

at Nashville, Tenn., by the United States through its district attorney, and against an illegal coal monopoly, doing business under a combination clearly differing from this case, and manifestly illegal; and that company was enjoined from doing business, and the public in that suit protected against the high prices in coal which resulted from a contract held illegal under this act. If, therefore, the attorney general of the United States should deem it proper to further test the question of whether the business of the defendants in this case is a monopoly, or in restraint of trade, he may authorize such a civil proceeding to be instituted, and by such suit speedily secure an adjudication from the circuit courts as to the effect and scope of this act. Inasmuch as these defendants were legally engaged in this extended business before the act of congress was passed, it would be fair and proper to proceed against them first by such civil suit. The public would be better protected, and more promptly benefited, by such proceeding, because it could be speedily heard, and relief be effectually granted, by an injunction restraining such business, and destroying the monopoly, if such the court should adjudge it to be. The warrant for removal will therefore be denied, and the defendants discharged from further custody.

In re TERRELL.

UNITED STATES *v.* GREENHUT *et al.*

(Circuit Court, S. D. New York. June 28, 1892.)

1. CRIMINAL LAW—HABEAS CORPUS—JURISDICTION OF CIRCUIT COURTS—REMOVAL OF PRISONER.

Where a prisoner, arrested under warrant based upon an indictment in a distant state and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has authority on *habeas corpus* to examine such indictment, and to release the prisoner, if in its judgment the indictment should be quashed on demurrer.

2. ILLEGAL COMBINATIONS—CONTRACTS IN RESTRAINT OF TRADE—INDICTMENT.

An indictment under the act of July 2, 1890, relating to monopolies, averred in the fourth count that defendants, in pursuance of a combination to restrain trade in distillery products between the states, shipped certain whisky to Massachusetts, and sold it there through their distributing agents to dealers under a contract whereby said dealers were promised a rebate of five cents per gallon on their purchases, providing 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 dealers bound themselves not to purchase from others, or not to sell at less than list prices. *In re Corning*, 51 Fed. Rep. 205, approved.

Petition by Herbert L. Terrell for a writ of *habeas corpus*. Prisoner discharged.

Thos. Thacher and *Elihu Root*, for petitioner.

Edward Mitchell, Dist. Atty., and *Maxwell Everts*, Asst. Dist. Atty.,
for the United States.

LACOMBE, Circuit Judge. The petitioner was arrested in this district upon a warrant issued by a United States commissioner here. The warrant was based upon an affidavit, which was itself based solely upon the fourth count in an indictment found by the grand jury in the district court of the United States for the district of Massachusetts. The petitioner being in custody of the United States marshal to await the order of the district judge, under Rev. St. § 1014, for his removal to the district of Massachusetts, writs of *habeas corpus* and *certiorari* were issued, to which returns have been made. It is not disputed by the district attorney that it is not only the right, but the duty, of the district court, before ordering removal, to look into the indictment, so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge whose decision is thus reviewed, or under the warrant of the commissioner to await the action of the district judge. The later decisions of the circuit courts abundantly establish this proposition. *In re Buell*, 3 Dill. 116; *In re Doig*, 4 Fed. Rep. 193; *U. S. v. Brawner*, 7 Fed. Rep. 86; *U. S. v. Rogers*, 23 Fed. Rep. 658; *U. S. v. Fowkes*, 49 Fed. Rep. 50. This practice was followed in *Re Pallisser*, 136 U. S. 257, 10 Sup. Ct. Rep. 1034, and approved by the supreme court in *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending. Nor should the mere novelty of the points raised be held to preclude the court, before which comes the question of removal, from passing upon them, when it has no doubt as to how it would pass upon them if the cause were pending before it. If the questions are of such a character that it is thought desirable that the opinion of an appellate court should be obtained, such a proceeding as this is the more appropriate way in which to raise them, for a decision here adverse to the government is reviewable by appeal; but a similar decision on the trial is final, as the government cannot appeal from a criminal judgment. *U. S. v. Sanges*, 144 U. S. 310, 12 Sup. Ct. Rep. 609.

The points of-law arising upon this indictment were all carefully considered by Judge Ricks in his opinion (filed June 11, 1892, N. Dist. Ohio) on application for a removal in *Re Corning*, 51 Fed. Rep. 205. In that opinion I entirely concur; and the district attorney, apparently admitting its application, has discussed only the questions arising under the fourth count, urging that the learned judge did not fully apprehend the averments of that count, and therefore erred in holding that no contract was averred by which the dealers obligated themselves to purchase exclusively from defendants, and to sell at the prices defendants fixed. It is insisted that the paper set out in the fourth count became a contract on May 7, 1892, when the purchasers signed it, and that it is distinctly charged that defendants made such contract "in restraint of trade and commerce among the several states" on May 7, 1892. But, though it be conceded that the contract set forth in the indictment was made on that day, it does not follow that it was a contract in restraint of trade. The only trade which it is pretended was at all curtailed or affected in any way was the trade of Kelly & Durkee in distillery products between September 23, 1891, and May 7, 1892. During that period they bought such products only from certain named dealers in a limited number of states, and sold only at prices fixed by the defendants; but they did so only because they chose to,—because the offer of a rebate to purchasers who would thus conduct their business was an inducement operating upon their self-interest. No obligation of any kind constrained them so to do; during that entire period, certainly, no contract restrained them, for there was no contract in existence. They were entirely free to buy from whom they pleased, and to sell at any price they chose. The statute does not prohibit the offering of special inducements to such purchasers as shall make all their purchases from a single concern, and shall sell only at the prices fixed by it, even though those inducements be so favorable as to accomplish their object. It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade, of a contract which restrains or is intended to restrain trade. It is difficult to understand upon what principle it can be contended that trade is restrained by a contract, when no contract exists. That, when the trade in distillery products which Kelly & Durkee carried on between September 16, 1891, and May 7, 1892, was restrained, (if restrained it were,) there was no contract in existence, is conclusively admitted on the face of the indictment itself, which charges the statutory offense, to wit, the making of a contract, etc., as committed on May 7, 1892. The petitioner should be discharged.

MASTEN *v.* HUNT *et al.*

(Circuit Court, D. Massachusetts. June 29, 1892.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—COMBINATION.

Letters patent No. 821,833, issued July 7, 1885, to Cornelius E. Masten for a firecracker, covers, in claim 1, "the match, B, and fuse, C, in combination with the solid plug, D, and body, A, substantially as set forth." The specifications make no reference to the prior state of the art, and merely state that the invention produces "a more desirable article" "than is now in ordinary use," without particularizing the points constituting the improvement. *Held*, that the presumption of novelty applies to the combination as a whole, and, in the absence of evidence as to the prior state of the art, the court has no power to declare that the match, B, or its equivalent, was not essential, and to hold that a like cracker, with a continuous fuse, is an infringement.

2. SAME.

The use of the conjunction "and" between the words "match, B," and "fuse, C," does not show that the match and fuse constitute but one element, of which a continuous fuse would be the equivalent.

In Equity. Suit by Cornelius E. Masten against Edmund S. Hunt *et al.* for infringement of letters patent No. 321,833, issued July 7, 1885, to complainant for a firecracker. Bill dismissed.

The specification and claim of the patent are as follows:

Be it known that I, Cornelius E. Masten, of Boston, in the county of Suffolk, state of Massachusetts, have invented a certain new and useful improvement in firecrackers, of which the following is a description sufficiently full, clear, and exact to enable any person skilled in the art or science to which said invention appertains to make and use the same, reference being had to the accompanying drawing, forming a part of this specification, in which the figure is a vertical longitudinal section.

My invention relates more especially to large firecrackers, or the class known as "cannon crackers;" and it consists in a novel construction and arrangement of the parts, as hereinafter more fully set forth and claimed, by which a more desirable article of this character is produced than is now in ordinary use. The nature and operation of the improvement will be readily understood by all conversant with such matters from the following explanation, its extreme simplicity rendering an elaborate description unnecessary: In the drawing, A represents the body of the cracker, B the match, and C the fuse. The body is cylindrical in form, and is composed of layers of strong, tough paper overlapping each other, and cemented together in the usual manner. The match is composed of cotton, powder, and gum, the cotton being saturated with a solution of the gum, and then rolled in powder, or the powder rubbed into it and dried. The fuse is composed of a short cord or twist of ordinary touch-paper, into the inner end of which the outer end of the match is inserted and secured, as seen at *a*. The breech plug, D, of the cracker consists of fire clay, and is inserted in the body around the fuse and match as follows: The fuse and match having been first united, as shown and described, the fuse is inserted in a vertically-arranged hole in the center of an anvil or stake, which fits closely into the lower end, *a*, of the body. This stake is provided with a rabbet or shoulder on which the end, *r*, of the body rests; the body standing vertically with the match in its center when the stake is inserted. Powdered fire clay, or similar material, of proper temperament, is then introduced around the match through the open upper end of the body, and rammed down to form the solid plug, D, by means of a hollow ramrod, which is adapted to pass freely over the match. The body is