In Supreme Court of the United States

AT OCTOBER TERM, 1882.

No. 217.

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

Statement of Case,

ASSIGNMENT OF ERRORS, AND BRIEF

FOR PLAINTIFFS IN ERROR.

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

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

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

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

Record pp. 1–2.

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

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

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

Record p. 4.

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

Record pp. 5–6.

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

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

Record pp. 7, 18–19.

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

Record p. 19.

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

ASSIGNMENT OF ERRORS.

(1)

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

(2)

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

(3)

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

(4)

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

(5)

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

(6)

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

(7)

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

BRIEF.

I.

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

Sec. 1.

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

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

(1)

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

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

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

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

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

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

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

See in this connection

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

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

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

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

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

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

16 Wallace 74–83.

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

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

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

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

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

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

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

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

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

(2)

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

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

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

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

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

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

II.

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

Record pp. 8 and 9.

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

The judge told the jury:

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

Record pp. 12–13.

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

Record p. 13.

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

Record p. 13.

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

Record p. 14.

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

Record p. 17.

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

Record p. 18.

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

(1)

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

Insurance Co. v. Seaver, 19 Wallace 531.

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

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

Record pp. 14–15.

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

Record p. 15.

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

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

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

Record p. 11.

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

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

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

Record p. 12.

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

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

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

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

(2)

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

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

(3)

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

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

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

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

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

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

11 Allen 307.

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

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

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

(4)

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

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

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

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

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

(5)

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

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

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

(6)

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

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

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

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

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

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

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

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

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

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

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

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

(7)

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

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

Greenleaf's Ev., sec. 74.

(8)

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

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

Record p. 16.

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

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

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

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

(9)

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

Record p. 17.

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

Record p. 15.

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

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

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

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

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

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

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

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

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

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

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

MEMPHIS, TENN., November 21st, 1882.