the pleadings; and it decides that the carrier has no right to prescribe the rule in question. In thus deciding, the court invades the right of private property. It deprives a citizen of his property without any process of law whatever. For, if a carrier cannot make and enforce such regulations as experience has shown to be necessary for the comfort and safety of his passengers, and for the promotion of his own interests as a carrier of passengers, then the owner, the carrier, is virtually deprived of his property, the conveyance, because he is deprived of the right and the power to use it profitably in the only business for which it is adapted and designed.

Whatever might be found to be the meaning and effect of the Article of the Constitution and Act of the Legislature of Louisiana, under consideration, by applying to them the ordinary rules of criticism, there can be no doubt as to the interpretation put upon them by the Supreme Court of Louisiana. That Court says the meaning is, that carriers of passengers are forbidden, under heavy pecuniary liability, to provide and assign to colored passenger apartments and accommodations separate from those provided for and assigned to white passengers. From the wording of the act : "All persons engaged, *within this State*, in the business of common carriers of passengers," it might be supposed that the Legislature had some idea that its authority to deal with the subject was limited to carriers of passengers pursuing their business wholly *within the State ;* but the Supreme Court of Louisiana decides, in this case, that a steamboat, enrolled and

licensed for the coasting trade, a common carrier of passengers and cargo, pursuing that business on the Mississippi river, a public navigable water of the United States, between the port of New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, is subject to this prohibition.

It is obvious that such a separation of passengers is reasonable, conducive, nay, necessary, to the preservation of peace, good order, decorum, and the comfort of the great mass of the traveling public, as well as to the protection and promotion of the business and interests of the carrier. The owner of the conveyance, the carrier, has the right to prescribe this separation, as one of the rules for the management and conduct of his business, and to require those who choose to become passengers on his conveyance to submit to it, unless such rule is forbidden by competent law-making power and authority, The Supreme Court of Louisiana decides, in this case, that Article 13 of the Constitution and Act No. 38 of the Legislature of 1869, forbid such separation, and that they are valid and obligatory.

It is plain that this prohibition, thus interpreted and applied, isintended to regulate and control the business in which the steamboat "Governor Allen" was employed; and that business was navigation and commerce, between different States. Two questions remain to be considered:

FIRST. Do this Article of the Constitution and Act of

the Legisiature of Louisiana, conflict with Article 1, Section 8, clause 3, of the Constitution of the United States?

SECOND. Do this Article and Act of the Legislature conflict with Article 14, Section 1, of the Amendments to the Constitution?

FIRST. The first section of the Act in question was evidently intended to enumerate, limit and define the causes for which the carrier may refuse to admit a person as a passenger, or may expel him after admission; and it is equally clear that this Article and Act of the Legislature, as interpreted and applied by the Supreme Court of Louisiana, forbid the carrier to separate his passengers on account of race or color, as he would otherwise have the right to do. In both senses, these provisions attempt to control and regulate the business of the carrier; that is, to subject him to the terms and conditions prescribed, upon which, alone, he is to be permitted to conduct his business. Was that business such commerce as Article 1, Section 8, clause 3, of the Constitution of the United States empowers Congress to regulate?

1. It would not be possible for the business of the carrier to be conducted with profit to himself, or with convenience to the public, if that business were subject to the conflicting rules, conditions and restrictions which might be prescribed by the laws of the several States within which he might choose to employ his vessel. Numerous steamboats, aggregating a

vast tonnage, are employed in this business on the Mississippi, the Ohio and their tributaries. Seven States are bounded by the Mississippi between New Orleans and St. Louis; and a boat going from New Orleans to Pittsburg passes along the borders of eleven States.

Boats receive and discharge cargo and passengers, and, for that purpose, stop at landing places, in all the several States on their respective routes. If one of these States, Louisiana, can define the causes for which the carrier may refuse to receive cargo or passengers, or for which he may expel a passenger ; or can prohibit the separation of passengers on account of race or color, each one of the other States might prescribe wholly different causes, which, alone, would justify such refusal or expulsion within their respective jurisdictions ; or might require the separation of passengers on account of race or color. The power to forbid by law implies, also, the power to give the sanction of law to that which is not *malum in se*. One State might prescribe rules for the transportation of gunpowder and other explosive and combustible articles ; while another State might establish different and conflicting rules ; and the carrier might thus be subjected to actions for damages, or to prosecutions, in one of the States on his route, for doing that which others of the States authorized and required him to do in the prosecution of his business. If one of the States, Louisiana, can give colored passengers on a steamboat, plying between different States, the right to recover vindictive damages for being separated from the white passengers,

any other State might give the white passengers, on the same voyage, the right to recover like damages for being forced into association and contact with the colored passengers. No business could live under such conditions; and uniformity in the regulation of inter-State commerce is an absolute necessity.

It was for the purpose of establishing uniformity in the laws controlling this business, in view of the public interest and convenience, that the power to regulate commerce among the several States was given to Congress: and the decision in Gibbons vs. Ogden, 9 Wheaton, has established the construction that the intercourse which consists in the transportation of passengers and cargoes, by means of ships and other vessels plying between different States, is "commerce among the several States," within the meaning of the Constitution.

Commerce is regulated, as well by rules which operate directly upon the persons who engage in it, as by rules which apply to the instruments, the vessels, the conveyances by which it is conducted; Wheeling Bridge case, 18 Howard; and a rule which the owner of the conveyance is required to observe in the conduct of his business, is as much a regulation of commerce as the rule which subjects a steamboat to inspection in hull and machinery, or which requires certain appliances, apparatus, outfit, and construction, designed for the safety and comfort of passengers; or that which requires enrollment and license for the coasting trade.

As the owner of the boat in this case, was engaged, and employed his boat in the transportation of passengers and cargo, any rule which he was compelled to observe in the conduct of that business, and having reference only to that business, was necessarily a regulation of that business; and as that business was commerce, and was conducted between different States, any rule which controlled that business, on any part of the route, was a regulation of "commerce among the several States."

The Act of Congress, approved 28th February, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam, and for other purposes," is a regulation of commerce; and it embodies all the rules to which Congress has chosen to subject vessels propelled by steam as contradistinguished from vessels otherwise propelled. Section 41 of this Act is remarkable:

"All steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation, shall be subject to the provisions of this Act." The proviso excepts public vessels of the United States, vessels of other countries, and boats navigating canals exclusively.

Many of the waters specified in this section are wholly within a State, as the harbor of New Orleans, for example, which is wholly within the State of Louisiana; and

numerous vessels, propelled by steam, are engaged in service within the harbor, such as towing and moving ships and other vessels. There are steamboats plying between New Orleans and landing places on the Mississippi river, some above, some below the city, wholly within the State of Louisiana. Others ascend the Mississippi to the mouth of Red river, and go up that river to Shreveport; and others, again, enter the Ouachita, and go up that river to Monroe, the whole route in each one of these cases, being within the State of Louisiana, although the Red river is navigable and navigated above Shreveport, into the State of Texas and the Indian Territory; and the Ouachita river is navigable and navigated above Monroe into the State of Arkansas. These boats are all common carriers of passengers and cargo; but their business is not "commerce among the several States," in the restricted sense which would apply the phrase only to voyages from a port in one State to a port in a different State.

Obviously, Congress cannot regulate this commerce if its powers are limited to interstate and foreign voyages. And yet, this act of 1871, subjects all vessels propelled by steam, navigating the public waters of the United States, to the same rules and regulations, whether they extend their voyages into other States, or limit them to one State. Whence comes this power?

This Court having decided that "navigation," on the public waters of the United States, is subject to the regulating power of Congress, Congress must exercise

power and control over these waters, the highways on which commerce between different States and foreign countries is conducted, in whole or in part. The commerce which exists between New Orleans and the seaports, foreign and domestic, with which it has intercourse through the mouths of the Mississippi, and that which exists between New Orleans and the vast empire watered by the Mississippi and its tributaries, could not be conducted with convenience or safety, if the numerous steamboats, plying wholly within the State of Louisiana, might be navigated by reckless or incompetent persons, by whose negligence or want of skill, the lives and property afloat on vessels engaged in inter-State or foreign trade, whether prosecuting their voyages, or moored at the wharf, would be exposed to the risk of collisions, or explosions, or fire, which, occur too frequently from inexcusable negligence, notwithstanding the wholesome regulations to which Congress has subjected all American merchant vessels propelled by steam, navigating any public water of the United States.

The Constitution having vested in Congress the power to regulate commerce with foreign countries and among the several States, it was not difficult to deduce from the terms and the purposes of the grant the power and the duty of Congress to place that commerce, at its every stage, within the United States, under proper regulation and protection. Accordingly, it subjects the commerce which is carried on by means of steam vessels navigating wholly within a State, on the public waters of the United

States, which are, in whole or in part, the highways of inter-State and foreign commerce, to the rules and regulations without which that commerce might be interfered with or endangered. The vessel, no matter whence she comes nor whither she is bound, must keep a proper lookout; must display certain lights; must observe certain rules, and give certain signals when meeting other vessels; must sound fog whistles at prescribed intervals; the boilers and machinery must be subject to certain inspection; captains, mates, pilots and engineers must be examined by public officials, be classified and obtain license, without which they cannot serve in their respective capacities; and the boat itself must be enrolled and licensed, a *sine qua non*, the full authority of the Government of the United States to pursue the coasting trade, without which no steamboat can be employed in that business.

Section 41, of the Act of 1871, derives its authority from the manifest fact that Congress cannot exercise its unquestioned power to regulate commerce among the several States and with foreign countries, if it cannot, also, regulate and control the navigation by steamboats of any public water in the United States, on which inter-State and foreign commerce is conducted, in whole or in part. Although many of the steamboats which arrive at, and depart from, the port of New Orleans, perform their voyages entirely within the State of Louisiana, few of them make a trip without either passengers or cargo coming from or destined for ports and places in other

States, or in foreign countries. Such boats are auxiliaries to inter-State and foreign commerce, the promoters of that commerce, either at its inception, or in its intermediate or its final stages; and the power to regulate inter-State and foreign commerce would be wholly inadequate to the purposes contemplated, if it extended merely to the persons and the vessels directly engaged in inter-State or foreign voyages. To be effectual, this power must extend to the entire business of navigation and commerce on the public waters of the United States on which inter-State and foreign commerce is carried on, although some of the vessels engaged in this navigation never extend their voyages beyond the limits of a single State, or some of the passengers, or part of the cargo, on an inter-State voyage, may be destined for ports in the State in which the voyage begins.

This doctrine is clearly recognized in Foster vs. Davenport, 22 Howard, 245, and in Sinnott vs. Davenport, in the same volume. An act of the Legislature of Alabama required the owners of steamboats navigating the waters of Alabama, before leaving the port of Mobile, to file in the office of the Probate Judge of Mobile County, a statement in writing, setting forth the name of the vessel, the names and residence of the owners, and their respective interests in the vessel. In Sinnott's case, the boat plied between the port of New Orleans, and ports and places on the Alabama river; in Foster's case, the vessel was a towboat, used also as a lighter, and engaged exclusively in the domestic trade and commerce of the

State, on the waters of Mobile Bay ; and both the boats were enrolled and licensed for the coasting trade. In both cases this court decided that the act in question was an attempted regulation of commerce ; that it was an infringement of the right conferred by the license, and that it was in conflict with the power to regulate commerce, which the Constitution has vested exclusively in Congress.

It would cause the most inextricable confusion if a boat, leaving the port of New Orleans, bound for Vicksburg, were subject to the laws of Louisiana with respect to that part of the voyage, which is wholly within the State of Louisiana, and to the passengers or cargo received and to be discharged in that State; to the laws of Mississippi with respect to passengers or cargo received and to be discharged in that State; and to the laws of the United States, with respect only to the cargo and passengers received in one of the States, to be discharged in the other. Where the voyage is inter-State, all that pertains to it, from the port of departure to the port of ultimate destination, is subject to the regulating power of Congress.

It can make no difference, therefore, that defendant in error embarked at New Orleans, and that her place of destination was within the State. The article of the Constitution and act of the Legislature of Louisiana attempt to regulate the business in which the boat was engaged. They prescribe rules for the conduct of that business ; and that business was navigation on a public

water of the United States, intercourse, commerce between different States which is not only subject to the regulating power of Congress, along the entire route, from the inception to the termination of each and every voyage, but which the Congress has regulated, in the most minute details and particulars, by numerous acts, from 1789 down, particularly, by the Act of 28th February, 1871.

Congress has regulated this commerce by providing for the sale, and for recording conveyances and mortgages of ships and other vessels; enrollment at the customhouse of the district in which the owner resides; the character of iron to be used in the manufacture of steam boilers; tests to which boilers are to be subjected; the transportation of certain dangerous articles; number of passengers to be carried; liability for jewels, bullion and other valuables; watch to be kept in the cabins at night; by enforcing compliance with all the provisions of the Act of 1871, applicable to steamboats, including the rules relating to inspections, qualifications and license of officers, signals, lights, boats, axes, pumps, valves, floats, life-preservers, appliances, apparatus, outfit, etc.; and by requiring and granting a license for the coasting trade, which cannot be obtained until all the requirements of the laws of the United States have been complied with.

These requirements constitute the terms and conditions which the Government of the United States has chosen to impose upon the business, the coasting trade;

and the license is the evidence that these terms and conditions have been fully complied with, and of the right and title of the owner to employ his boat in the specified trade.

2. The supreme law of the land gives the right to pursue the coasting trade, on the terms and conditions which it has seen fit to prescribe; and no State can interfere with this right, either to abridge or to enlarge it, or to subject it to any terms or conditions whatsoever.

It would be easy to demonstrate the necessity for uniformity in the regulation of commerce among the several States, and to show that the whole power over the subject must be vested in Congress, exclusively, in order to secure this uniformity. But this Court would not listen patiently to argument in support of principles long since established, and recognized by an unbroken current of repeated decisions. It suffices to cite the following, among the numerous cases in point: Sturges vs. Crowningshield, 4 Wheaton; Houston vs. Moore, 5 Wheaton; Gibbons vs. Ogden, 9 Wheaton; Ogden vs. Saunders, 12 Wheaton; Brown vs. Maryland, 12 Wheaton; Boyle vs. Zacharie, 6 Peters; Prigg vs. Commonwealth, 16 Peters, pp. 617, 618; Passenger Cases, 7 Howard, pp. 400, 414, 464; Wheeling Bridge case, 18 Howard; Sinnott vs. Davenport, 22 Howard; Foster vs. Davenport, 22 Howard; Gilman vs. Philadelphia, 3 Wallace.

The power granted to Congress is exclusive; and the whole subject has been placed beyond the reach and con-

trol of the States, so far as those vessels are concerned of which the Government requires, and to which it grants enrollment and license for the coasting trade.

It may not be out of place to observe that Congress, by the Act of 1st, March, 1875, attempts to formulate and declare the right of "all persons, within the jurisdiction of the United States, to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theatres and other places of public amusement." It may be that Congress has exceeded its powers ; that it has trespassed upon the right of private property ; and that it has invaded the domain of State authority, so far as inns, theatres and other places of public amusement are concerned ; but, so far as the Act relates to common carriers of passengers, it is an assertion, by Congress, of the right to regulate commerce, by enforcing equality of rights on public conveyances.

It would be a strained construction of this act to say that it prohibits such separation of passengers as decency, good order, and the comfort and convenience of the community at large require, and as the carrier's right of private property may authorize him to establish and insist upon ; but it does require equality of comforts in the accommodations on public conveyances, which is perfectly compatible with the rule of separation.

This act, as already stated, was passed nearly three years after the cause of action propounded in this case arose; and while it cannot be invoked for the benefit of

defendant in error, it serves to show that Congress assumes jurisdiction and control of the equality of rights on all public conveyances: and, by all the analogies, if the power thus asserted is vested in Congress, it does not belong to the States; nor could it be exercised by them, since no State can give extra-territorial effect to its legislation.

SECOND. The article of the Constitution, and act of the Legislature of Louisiana, in so far as they forbid the carrier to prescribe reasonable rules and regulations for the use of his boat, in the conduct of his business, such as the comfort and convenience of the public generally, and his own interest require, attempt to deprive him of his property without due process of law. The right to use his property, in the only business for which it is adapted, in subordination to the regulating power alone, is as much his property, and is as valuable to him as the thing which he so uses.

The license confers the right to use the boat in accordance with its terms; and the right thus conferred is as much the property of the owner as the boat itself. When any State attempts, whether by its Constitution, or by act of the Legislature, to deprive the owner of the full, free and perfect enjoyment of this right, or to abridge it by subjecting it to terms and conditions, such attempt is in violation of Section 1, Article 14, of the Amendments to the Constitution; and is, moreover, an invasion of that supremacy which, by Article 6, clause 2, belongs to the laws and Constitution of the United States. The license would be a cheat and a delusion if

any State could interfere with the exercise of the right which it professes to give, or could require anything to be done in order to pursue the business which it professes to permit and to authorize.

It seems clear, therefore, that the article of the Constitution and act of the Legislature of Louisiana, as interpreted and applied by the highest judicial authority in the State, are in conflict with and violate Article I, Section 8, clause 3, of the Constitution of the United States, and Article 14, Section 1, of the Amendments to the Constitution; and that the judgment of the Supreme Court of Louisiana is erroneous, and should be avoided and reversed.

R. H. MARR,

Of Counsel for Plaintiff in Error.

NEW ORLEANS, December, 1876.