SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 210.

HOMER A. PLESSY, PLAINTIFF IN ERROR,

vs.

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

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

SYLLABUS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proceedings.

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

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

(Signed) LIONEL ADAMS,

Assistant District Attorney for the Parish of Orleans.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Opinion Upon Plea.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is no pretense that he was not provided

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EX. PARTE, HOMER A. PLESSY.

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

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

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

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

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

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

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

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

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

And petitioner also says that the said Criminal

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

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

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

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

other necessary preliminary according to his best knowledge and information.

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

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

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

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

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

ANSWER OF RESPONDENT.

To the Honorable the Supreme Court of Louisiana:

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

That the cognizance of the said cause of the State

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

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

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

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

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

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

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

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

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

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

And your respondent prays for all general and equitable relief.

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

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

BRIEF.

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

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

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

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

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

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

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

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

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

It is conceded that where an inferior tribunal is

proceeding under an unconstitutional act prohibition is the proper remedy.

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tied. Lim. Pol. Pow. § 201.

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

These authorities have determined not only that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ex Parte HOMER A. PLESSY. No. 11134.

Application for certiorari and prohibition.

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

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

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

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

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

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

The legislative act in question is entitled:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Civil Rights cases, 109th United States, 3.

We may therefore confine ourselves to the question whether or not the statute violates the XIVth amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Roberts vs. Boston, 5 Cush., 198.

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

Hutchinson on Carriers, paragraph 542.

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

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

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

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

Barbier vs. Connelly, 113 United States, 27.
United States vs. Cruikshanks, 92 United States, 542.
Slaughterhouse cases, 16 Wallace, 36.

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

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

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

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

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

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

The reading of the statute utterly repels these charges.

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

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

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

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

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

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

(*Syllabus.*)

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

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

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

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

Respectfully submitted,

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