In re WONG YUNG QUY.

(*Circuit Court, D. California.* February 5, 1880.)

HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS—UNCONSTITUTIONAL STATE STATUTE.

Under Rev. St. U. S. § 752, which authorizes judges of the supreme court and of the district and circuit courts to grant writs of *habeas corpus*, and section 753, which provides that the writ shall not extend to a prisoner in jail, unless, among other cases, he is in custody in violation of the constitution, or of a law or treaty of the United States, such judges can on *habeas corpus* inquire into the legality of imprisonment by judgment of a state court under a state statute alleged to be in violation of the constitution and of a treaty of the United States.

Application for Writ of *Habeas Corpus*.

George E. Bates, *J. M. Rothchild*, and *M. S. Horan*, for petitioner.

Jo Hamilton, Atty Gen., and *Crittenden Thornton*, for respondent.

Before SAWYER, Circuit Judge.

SAWYER, J. The petitioner, a subject of the empire of China, having been convicted of a misdemeanor committed in removing a dead body of one of his countrymen from the place of interment without a permit, contrary to the provisions of "An act to protect public health from infections caused by exhumation and removal of the remains of deceased persons," passed by the legislature of California, April 1, 1878, (St. 1877–78, p. 1050,) was sentenced to pay a fine of $50, and in default of payment to be imprisoned for a period of 25 days. Failing to pay the fine, and having been committed to prison, he sued out a writ of *habeas corpus*, and asked to be discharged on the ground that the said act of the legislature of California was passed in violation of the fourteenth amendment of the national constitution and of the Burlingame treaty; and that it is, therefore, void. Crittenden Thornton, Esq., and the attorney general of California representing the state, appearing as counsel on the part of the respondent, raise a preliminary objection that the court has no jurisdiction, in the case of a party held in custody by virtue of a judgment of a state court, to inquire upon *habeas corpus* into the validity of the judgment under which he is held, where the judgment is regular in form upon its face. It is insisted that the state court had jurisdiction to determine the validity of the statute; and, having determined it, the determination is conclusive in all other proceedings, except upon writ of error from a court having appellate jurisdiction to revise the action of the court below. A very able and exhaustive argument has been filed in support of the objection taken to the jurisdiction, the only question as yet submitted for decision. Section 752 of the Revised Statutes provides that the justices and judges of the United States courts, "within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." This section is general and unlimited in its terms. But section 753 limits the cases in which the writ may be issued, and provides, among other cases, that "the writ of *habeas corpus* shall in

no case extend to a prisoner in jail, unless where he * * * is in custody in violation of the constitution, or of a law or treaty of the United States." Under these provisions it seems clear that the writ may issue and the prisoner be discharged whenever he is "in custody in violation of the constitution or of a law or treaty of the United States." In this case it is claimed that the prisoner is in custody in violation both of the constitution of the United States and of a treaty between the United States and the empire of China; and whether he is in custody in violation of the constitution or treaty is the very question to be investigated. It is claimed, however, that the writ of *habeas corpus* must be confined to cases to which it is appropriate, according to established common-law rules relating to the writ, and that it cannot be used as a substitute for a writ of error to review a judgment of a state or other court having jurisdiction to inquire into the matter and adjudge the rights of the parties; that in this case the state court, rendering the judgment under which the petitioner is imprisoned, had jurisdiction under the state law to hear and determine the question of the validity of the statute under which the conviction was had, and having determined it, as held by Chief Justice MARSHALL in *Ex parte Watkins*, 3 Pet. 202, 203, affirmed in subsequent cases, the judgment, in its nature, concludes the subject on which it is rendered and pronounces the law of the case; and when the judgment is of a court of record, whose jurisdiction is final, it is as conclusive on all the world as the judgment of the supreme court of the United States would be; that it puts an end to the inquiry concerning the fact by deciding it; and that, when a judgment is not of a court of final jurisdiction, it can only be reviewed on writ of error by the court having appellate jurisdiction over its judgment. This position is undoubtedly correct in respect to cases of mere error in the proceedings. But the supreme court, in later cases, has drawn a clear distinction between cases in which the judgment is erroneous, but still valid until reversed; notwithstanding the error, and cases absolutely void, as being entered without authority of law, and erroneously because unauthorized and void. This distinction is established in *Ex parte Lange*, 18 Wall. 175. In that case the statute authorized an alternative punishment for the offense for which conviction was had, of imprisonment for not more than one year, *or* a fine not exceeding $200. The court inadvertently adjudged an imprisonment of one year and a fine of $200. After paying the fine the prisoner moved for his discharge on the ground that the further imprisonment was unlawful, as being in excess of the power of the court to adjudge. Upon the error being called to its attention, the court at the same term vacated the judgment and entered another judgment of imprisonment only. Being imprisoned under the latter judgment he sued out a writ of *habeas corpus*, and was thereupon discharged by the supreme court. Upon the point now under consideration, Mr. Justice MILLER, speaking for the court, said:

"A judgment may be erroneous and not void, and it may be erroneous because it is void. * * * We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, has fully suffered one of the alterna-

tive punishments to which alone the law subjected him, the power of the court to punish further was gone." The record "showed the court that its power to punish for that offense was at an end. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist. It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void." *Ex parte Lange*, Id. 176.

On the ground that the judgment was void for want of power, and not merely erroneous, the case was taken out of the rule claimed to be applicable to the present case, and the prisoner discharged. Mr. Justice CLIFFORD delivered an elaborate dissenting opinion, urging the principle and citing the authorities now relied on in this case. Thus the court established a distinction between judgments erroneous and not void, and judgments void as well as erroneous. And this distinction has since been recognized in several instances. Thus in *Ex parte Parks*, 93 U. S. 22, 23, the court says:

"From this review of the law it is apparent, therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should be at once remanded, if the court below had jurisdiction of the offense, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment. *Ex parte Kearney*, 7 Wheat. 39; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163. But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error."

So in *Ex parte Reed* (decided at the present term) the court, speaking through Mr. Justice SWAYNE, says, (100 U. S. 23:)

"A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the prisoner, the sentence under which he is held must be not merely erroneous and voidable, but absolutely void."

—Thus again recognizing the principle that if the judgment under which the prisoner is held be void as well as erroneous, he must be discharged on the writ of *habeas corpus*, and this involves the jurisdiction to inquire in such proceeding whether the judgment is void, or only erroneous and voidable. In *Ex parte Bridges*, 2 Woods, 429, Mr. Justice BRADLEY discharged a prisoner who had been convicted in a state court for the crime of perjury arising under a statute of the United States, on the ground that a state court has no jurisdiction of an offense created by an act of congress, and the judgment was therefore void. The jurisdictional

question on writ of *habeas corpus* was raised, upon which Mr. Justice BRADLEY observes:

"It is contended, however, that where a defendant has been regularly indicted, tried, and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the supreme court of the United States, and that it is too late for a *habeas corpus* to issue from a federal court in such a case. This might be so, if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case." *Ex parte Lange*, 18 Wall. 163.

In speaking of the effect of the present statute, quoted at the commencement of this opinion, the learned justice adds:

"In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, congress, by the act of February 5, 1867, extended the writ to *all cases* where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States, and made it issuable by the several courts of the United States, and the several justices and judges of said courts within their respective jurisdictions." 14 St. 385.

The present case clearly belongs to the last category. The relator was certainly restrained of his liberty in violation of the law of the United States. The statutes above cited are condensed in section 753 of the Revised Statutes of the United States. They have had the effect greatly to enlarge the jurisdiction by *habeas corpus* in the courts of the United States since the first enactment on the subject in 1789. They have removed all impediment to its use which formerly existed where the prisoner was committed under state authority, provided his imprisonment is contrary to the United States constitution or laws. Mr. Justice BRADLEY participated in the decision in *Ex parte Lange*, cited by him, and in this opinion, and would not be likely to misapprehend the extent to which it was intended to go. If the act of the legislature of California creating, or attempting to create, the offense for which the petitioner was convicted and for which he is held in custody, was passed in violation of any provision of the constitution, or of the provisions of a valid treaty with China, it is void, and does not, and cannot, confer upon the state court any authority whatever to adjudge the defendant guilty of the offense charged, or to imprison him therefor. The judgment in that event is void, not merely voidable. The judgment is no more conclusive than that in the *Case of Lange*. In that case the court had jurisdiction of the subject-matter and the person. It had authority to determine whether it had exhausted its power or not. But having wrongly determined that its power had not been exhausted, this determination was held not to be conclusive, and the question was re-examined and the prisoner discharged on *habeas corpus*. The *Case of Bridges* is similar, and this case is also like those cases in this respect; and like the instances cited in *Lange's Case* of a justice of the peace having jurisdiction to fine only, but adjudges that the prisoner be hanged. It is said the judgment is void, because the justice has no power to render such a judgment, and the

judgment against Lange was held to be void, because the power of the court had been exhausted, and there was no law authorizing any further judgment. So, in this case, if the statute under which the prisoner was convicted and held is void, it is no statute. It is no more effective than a piece of blank paper. If no statute, then there is no statute authorizing the conviction, and the court acted without any authority whatever. His judgment is no more effective than it would have been had the statute never been passed, and the conviction been had without any act upon the subject. If the act in question is void, then there is no law creating the offense for which the prisoner is convicted, and there is nothing over which the court had jurisdiction. It is said, further, that if this act is unconstitutional, the restraint of the petitioner's liberty is not "in violation of the constitution," in the sense of the statute, because there is no express inhibition in terms against the passage of such a law. Mr. Justice BRADLEY did not take this view in *Bridges' Case*, for he says: "The present case clearly belongs to the last category. The relator was certainly 'restrained of his liberty in violation of a law of the United States.'" 2 Woods, 432. Yet there was no more an express prohibition in that case than in this. The state court simply undertook to punish an offense against the United States. There was an offense committed, but it was an offense against another sovereignty. There was no offense of which that court could take cognizance. So in *Lange's Case* there was no express prohibition against inflicting both punishments. The provision simply authorized alternative punishments, and the prohibition was not express, but only inferred from a want of a provision expressly authorizing both punishments. I am satisfied, under these authorities, that this court has jurisdiction upon *habeas corpus* to inquire into the validity of the state statute under which the prisoner was convicted, and if found void, that the judgment as rendered in pursuance of its provisions is also void, and the prisoner entitled to his discharge. The case will, therefore, be retained for the purpose of this inquiry; and the motion to dismiss for want of jurisdiction to examine the case is overruled. Counsel will argue the case upon the merits as to the constitutionality and validity of the act and validity of the judgment.

In re TOM MUN.

(*District Court, N. D. California.* August 21, 1888.)

CHINESE—RESTRICTION ACT—RE-ENTRY OF LABORER—EVIDENCE OF IDENTITY.

A Chinese laborer, claiming to be one Tom Mun, who left the United States before the passage of the restriction act, (Act Cong. May 6, 1882,) showed by the books of a steamer that Tom Mun sailed from this country March 15, 1882, and also by the books of a shoe factory that an employe of that name had been paid off a few days prior to that date. A white Chinese collector testified that he knew such laborer at the shoe factory as Tom Mun, and "guessed" that he left in 1878 or 1879. Chinese witnesses also testified as to his identity. It appeared, however, that the court had already allowed another person to re-enter the United States as the Tom Mun mentioned. *Held*, that the identity was not established, and such laborer was not entitled to land.

Petition for Writ of *Habeas Corpus* to release a Chinese laborer and permit him to enter the United States.

Thos. D. Riordan, for petitioner.

John T. Carey, U. S. Atty.

HOFFMAN, J. The petitioner claims to be entitled to land on the ground commonly known as "previous residence." He adduces the usual proofs tending to show that he left the United States on the 15th of March, 1882. The company's books are produced, showing that one Tom Mun paid his dues, and departed on the steamer Oceanic, which sailed on that date. Books also are produced from the shoe factory in which he claims to have been employed, which contain his name among those of the employes paid off a few days previous to the date of his alleged departure. He also produces one F. H. Martin, who testifies that he was a Chinese collector; that he knew the petitioner at the shoe manufactory mentioned, and he "guesses" he went away in 1878 or 1879, since which time he has not seen him. This discrepancy between the testimony of the petitioner and his only white witness is explained by the attorney for the petitioner by the suggestion that the date fixed by Martin is "as close as a white man could fix the departure of a Chinaman in whom he had no interest or business connection." This observation may be just, but it is also evident that the witness who made a mistake of three or four years as to the date of the departure may be equally mistaken as to the identity of the person whom he pretends, or perhaps thinks, he saw working in the shoe factory. It unfortunately happens, however, that it appears by the company's books produced by the petitioner that another Tom Mun, who claimed to be the party mentioned in the Six Company's book, was landed by the court. That entry has been canceled, affording certain proof that it has been used by the first Tom Mun, and successfully. The attorney for the petitioner, who was also the attorney of the first Tom Mun, is thus compelled to admit, and even to contend, that the first Tom Mun was landed by means of perjured testimony and false personation; but he insists that the present Tom Mun is the true owner of that name, and that he ought to be landed, notwithstanding the fraud previously practiced upon the court.

The circumstances of this case afford another instance of the perjuries and frauds committed in these cases, and of which the court has unfortunately been too often the dupe. Whether the present applicant is Tom Mun, or whether the real Tom Mun was the man heretofore landed, or whether either of them is the owner of the name, it is impossible to determine. It may be that a third Tom Mun will hereafter present himself, and the court will be asked to believe that the testimony in both these cases is false, and that the true and genuine Tom Mun is Tom Mun No. 3, who may hereafter make his appearance. When a Chinaman claims to be landed on the ground of previous residence, the burden of proof is upon him to show to the satisfaction of the court that he was in this country at the date of the treaty, and that he departed before the act of 1882 went into operation. If he fails to do so, he must, of course, be remanded. In this case I am unable to reach any satisfactory conclusion as to which of these Tom Muns, if either of them, is the person whose name is entered in the company's book. It is highly probable that somebody of that name did depart for China at the time specified, but whether the present petitioner or his predecessor of the same name is the man, depends entirely upon Chinese testimony, which was presented to the court in the first case with as much plausibility as the present case. I think that the petitioner has failed to establish his right to land, and must therefore be remanded.

UNITED STATES *v.* SIMMONS.

(*Circuit Court, S. D. New York.* October 21, 1891.)

BAIL PENDING APPEAL TO SUPREME COURT—NOT ALLOWED WHEN COURT IN SESSION. Defendant was convicted of embezzlement, and sentenced to six years' imprisonment. He appealed to the supreme court, and an order was made admitting him to bail. Bail was not procured for four months, and, when it was finally offered, the supreme court was in session. *Held* that, since the confinement of a party is good cause for advancing his case on the supreme court docket, the bail should be refused until such an application has been made, as the public interest requires a speedy disposition of the cause.

At Law. Indictment for embezzlement. On application to be admitted to bail.

Edward Mitchell, U. S. Dist. Atty., and *John O. Mott*, Asst. U. S. Dist. Atty.

Charles Donohue, for defendant.

BENEDICT, J. The defendant in this case, having been convicted of aiding and abetting in an embezzlement of the funds of the Sixth National Bank, was, on June 26, 1891, sentenced to be imprisoned for a term of six years in the Erie county penitentiary. On the same day an order was made admitting him to bail in the sum of $50,000. There-

after he presented for acceptance as his bail Jacob B. Tallman and Cornelius H. Tallman. These persons were, on the 1st day of September, 1891, rejected by the court, because of the fact that they were indemnified against any loss by reason of their becoming bail for the defendant. Now, on this 18th day of October, 1891, the same persons are presented for acceptance as bail, each one having made affidavit that he has surrendered the agreement in regard to indemnification which he had, and is not now in any way indemnified against any loss he may sustain by reason of being bail for the defendant. These affidavits, not being contradicted, are sufficient to remove the objection heretofore taken to these persons as bail; but, notwithstanding this, it is my duty to decline at this time to accept these, or any other persons, as bail for the defendant, for this reason: The supreme court of the United States, before which court the defendant's appeal is now pending, is now in session, and the fact that the defendant is in confinement affords good ground for an application to that court to advance the defendant's case, and I do not doubt that such an application, if made, would be granted. In this way, an early decision of the case can be secured. The rules of the supreme court of the United States (rule 36) permit persons convicted, when they appeal to the supreme court of the United States, to be admitted to bail; but leave the question of admitting to bail to the discretion of the court below. It being, therefore, a matter of discretion, it is, in my opinion, a proper exercise of that discretion to refuse to accept bail in a case like this, where the defendant has been, since June last, under a sentence, to be imprisoned for a term of six years, and no sufficient bail has been presented until this late day, when, as it must be assumed, a decision on his appeal can be secured at an early day. At the circuit, bail tendered when the trial is about to proceed has often been declined, and, as it seems to me, the public interest requires that a person, who upon a trial has been convicted of crime, and is under a sentence, the execution of which is stayed by his appeal to the supreme court of the United States, should not be discharged on bail when the supreme court is in session, and it lies within his power to procure a speedy decision upon the appeal which he has taken to the court.

For these reasons, the bail now presented are not accepted, but leave is given to the defendant again to present them for acceptance, upon showing that an application to the supreme court to advance his case has been made by him, and refused by the court.

PEORIA TARGET CO. *v.* CLEVELAND TARGET CO. *et al.*

(*Circuit Court, N. D. Ohio, E. D.* May 27, 1890.)

1. PATENTS FOR INVENTIONS—NOVELTY—INVENTION—TARGETS.
The claim of letters patent No. 334,782, granted January 26, 1886, to Fred Kimble, for an improvement in making targets, which is alleged to have been infringed by defendants, is for "the process of making targets which consists in mixing with melted pitch a quantity of either plaster of Paris or whiting, and then pouring the composition so formed into suitable moulds." Letters patent granted to one Woodward, March 9, 1880, cover the same ingredients and the same process, with the sole difference between the products that Woodward's was intended to be strong while Kimble's was to be fragile; the result in the latter case being obtained by varying the proportions as might be necessary. *Held* that, as this required only "the accepted skill of the calling," it involved neither invention nor discovery, and hence Kimble's patent is invalid.
2. SAME—NOVELTY AND UTILITY—EVIDENCE.
The speedy and general adoption by the public of a patented device is not conclusive on the question of novelty and utility, where it can be accounted for on grounds peculiar to the course of trade; nor can such adoption ever sustain a patent in which the court fails to find invention.

In Equity. On bill for infringement of patent.
Poole & Brown, for complainant.
Webster & Angell, for defendants.

RICKS, J. This suit is for infringement of letters patent 334,782, granted to Fred Kimble, January 26, 1886, for a new and useful improvement in making targets. Prior to January 11, 1888, the patentee, Kimble, sold and conveyed to complainant all his right, title, and interest to said patent, and all rights of action thereunder, which assignment was duly recorded in the patent-office. Kimble's claim is stated in his application as follows:

(1) As a new article of manufacture, a target composed of pitch and plaster of Paris or whiting, in the proportion specified. (2) The process of making targets, which consists in mixing with melted pitch a quantity of either plaster of Paris or whiting, and then pouring the composition so formed into suitable moulds, substantially as described.

He says his invention "relates to that class of targets known as 'clay pigeons,' 'blackbirds,' and the like, made usually of clay or other fragile material, and adapted to be thrown through the air from a suitable trap to be shot at by marksmen, and has for its object the production of a target which will be fragile, so as to be readily shattered when struck by a pellet of shot, to which it may be subjected, and which will be cheap." He then describes the process of making the target from pitch and plaster of Paris. The proportions are not limited. He says he adds to each 100 pounds of pitch from 25 to 75 pounds of plaster of Paris, and mixes the ingredients while heated. The quantity of plaster of Paris or whiting used depends upon the amount of oil remaining in the pitch after boiling. He says he uses either plaster of Paris or whiting, at will. The patent is on the composition of which the target is made.

The defenses are several: (1) That the target described by Kimble in his patent is not novel, and the process described in his second claim