Company is not the owner of any of the telephone patents, but only a licensee. Whatever claims that company had in the patents were transferred by it to the National Bell Telephone Company under the contract of November 10th, which provided that thereafter the telegraph company should have the exclusive use of the telephone for purposes of telegraphy. But the enforcement of this part of the contract would violate the rule that, when the use of a patented device is thrown open to the public, or to classes of the public, all are entitled to use it on the same terms as others in the same class; and, therefore, any contract or agreement which would effectually evade the rule must be declared void as being against public policy, both at common law and by statute.

The authorities referred to by the counsel for the respondent to support their theory, that a patentee can control the use of his patent, are specially applicable to patents and patented articles designed for private use. In the Vermont case, *supra*, (17 Atl. Rep. 1071,) the distinction between the law governing the private use of a patent and the law governing its public use is briefly but clearly stated, and it was there said:

"Patents are property, and the right to sell or lease them is subject to the same restrictions as other property. The patentee cannot lease them for any use that contravenes principles of public policy. If he leases them for a public rather than an individual use, he thereby gives the use to the whole public. In this case the American Bell Telephone Company might have licensed its patent to the defendant so the latter alone could have used it; but when it went beyond this, and licensed the defendant to use it for the public, it in fact licensed it for all who desired its use, and offered compliance with reasonable conditions."

That decision was rendered in 1889, and is the most recent one of the adjudications on the questions now under discussion which have been brought to our notice. The decisions of the courts in Pennsylvania, Maryland, and Indiana were made with reference to the statutes of those states which had been enacted for the regulation of telephone companies, limiting charges and prohibiting discriminations; but there is a concurrence of opinion in the conclusion that those companies are subject to the common-law rules which pertain to all common carriers. In Nebraska and Vermont, in the absence of any general statutes on the subject, the courts have held the same doctrine.

The final position taken on behalf of the respondent is that, under the decision of the supreme court of the United States, in the *Express Cases*, reported in 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, the contract of November 10, 1879, is valid, and should be sustained. Those cases grew out of the applications of several independent express companies to compel certain railroad companies to carry their express matter and express agents. The applications were granted by the court below, but, on appeal, the supreme court held that the railroad companies were not required, by usage or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled, and that the use of the lines might be given to one or more express companies, or withheld altogether. The evidence showed that the business between the railroad companies and

the express companies had always been the subject of special contracts, which regulated the rates to be charged, and contained stipulations for the termination of the contracts. It also appeared that, with very few exceptions, only one express company had been allowed by a railroad company to do business on its road at one time. Chief Justice WAITE, in delivering the opinion of the court, said:

"The reason is obvious why special contracts in reference to this business are necessary. The transportation is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employe of the express company, it is important that a certain amount of car space should be especially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is express, it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. * * * The car space that can be given to the express business on a passenger train is, to a certain extent, limited; and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. * * * On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided."

The reasons assigned for the decision in the *Express Cases* do not apply, even remotely, to the right of telephone companies to make discriminations by special contract in the transmitting of messages. In the first place, the relator is not asking for any special accommodation or service from the respondent, but for such facilities only as are given by the latter to the general public and to the Western Union Telegraph Company. These facilities are now actually furnished to other common carriers of every kind excepting telegraph companies, and the respondent is requested to do nothing more for the relator than it does for all of its patrons and subscribers. For want of a sufficient rolling stock, a railroad company may be unable to accommodate more than one express company on a single train. A telephone company is not prevented by any deficiency of appliances or of instruments from giving the same service to all, and, finally, it is not claimed by the respondent that it cannot serve the relator in like manner as it does others without inconvenience or delay to the public.

From the foregoing review of the law, it follows that the respondent is a common carrier which has offered to the public the use of a telephonic system for the rapid conveyance of oral messages from one point to another; that one of the most important duties of a common carrier is that it shall serve all persons alike, impartially, and without unreasonable discrimination; and that the performance of this duty cannot be avoided by a special contract made between the respondent or its licensor and one or more persons for the exclusive use of the system, such contract being void as against public policy; and that a patented device or

devices, when employed for a public use, or by a common carrier in the prosecution of its business, will be subjected to the rules and regulations which govern unpatented property under the same circumstances. The reasons assigned by the respondent for its refusal to furnish the relator with a telephone are therefore insufficient, and it is ordered by the court that the writ of *mandamus* be awarded.

LAU OW BEW *v.* UNITED STATES.[1]

(Circuit Court of Appeals, Ninth Circuit. October 7, 1891.)

CIRCUIT COURT OF APPEALS—CERTIFYING CASE TO SUPREME COURT—CONTROLLING DECISION—CHINESE.

The decision of the United States supreme court in *Wan Shing* v. *U. S.*, 140 U. S. 424, 11 Sup. Ct. Rep. 729, that no Chinese merchant formerly residing in the United States, but temporarily absent therefrom, is entitled to return without presenting the certificate prescribed by section 6 of the exclusion act, (22 St. c. 126,) is conclusive upon the circuit court of appeals, and that court will not certify a like case to the supreme court for instructions.

Appeal from circuit court. 47 Fed. Rep. 578.

Petition by Lau Ow Bew for *habeas corpus*. The petitioner is a Chinese merchant, who came to the United States under the treaty entered into between the United States and China on the 28th day of July, 1868, which treaty is commonly known as the "Burlingame Treaty," and he established his domicile therein, and continued to reside in the United States until the 30th day of September, A. D. 1890, when he departed for China on a temporary visit to his relatives, with the intention of returning to this country as soon as possible, and did in fact return hereto on the 11th day of August, A. D. 1891. For 17 years prior to his departure to China he had been a resident of the city of Portland, in the state of Oregon, and had carried on a wholesale and importing mercantile business therein, under the firm and style of Hop Chung & Co. This firm is worth the sum of $40,000 over and above its debts and liabilities, and the petitioner has a one-fourth interest therein, in addition to other properties. The firm does a business annually of $100,000, and pays annually to the United States government large sums of money, amounting to many thousands of dollars, as duties on imports. At the time of petitioner's departure for China he procured satisfactory evidence of his *status* in this country as a merchant, and on his return hereto he presented said evidence to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs, and admitting that the petitioner was a merchant domiciled in this country, refused to permit him to land, on the sole ground that he failed and neglected to present to the collector the certificate of the Chinese government, mentioned in section 6 of the act entitled "An act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, as

[1] For *certiorari* from supreme court, see 12 Sup. Ct. Rep. 43.