

MRS. JOSEPHINE DECUIR }
 vs. } No. 4829.
 JOHN G. BENSON.

Mr. Chief-Justice LUDELING.

280 The plaintiff alleges that, in July, 1872, being in the city of New Orleans, & desiring to go to her plantation in the parish of Point Coupée, she went on board the steamboat Governor Allen, a packet engaged in the business of common carrier of passengers, & plying between New Orleans & Vicksburg, & that she was refused a berth in the cabin & denied the right to take her meals at the table with the other passengers, & that she was forced to remain in a small compartment in the rear of the boat, without the common convenience granted to other passengers, solely on the ground that she is a colored person. She alleges that she is well educated, resided in Paris, France, several years, & that the treatment above mentioned is not only a gross infraction of her rights under the Constitution & laws of the United States & of this State, but was also an indignity to her personally, which shocked her feelings & caused her mental pain, shame, & mortification. She prays for \$25,000 actual damages & \$50,000 exemplary damages.

281 The defendant filed an exception, in which he pleaded want of jurisdiction in the State court *ratione materiæ*, as, he alleges, "the matters set up are admiralty matters, over which the United States court alone has jurisdiction." This plea was overruled & the other parts of the exception were referred to the merits. In his answer the defendant reiterates the objections urged in his exception. They are as follows:

1st. A general denial.

2d. That the steamer Gov. Allen was, on the 20th of July, 1872, and had been for some years before, enrolled and licensed under the laws of the United States to pursue the coasting trade, and was in the month of July, 1872, actually engaged in commerce and navigation, between the ports of New Orleans and Vicksburg, in the State of Mississippi, and that the 13th article of the constitution of the State of Louisiana, and the act, No. 38 of 1869, of said State, so far as they attempted to regulate steamboats, are in conflict with article 1, section 8, of
 282 the Constitution of the United States, giving Congress exclusive power to regulate commerce among the several States, and are consequently null and void.

3d. That he has by law a right to regulate and prescribe rules for the accommodation of passengers on the steamer Gov. Allen; that the boat is private property, and does not belong to the public, and any law attempting to prevent him from regulating said steamboat to the best advantage, and for the interest of her owner, would be violation of article 14, section 1st, of the amendment of the Constitution of the United States, prohibiting any State from depriving any person of his property without due process of law.

4th. That there is now, and always has been, a well-known regulation on the steamer Gov. Allen, as well as all other boats engaged in commerce and navigation between the ports of New Orleans and the various ports and places on the Mississippi and tributary rivers, that
 283 colored persons are not placed in the same cabin as white persons, or allowed to eat at the same table with them; that this regulation is reasonable, usual, and customary, and is made for the protection of their business, and was well known to the plaintiff in this cause in July, 1872, and had been known to her for many years previous.

5th. That the steamer Gov. Allen has a cabin called the bureau, for exclusive accommodation of colored persons, provided with state-rooms and all the conveniences of the cabin appropriated for the exclusive use of white persons; that plaintiff was tendered a state-room in said bureau-cabin appropriated for the exclusive use of colored persons, according to the well-known rules and regulations of the boat, and instead of accepting it took a seat in the recess of the boat, in the rear of the ladies' cabin, where she was offered a stretcher, which she declined.

6th. That she was distinctly informed before she came on the boat, by the clerk to a person who applied to him on her behalf, that she
284 could not be accommodated in the cabin for white persons, but would be put in the bureau or cabin for colored persons, and that she came on the boat with that understanding and without complaint, and only paid \$5, the amount charged in said cabin, and that the other passengers are charged \$7 to Hermitage Landing.

There was judgment in favor of the plaintiff for one thousand dollars, & the defendant has appealed. We think the exception to the ruling of the court was properly overruled. (See 20 An., 432, & 22 An., 244.)

The evidence sustains the material allegations of the petition. The defendant himself, a witness in the case, states: "I would not have given her a room if they had not all been taken." He had previously stated that he did not know if there was a vacant room; that he thought there were unoccupied berths in some of the rooms. When

asked if the reason for refusing to give her a berth in the cabin
285 was on account of her being a colored person, he answered:

"Yes, sir; as being contrary to the rules of the boat." Two constitutional questions are presented for solution: Is the act of 1869, No. 38, in conflict with article one, sect. eight, of the Constitution of the United States?

It is in conflict with article 14, section one, of said constitution:

It is insisted that act No. 38 of the general assembly, passed in 1869, violates article 1, section 8, of the Constitution of the U. States, because it undertakes to regulate commerce. This is a mistake. The act does not make any regulations of commerce. The act was passed to carry into effect the provisions of article 13 of the State constitution, which declares that "all persons shall enjoy equal rights & privileges upon any conveyance of a public character; & all places of business or public resort, or for which a license is required by either State, parish, or mu-

nicipal authority, shall be deemed public places of a public char-
286 acter, & shall be open to the accom'odation & patronage of all persons, without distinction or discrimination on account of race or color." The act contains five sections. The first and fourth alone are applicable to this case. The first section provides "that all persons engaged within this State in the business of common carriers of passen-

gers shall have the right to refuse to admit any person to their railroad cars, street-cars, steamboats, or other water-crafts, stage-coaches, omni-buses, or other vehicles, or to expel any person therefrom, after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance [of the carrier, of gross, vulgar, or disorderly conduct, or who shall commit any act tend-

ing to injure the business of the carrier, prescribed for the management
of his business after such rules & regulations shall have been
287 made known, provided said rules & regulations make no discrim-ination on account of race or color, & shall have the right to re-fuse any person admission to such conveyance when there is not room

or suitable accommodations, and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever." The fourth section provides "that for a violation of any of the provisions of the first & second sections of this act, the party injured shall have the right of action to recover any damages, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction."

The first section forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race or color, & that is the substance of the section 288 so far as it is applicable to this case. It was enacted solely to protect the newly-enfranchized citizens of the United States, within the limits of Louisiana, from the effects of prejudice against them. It does not in any manner affect the commercial interest of any State or foreign nation, or of the citizens thereof.

The objection that the act No. 38 violates section one of article 14, is utterly untenable. No one is deprived of life, liberty, or property, without due process of law, by said statute.

The position that because one's property cannot be taken without due process of law, therefore a common carrier can conduct his business as he chooses, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy. "The rights & responsibilities of the common carrier may be briefly stated thus:

289 he is bound to take the goods of all who offer, if he be the carrier of goods, & the persons of all who offer, if he be a carrier of passengers; to take due care & to make due transport & due delivery of them.

"He has a lien on the goods which he carries & on the baggage of the passengers for his compensation.

"He is liable for all loss or injury to the goods under his charge, unless it happens from the act of God or from the public enemy." (Parsons' Mercantile Law, p. 207.)

If he be a common carrier of passengers he must receive all who offer, carry them over the whole route, demand only the usual compensation, & treat all alike, unless there be actual or sufficient reason for the distinction, such as the filthy appearance, dangerous condition, or misconduct of a passenger, & for failure in any of these particulars he is responsible to the extent of the damage occasioned thereby, including pain or injury to the feelings. (Chamberlain vs. Chandler, 3 290 Mason, p. 142; 5 La.; Keene vs. Lizardi, 431; Block vs. Bannerman, 10 An., p 1; 1 McLeary, 550; 3 McLean, 24; Parsons' Mercantile Law, p. 207; 3 Kent, ed. 1832, p. 160.)

In Keene vs. Lizardi, Judge Porter, as the organ of the court, quoted the following language of Judge Story as expressing the ideas of the court on this subject:

"In respect to passengers, the case of the master is one of peculiar responsibility & delicacy.

"The contract with him is not for mere ship-room & personal existence on board, but for reasonable food, comforts, necessaries, & kindness.

"It is a stipulation, not for toleration merely, but for respectful treatment, for the decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, & that promptitude which administers aid to distress. In respect to 291 females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which

borders on lasciviousness, & against that wanton disregard of the feelings which aggravates every evil & endeavors by the excitement of terrors & cool malignancy of conduct to inflict torture on susceptible minds."

In truth, the right of the plaintiff to sue the defendant for damages would be the same whether act No. 38 existed or not, but the act is in perfect accord with the Constitution of the United States:

"All persons born or naturalized in the United States, & subject to the jurisdiction thereof, are citizens of the United States & of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," &c. (14 amendment of the Constitution of the United States.)

292 It is settled, in this State at least, that colored persons now have all the civil & political rights which white persons enjoy. (See Succession of Cabalero & Hoss & Elder vs. Hart et al., 25 An.)

Mrs. Decuir was denied the right to go into the ladies' cabin; she was compelled to remain in a small compartment back of the ladies' cabin, or to go into the "colored bureau," & to take her meals there also. If she had been a white lady, it will not be denied that she would have had just cause for complaint. Under the Constitution & laws of the United States & of this State she was entitled to the same rights & privileges while upon the defendant's boat which were possessed & exercised by white persons. In a recent case, C. Justice Beck of Iowa held the following language, which we adopt: "These rights & privileges rest upon the equality of all before the law, the very foundation principle of our Government.

293 "If the negro must submit to different treatment, to accommodations inferior to those given to the white man, when transported by public carriers, he is deprived of the benefits of this very equality. His contract would not secure him the same privileges & the same rights that a like contract made with the same party by his white fellow-citizen would bestow upon the latter." (Coger vs. N. W. Union Packet Company, American Law Register for March, 1874.)

The defendant relies also upon the fact that by regulation & the established course of business on steamboats, colored persons were not received as cabin-passengers & were not allowed the use of the cabins; that they have the right to make regulations for the comfort & convenience of the passengers, & that said regulation was reasonable.

294 That the common carrier may make reasonable rules & regulations for the government of the passengers on board his boat or vessel is admitted, but it cannot be pretended that a regulation which is founded on prejudice & which is in violation of law is reasonable.

The appellee has not asked for an increase of the judgment.

It is, therefore, ordered & adjudged that the judgment of the district court be affirmed, with costs of appeal.

DECUIR }
vs. } 4829.
BENSON. }

WYLY, J., dissenting:

Article 13 of the Constitution provides that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character."

* * * Act No. 38 of the act of 1869, an act to carry said article into

effect, provides in substance that for certain causes (such as im-
 295 proper conduct, infamous character, or refusal to pay the fare,) all
 persons engaged in the business of common carriers shall have
 the right to refuse to admit passengers, or to expel them from their
 steamboats or other water-crafts, railroad-cars, or other vehicles, pro-
 vided they make no distinction on account of race or color.

And for violating this provision the party injured shall have the right
 to recover any damage, exemplary as well as actual, which he may sus-
 tain. Assuming that the meaning of this legislation is that no colored
 person shall be excluded from the cabin and table of a steamboat
 usually occupied by white passengers, and if so excluded he shall have
 the right to recover damages on account thereof, the question is, were
 these enactments obligatory on the steamboat Governor Allen, engaged
 in carrying passengers and freight between New Orleans and
 296 Vicksburg, Louisiana and Mississippi? Was the steamboat Gov-
 ernor Allen, engaged in commerce between the States under a
 license issued by the United States, bound to observe this local or State
 legislation regulating the entertainment of passengers, requiring them
 to set at the same table and occupy the same cabin?

This legislation being in force, could the Governor Allen provide for
 her passengers two cabins and tables, affording equal accom'odations,
 one exclusively for white passengers, and the other exclusively for col-
 ored passengers, and, having so provided, assign each passenger to his
 proper place?

I speak not now of the right resulting from a contract, express or
 implied, between the passenger and the boat; because if the boat con-
 tract to carry a colored passenger in the white cabin, and fails to do
 so, it will be responsible for a breach of that contract.

297 Such a contract would depend for its existence in no manner
 upon the legislation to which I have referred.

The inquiry is, has the State of Louisiana authority to make it un-
 lawful for a steamboat engaged in commerce between the States to pro-
 vide separate cabins and accom'odations for the white and colored pas-
 sengers?

In my opinion she cannot do so without encroaching upon the power
 conferred by the Constitution of the United States upon Congress, to
 regulate commerce among the States.

If Louisiana can require the passengers to be mixed, and make it un-
 lawful for the whites to be assigned to one cabin and the colored to
 another, why may not Mississippi require the white and the colored pas-
 sengers to have separate apartments, and make it a penal offence for
 them to be mixed in the same cabin?

If one State has jurisdiction on the subject, why has not the
 298 other? If each have jurisdiction, each can pass just such laws
 as it deems necessary in the premises.

Now, what would be the consequence of such a state of affairs? The
 result would be that the boat could carry no passengers.

If it should carry passengers, mixed in the same cabin, conformably
 to the laws of Louisiana, it should incur the penalty prescribed by Mis-
 sissippi for mixing white and colored passengers.

If the States have authority to pass conflicting laws which in effect
 would prohibit the transportation of passengers on steamboats from one
 State to the other, why may they not enact similar laws in regard to
 freight?

And if they can legislate upon the subject of passengers and the sub-
 ject of freight passing on steamboats between the States, are they not, in

effect, regulating commerce among the States, in contravention of the Constitution of the United States ?

299 It was to prevent this very conflict of authority between the States that the founders of our Government wisely provided that Congress alone should have power to regulate commerce among the several States.

I cannot regard the constitutional provision and the statute of this State, as applied by the majority of the court in this case, otherwise than as enactments of a State to regulate commerce between the States, in contravention of the Constitution of the United States. They are in no sense enactments springing from the exercise of police power ; because the police power of a State cannot extend beyond its own limits. It cannot be brought into activity to regulate commerce between the States ; to prescribe how freight shall be carried or passengers accom-
modated upon steamboats running from one State to another.

Having shown, as I think conclusively, that the enactments of
300 Louisiana, as applied in this case by the majority of the court, contravene the Constitution of the United States, I think I may safely affirm that it was not unlawful for the Governor Allen to have two separate cabins and tables, one for the white and the other for the colored passengers, affording like accommodations to each, and in assigning each passenger to his proper place the captain or clerk committed no illegal act.

If there was no law prohibiting the universal custom of steamboats in this trade from have separate cabins for the white and colored passengers, that custom surely was not an unlawful custom. I entirely agree with our learned brother below that every custom must yield to positive law, and it was useless for the defendant to prove a custom contravening a prohibitory law.

But the precise question is, was the custom, which the defendant proved by overwhelming evidence to be universal among all the
301 boats navigating the Lower Mississippi, an unlawful custom—was it a custom in contravention of a prohibitory law ?

Laying out of view the enactments of Louisiana, which I think I have fully shown have no application to boats like the Governor Allen, engaged in commerce between the States, I boldly assert that the custom in question was not unlawful—that it contravened no prohibitory law.

Now, let us examine the testimony of the witnesses in regard to the custom or regulation to which I have referred.

Thomas P. Leathers, a witness, says : “ I have been engaged in steamboating for the last thirty-six years ; my principal trade has been between New Orleans and Vicksburg, Mississippi ; have been running boats there for the last thirty-three years as master. I am now master

of the steamer Natchez, a weekly packet between New Orleans
302 and Vicksburg ; was on the steamer Governor Allen when Mr.

Washington came on board and applied for a passage for some person—did not see who. Heard the clerk the boat tell him that if she was a colored person she could only be accommodated in the colored cabin. Think this was in July, 1872 ; the Allen was then running in place of my boat, the Natchez, carrying the mail ; heard nothing more. This was Saturday evening before the boat backed out from the wharf. Witness went with the boat to Carrollton. Witness is familiar with the custom and regulation of steamboats carrying colored persons ; it is usual to have a colored cabin for their accommodation, separate and distinct from all others. This custom is well known among all persons traveling upon the river, both white and black. It is a reasonable regu-

lation, and prevails among all boats coming to this port. The colored passengers on my boat are accom'odated as well as the white, and are provided with the same bill of fare, but distinct and separate apartments. The rule on my boat is to keep the officers in a separate cabin; the waiters have a separate one; the ladies have a separate one; the gentlemen have a separate one; the ladies' servants have a separate one, and the colored passengers another. Each one is separate and distinct from the others, and have separate tables. The steamboat Governor Allen is regulated the same way my boat is regulated. This regulation and custom among steamboats coming to this port, of keeping the white and colored cabin-passengers separate has prevailed ever since I have been steamboating. I have never heard of any other. This regulation is made for the accommodation of the whole traveling community, because there are a large majority of white people who do not wish to be mixed up with the colored people, and the colored people do not wish to be mixed up with the white people. It would be impossible to run a steamboat without this regulation. It is just as essential as to keep the gentlemen and ladies' cabin separate. I think the colored travel in my trade is between a fourth and fifth of the whole—that is, the white persons traveling are about four-fifths of the whole, or near that. About one-half that travel is for pleasure. If I did not have rules and regulations for my boat and accommodation of my passengers, I do not think I would have any, either white or colored. The white passengers are charged about 25 per cent. more than the colored, though they get the same accommodation. Lieutenant-Governor Dunn was a passenger on my boat just before his death. I gave him a state-room in the colored cabin, where he preferred to be, as he asked for it. I have also have Senator Ravels travel on my boat, and he informed me that the separate cabin was the only way to give satisfaction to the white and colored race; that they must be kept separate. He was always accommodated in the colored cabin. I have also frequently had other colored members of the legislature, of both Louisiana and Mississippi, and always put them in the colored cabin, and never heard of any complaint from them on the score."

John W. Cannon states, in substance, that he is master and owner of the steamer R. E. Lee, and owner of her and the steamer Katie; that he has been steamboating as master and owner for the last thirty-six years, in nearly all trades out of New Orleans, and has been in the Vicksburg and Bend trade for the last fifteen or eighteen years, except during the war, making about a trip a week; that he is familiar with the custom of carrying colored passengers; that they are always carried separate and apart from the white people; that they were carried in the "nursery" until the boats got what was called the colored cabin, under the ladies' cabin; that this regulation in regard to carrying colored persons is well known; that they are never carried in any other way; that since the war he has had the Quitman, the Grey Eagle, the Gov. Allen, the Belle Lee, the Pargoud, the Magenta, the R. E. Lee, and the Katie, all first-class boats, with the exception of the Grey Eagle, and she was a comfortable passenger-boat; that this regulation of keeping the colored and white passengers separate is well known to the traveling community, and is for the protection of their business; that white people would not travel on a boat if they knew negroes were put in the same cabin with them, or even that they had stayed in the same state-rooms where the white people would have to sleep after them, the prejudice in the public mind being so strong; that

the colored passengers are treated the same as the white; they
 307 have the same food and attention, get their meals at the same
 time, and have servants to wait upon them; that the Gov. Allen
 has a very comfortable bureau, and as good rooms as she has got above;
 there are some twelve or fourteen of them, and some very large ones;
 that he has never known any boats to put negroes in the cabin, or at
 the white table; that they could not get along without observing this
 rule strictly; that the Lee generally carries from 30 to 230 or 300 pas-
 sengers—has generally from 70 to 80 and 100; supposes about a third
 of them colored.

Capt. John G. Benson, the defendant, states, in substance, that he has
 been steamboating off and on since 1848, and for the last three or four
 years has been running in the New Orleans and Vicksburg trade; that
 the clerk of the boat came to him after the boat had backed out and said
 there was a woman on board of the boat disposed to make a little trouble
 if she could; that she was registered to get off at Hermitage
 308 Landing; that the passage of a white person to that landing was
 \$7 and a colored person \$5; that there is a regulation on his boat
 to keep the white and colored people separate, by having a cabin for
 the colored people separate from the white; that this is a regulation
 prevailing on the river; that the object of it is to protect a person in his
 business; that if a person adopted any other, and allowed negroes to
 occupy rooms in the main cabin, he would not carry any other people;
 that this regulation is for the accommodation of the traveling public;
 that the average colored travel is from a fourth to a fifth of the white;
 that this regulation of keeping the colored people separate from the
 white is well known to the travelling community; that it has prevailed
 on the river since he has been on it; that he has a colored cabin on the
 steamer Governor Allen, called the "bureau," where they get
 309 precisely the same attendance, food, and accommodation as the
 white passengers, and are charged from a fourth to a fifth less.

A large number of witnesses were examined, and they all concur as
 to the universality of the regulation or custom prevailing on all the
 boats navigating the waters of the Lower Mississippi; that white and
 colored passengers are accommodated in separate apartments; and they
 state that this rule or custom was well known to the travelling public
 generally.

This regulation was known to the plaintiff; her counsel went to the
 clerk of the boat before the hour of departure to endeavor, in her case,
 to get him to vary from that custom, and to allow her to travel in the
 same cabin with the white passengers. This request was peremptorily
 refused.

About the time, however, the boat was backing out, the plaint-
 310 iff came aboard; and being refused accommodation in the white
 cabin, she remained in the room known as the recess, in the rear
 of that cabin, during the trip, refusing to accept the accommodations
 tendered her in the colored cabin.

Just before arriving at her place of destination, (the Hermitage Land-
 ing,) the plaintiff went to the office and settled her fare, paying five dol-
 lars, the usual charge for colored passengers, the rate for white pas-
 sengers being seven dollars. Now the question is, when the plaintiff
 went aboard the Governor Allen as a passenger in July, 1872, what
 was the implied contract arising between her and the boat, or the de-
 fendant, the captain?

Was the implied contract the securing of a passage in the white or
 colored cabin?

In my opinion the contract was made in reference to the custom of that boat and all others carrying white and colored passingers. 311 Entering that boat as a colored passinger, in view of the well-known regulation referred to, the plaintiff tacitly consented to take accommodation in the colored cabin. And the obligacion of the defendant was to furnish her as good a room and as good fare, in that apartment, as he gave to any passenger on the boat.

Now, the complaint is not that the accommodation in the colored cabin was not as good as it was in the white cabin, (and the proof is, there was no difference in the comforts of the two apartments,) but it is because there was a discrimination on account of color, and the plaintiff was denied entertainment in the same cabin with the white passengers.

The basis of plaintiff's action is a breach of contract, and on account thereof, she claims damages to the amount of seventy-five thousand dollars.

312 But the difficulty in her case is, she had no contract for passage in the same cabin with the white passingers, and being excluded therefrom, there was no breach of contract on the part of the defendant, and consequently there is no ground either for the amount of damages claimed by her or for the amount of \$1,000.00 awarded by the court a qua.

If the clerk of the boat, when applied to by the counsel of the plaintiff, had consented to give the plaintiff accommodation in the white cabin, and afterwards refused to allow her to occupy the same, there would be a strong case in favor of the plaintiff to claim damages for breach of contract; and the authorities relied on by plaintiff with so much confidence, to wit: *St. Armand vs. Lizardi*, (4 L., 244,) and *Keene vs. Lizardi*, (5 L., 431, and 6 L., 319,) would be applicable. Those authorities 313 and that of *Chamberlain vs. Chandler*, (3 Mason, 142,) are correct expositions of the law most eloquently expressed, in regard to the responsibility of owners for the breach of duty by their officers, showing that they are responsible even for the mental suffering occasioned by the injustice & disrespectful and brutal conduct of said officers.

I fully endorse what is said in those cases, believing that part of the contract between the passinger and the boat or its owners is an implied stipulation for the good conduct and proper behavior of their officers.

If there is a breach of contract in this respect or any other respect, damages may be claimed on account thereof.

If there be a breach of contract in the case at bar, of course the plaintiff can claim damages. But if the custom or regulation in regard to the mode of carrying colored passingers to which I have referred 314 be not unlawful, on entering the boat as a passinger the plaintiff impliedly accepted the defendant's offer to carry colored passingers in pursuance of that regulation, and she impliedly consented to take accommodation in the colored cabin. The defendant held himself out as prepared to take colored passengers, subject to a certain regulation universally prevailing on all boats navigating the waters of the Lower Mississippi; and when a colored passenger entered his boat, the *Governor Allen*, the implied contract was that his passage should be in the colored cabin.

When a white passinger entered it, the implied agreement was that he should be accommodated in the white cabin; and if denied accommodation in the colored cabin, he could not claim damages for breach of contract.

It was the duty of the defendant, however, to provide suitable accom-

modations and to make each cabin equally comfortable; and this
315 he is shown to have done.

In conclusion, I maintain there was no breach of contract, if the regulation of the boat was not unlawful, because that regulation formed part of the implied contract which arose between the plaintiff and defendant in July, 1872, when she entered the boat as a passenger. Laying out of view the enactments of Louisiana, which are not applicable to boats engaged in commerce between the States, I find nothing in the common law, which is the law of the United States, prohibiting boats from making regulations for the common benefit of all the passengers, from separating the white and the colored into different apartments, giving to each equal accommodations.

This custom or regulation is proved to have existed at least for the last thirty years, and perhaps ever since the American people
316 commenced to navigate the Mississippi River.

Congress, which alone has authority to regulate commerce among the several States, has not seen proper to enact a law making this custom or regulation unlawful, although the subject in the shape of the civil-rights bill has been lately under its consideration.

Until the lawgiver speaks, it is our duty to be silent.

For this State to interpose its enactments, and for this court to apply them, to a subject solely confided by the Constitution of the United States to Congress, is a glaring usurpation of authority.

For the reasons stated, I deem it my duty to dissent in this case.

Extract from the minutes, Monday, April 6, 1874.

The court was duly opened, pursuant to adjournment.

317 Present, their honors John T. Ludeling, chief-justice; and James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

MRS. JOSEPHINE DECUIR }
vs. } No. 4829.
JOHN G. BENSON. }

Appeal from the 5th dist. court for the parish of Orleans.

It is ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

(Mr. Justice Wyly, dissenting, read a separate opinion of this case.)

Petition & argument for rehearing.

Filed April 17, 1874.

(Signed)

M. P. JULIAN, *D'y Clerk.*

JOSEPHINE DECUIR, APPELLEE, }
vs. } No. 4829.
JOHN G. BENSON, APPELLANT. }

318 Appellant prays the court to grant him a rehearing in this case; and, in support of this application, his counsel respectfully submit the following argument.

We rely and insist upon all the matters of defense set up in the pleadings, and urged in our original brief and oral argument; but we limit this argument to one single point, because it seems so plain and so conclusive, that we presume it must have been overlooked by the court in the pressure of business.