Supreme Court of the United States.

OCTOBER TERM, 1895.

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

No. 210.

Writ of Error to the Supreme Court of Louisiana.

Brief on Behalf of Defendant in Error.

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

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

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

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

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

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

On behalf of the defendant in error I submit:

That a State has the power to require that railroad trains

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

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

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

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

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

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

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

I.

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

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

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

It does not:

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

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

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

The Power of States Over Police Regulations is Supreme.

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

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

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

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

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

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

II.

A SINGLE QUESTION INVOLVED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

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

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

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

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

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

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

ALEXANDER PORTER MORSE,
Of Counsel for Defendant in Error.