

prosecuted. In view of the duty imposed upon a sheriff by the Code of Virginia, and the necessary and incidental power conferred by the imposition of that duty, and the marshal, by section 788 of Revised Statutes of the United States, having the same power, the petitioner had a right, when he suspected the Nelsons of violating the revenue laws of the United States, to make of them, or other persons, all proper inquiries as to such violations of law; and being a conservator of the peace, like a sheriff, it was his duty to do so, and in doing so he was acting in the line of his duty. So the court is of the opinion that, under the facts presented in this case, whether it was the purpose of the petitioner to arrest the deceased and his brother, or to make inquiries of them with a view of ascertaining whether they were or had been engaged in violating the internal revenue laws, he was acting within the scope of his authority, and that the circuit court of the United States has jurisdiction of the prosecution instituted against him in the state court, and that the petitioner has a right to have the same removed into the circuit court for trial. Counsel for the petitioner claims that, under the evidence, he is entitled to an absolute discharge. The court does not care at this time to enter into a discussion of the facts as shown by the evidence on which this demand is based. For the present it contents itself with saying that it deems it its duty not to discharge the petitioner. He will be allowed bail in the sum of \$1,000 to appear before the United States circuit court at its next regular term at Abingdon.

CARICO *v.* WILMORE, County Jailer.

(District Court, W. D. Virginia. May 14, 1892.)

1. APPEALABLE ORDERS—HABEAS CORPUS.

A district judge, in vacation, allowed a writ of *habeas corpus* for the person of a deputy marshal in custody under state process, and, after hearing, entered an order finding that the petitioner was in custody for an act done in pursuance of a law of the United States, that he had a right to have the prosecution against him moved to the federal circuit court, and therefore held him to bail for his appearance before that court. *Held*, that this was a final order, from which an appeal would lie to the United States supreme court.

2. SAME.

The writ of *habeas corpus* allowed by the district court was not the writ provided for in Rev. St. § 643, in cases of removal of a prosecution against a revenue officer from a state to a federal court, which writ is issued by the clerk of the circuit court after the filing of the petition for removal, and therefore was not merely ancillary to a petition for removal which was filed in the circuit court the day after the writ was allowed.

Petition for Leave to Amend an order made after hearing on *habeas corpus*, so as to allow an appeal therefrom to the supreme court. Granted.

On the 18th day of December, 1891, petitioner presented his petition to the judge of the district court, in vacation of the court, alleging that he was unlawfully detained in custody by the respondent on an alleged

charge of murder in killing one James Nelson, and alleging that the killing of said Nelson was no murder, but was done in petitioner's own necessary self-defense, while in the discharge of his duties as deputy marshal in enforcing the internal revenue laws of the United States, and praying for a writ of *habeas corpus cum causa*, and also alleging that he had a right to be tried in the circuit court of the United States for said alleged offense. Upon this petition the judge of the district court made the following order:

"In the District Court of the United States for the Western District of Virginia, in Vacation.

"Upon the petition of Joseph H. Carico, stating that he is illegally detained in custody by W. D. Wilmore, the jailer of Smyth county, Virginia, a writ of *habeas corpus* is granted him, directed to the said W. D. Wilmore, jailer of Smyth county, Virginia, commanding him to have the body of the said petitioner, Joseph H. Carico, before the judge of this court on Wednesday, the 23d day of December, 1891, at 10 o'clock A. M., at Abingdon, Virginia, together with the day and cause of his caption and detention.

"JOHN PAUL,

"U. S. District Judge for the Western District of Virginia.

"December 18, 1891."

On this order a writ of *habeas corpus* was issued, returnable to the 23d day of December, 1891. On that day respondent filed his return to said writ, as follows:

"To the Hon. Judge Paul, Judge of the District Court of the United States for the Western District of Virginia: W. D. Wilmore, keeper of the jail of Smyth county, to whom the within writ is directed, has now here before the court the body of Joseph H. Carico, therein named, as thereby commanded; and I certify that the cause of the detention of said Joseph H. Carico is a warrant of commitment directed to me, a copy of which is hereto annexed, marked 'Exhibit A,' and the proceedings of the county court of Smyth county and the commonwealth of Virginia, marked 'Exhibit B,' and made part and parcel of this return.

"Dated this 23d day of December, 1891.

"W. D. WILMORE, Jailer of Smyth Co., Va."

Upon this return petitioner was admitted to bail, and the further hearing of the case continued to the 8th day of January, 1891, and at a special term of the district court begun on the last-named day at Abingdon, Va., the court heard the evidence in the case, and on the 12th day of January, 1892, entered the following order:

"It appearing to the court that petitioner is in custody for an act done in pursuance of a law of the United States, and is held in custody contrary to law by the jailer of Smyth county, Virginia, and that he has a right to have removed into the circuit court of the United States for the western district of Virginia the prosecution pending against him in the county court of Smyth county, Virginia, it is therefore ordered that the petitioner be recognized in the sum of one thousand dollars for his appearance before the circuit court for this district on the first day of the next regular term thereof to answer the indictment found against him by a grand jury of the county court of Smyth county, Virginia."

F. S. Blair, for petitioner.

A. M. Dickenson, for respondent.

PAUL, District Judge. No appeal having been taken to this order by respondent at the time it was entered, he now asks leave at this, the first term of the district court since the special term at which said order was entered, to amend the same, and grant him an appeal to the supreme court of the United States. Petitioner objects to said order being amended as prayed for, on the ground that an appeal lies only from a final decision, and that the order of January 12, 1892, taking petitioner from the custody of respondent, and holding him to answer the indictment to the United States court, is not such a final order as would give respondent the right to appeal; and on the further ground that respondent has no right of appeal, even if the said order be regarded as final. The court does not concur in these objections. It thinks the order releasing petitioner from the custody of respondent, and placing him in the custody of the marshal, and holding him to answer in the circuit court of the United States the indictment found against him in the county court of Smyth, is as final, as far as the respondent is concerned, as if the order had been for the absolute discharge of the petitioner from the custody of respondent. In the argument counsel for the petitioner claimed that no case can be found in the reported decisions of the United States court where such an appeal has been allowed to respondent. This position is incorrect. Such an appeal was allowed to the sheriff of San Joaquin county, Cal., in the case known as the *Neagle Case*, 135 U. S. 1, 10 Sup. Ct. Rep. 658. Such an appeal was also allowed in the case of *Brimmer v. Ribman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213; and no doubt other decisions might be found to the same effect.

Nor is the position taken by counsel for the petitioner correct that the writ of *habeas corpus* was merely ancillary to the petition for the removal of the case of *The Commonwealth of Virginia v. Joseph H. Carico* from the county court of Smyth county, Va., to the circuit court of the United States. It was a distinct and different proceeding, held in a different court, and under a different statute. It was not taken under the provisions of section 643 of the Revised Statutes of the United States, as counsel for petitioner claims, in which case the writ would have been issued by the clerk of the circuit court as provided in said section. The writ was allowed by the district judge on the 18th day of December, 1891, whereas the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the circuit court until the 19th day of December, 1891. The court is of the opinion that the respondent in this case has the right to appeal to the supreme court of the United States, and the order will be amended accordingly.

MARSH v. QUICK-MEAL STOVE CO.

(Circuit Court, E. D. Missouri. April 25, 1892.)

1. PATENTS FOR INVENTIONS—ACTIONS AT LAW—JURY TRIALS.

The question of the construction of the claims of a patent is the province of the court, and does not rest with the jury.

2. SAME—CONSTRUCTION OF CLAIMS.

Where a claim of a patent reads, "In a gasoline stove," etc., and then enumerates a number of other elements, the words, "In a gasoline stove," will be understood as including the well-known essential elements of such stoves; and, to enable the plaintiff to recover, the other elements of the claim, or their substantial equivalents, must be all found in the defendant's stove.

3. SAME.

Where the claim of a patent contains, as an element, a commingling chamber capable of accomplishing two purposes, which are fully set forth in the patent, (such chamber being in addition to the commingling chambers common to all gasoline stoves,) and the defendant's stoves have only the ordinary commingling chambers, *held*, that the combination of the claim is not present in defendant's stove.

4. SAME—LICENSEE—COVENANT.

A licensee who covenants not to dispute the validity of a patent, under which he is licensed, will not be permitted to do so, but the burden is nevertheless on the licensor to show that the licensee has operated under his license, and, in the absence of such proof, the licensor cannot recover.

(Syllabus by the Court.)

At Law. Letters patent of the United States were issued to James A. Marsh, February 22, 1887, No. 358,284. On the 10th day of March, 1887, the Quick-Meal Stove Company took a license under the patent, agreeing to pay a stipulated royalty on all stoves made by the company under the Marsh patent. An action at law, under the license, was brought by Marsh to recover royalties upon certain stoves made by the Quick-Meal Company, which Marsh maintained came under his patent, while the Quick-Meal Company contended they did not. The claim of the patent involved reads as follows:

"1. In a gasoline stove, a retort, a commingling chamber, and a duct connecting said retort and said chamber, in combination with a side burner and a communicating pipe between the said chamber and the side burner, whereby ignited gas may be carried from one to the other, as and for the purpose set forth."

The defendant's stove contained only the ordinary commingling chambers, with a tube between the burners which communicated with one of the commingling chambers, and which served as an automatic lighting device between the burners. At the close of plaintiff's evidence, defendant asked the court to direct the jury to find for the defendant, on the ground that the plaintiff had not made out a *prima facie* case.

Fisse & Allen and Edward J. O'Brien, for plaintiff.

Geo. H. Lothrop, Geo. H. Knight, and Lubke & Muench, for defendant.

THAYER, District Judge, (*charging jury*.) I have given this case such an examination as I have been able to in the short time that has elapsed since the plaintiff closed his case, and I have come to the following conclusion: It is the province of the court to construe the claims of the

patent that has been offered in evidence. That construction, of course, is to be made in the light of such expert testimony as has been offered. In the Marsh patent the commingling chamber, D, is both described and claimed as a distinct and independent part (having special functions) of the combination covered by the first claim of the Marsh patent. The commingling chamber is provided with a separate needle valve marked on the drawing, C, to operate it, and both the commingling chamber and the accompanying needle valve seem to be necessary to enable the automatic lighting tube, F, to perform one of the functions that the inventor had in view; that is to say, the function of heating the side burner, K, for initial lighting purposes. Now, it may be true, and I think it is true, that the commingling chamber in the Marsh patent, with its valve, C, is a useless device; but the fact remains that it has been described with great detail, and is clearly claimed as an integral part of the Marsh combination or invention. His patent must accordingly be limited to a combination containing that part; that is to say, to a combination containing a commingling chamber in addition to the ordinary commingling chamber or chambers attached to the burners. In the Quick-Meal stove this separate and independent commingling chamber is wanting. It is obvious that the relighting tube in both modes of construction acts upon the same principle, and subserves the same purpose. In the Quick-Meal stove the tube is continuous from one light to the other, while in the Marsh stove it is broken, and passes the flame through the commingling chamber, and out through the small orifice that is marked *b'* on the drawing. But this concession does not alter the fact that Marsh has described and claimed a part not found in the Quick-Meal mode of construction. Having so described and claimed it, it becomes one of the necessary elements of his combination, though it is practically useless. The licensee, the defendant in this case, is not here alleging that the Marsh patent is void; that he could not do under his license. He simply says: "I have not used the patented device covered by my license;" and there is no evidence, in the opinion of the court, to show that he has used it. The result is that you, gentlemen of the jury, will be directed to return a verdict in favor of defendant. Plaintiff thereupon took a nonsuit with leave.

In re CORNING *et al.*UNITED STATES *v.* GREENHUT *et al.**(District Court, N. D. Ohio, E. D. June 11, 1892.)***1. MONOPOLIES—CRIMINAL LAW—INDICTMENT.**

An indictment under the act of July 2, 1890, relating to monopolies, averred that defendants, in pursuance of a combination to restrain trade in distillery products between the states and monopolize the traffic therein, acquired by lease or purchase, prior to the passage of the act, some 70 distilleries, producing three quarters of the distillery products of the United States, and that they continued to operate the same after the passage of the law, and by certain described means sold the product at increased prices. *Held*, that no crime was charged in respect to the purchase or continued operation of the distilleries, since there was no averment that defendants obligated the vendors of the distilleries not to build others, or to withhold their capital or experience from the business.¹

2. SAME.

The indictment further averred that defendants, in pursuance of the combination, shipped certain of the products to Massachusetts, and sold them there through their distributing agents to dealers, who were promised a rebate of five cents per gallon on their purchases, provided such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices, said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, that no crime was charged with respect to such sales, since there was no averment of any contract whereby the purchasers bound themselves not to purchase from others, or not to sell at less than list prices.

3. CRIMINAL LAW—FEDERAL COURTS—REMOVAL OF PRISONER.

On an application to a federal court for the removal of a resident of the district to a distant state and district for trial, it is the duty of the court to scrutinize the indictment, disregarding technical defects, but to refuse the warrant if the crime alleged is not triable in the district to which a removal is sought, or if the indictment fails to charge any offense under the law.

At Law. Indictment against Joseph B. Greenhut and others for violating the law against monopolies. Heard on application for a warrant to remove defendants to another district for trial. Denied and prisoners discharged.

Allen T. Brinsmade, Dist. Atty., for the United States.

Elihu Root, *Thos. Thatcher*, and *S. E. Williamson*, for defendants.

RICKS, District Judge. This cause comes before me upon the application by the district attorney for a warrant for removal to the district of Massachusetts of Warren Corning and Julius French, citizens of this judicial district, against whom is pending an indictment preferred by the United States in the district court for the district of Massachusetts. A certified copy of the indictment, together with the return of A. J. Williams, a United States commissioner for the circuit court of this district, that said defendants refused to give bail, and were by him committed, is filed. The defendants object to the granting of a warrant for removal, because the indictment does not charge an offense against the laws of the United States. Being residents and citizens of this judicial district, they

¹See *U. S. v. Greenhut*, 50 Fed. Rep. 469, for a decision in the district court of Massachusetts on motion to quash.