

Curie, Smith & Mackie, (W. Wickham Smith, of counsel,) for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

The court rendered the following judgment:

An appeal having been taken from the judgment or decree of the circuit court of the United States for the southern district of New York herein made and entered on the 17th day of November, 1891, and said appeal having come on to be heard, and after hearing James T. Van Rensselaer, assistant United States attorney, on behalf of the United States, appellant, for reversal, and William Wickham Smith, Esq., of counsel for Herter Bros., respondents, for affirmance, and due deliberation having been had thereon, and whereas the merchandise herein is determined by this court not to be dutiable as "marble in block," nor yet as "manufactures of marble," but that part thereof included in the importation by the Persian Monarch and represented by the sample "S. 2," should have been classified for duty as "veined marble," at \$1.10 per cubic foot, under Schedule N, Heyl's Tariff Index, (paragraph 467 of the tariff act of March 3, 1883,) and the remainder thereof, including the importation by La Champagne, should have been classified for duty, by similitude to "marble paving tiles," at \$1.10 per cubic foot under the same schedule and paragraph, and under section 2499 of the Revised Statutes of the United States, as amended by said tariff act, (chapter 121 of the Laws of 1883, approved March 3, 1883;) and whereas the protests of the importers herein do not raise the claim that the merchandise should be classified for duty either as "veined marble" or as "marble paving tiles" in fact or by similitude.

Now, on motion of Edward Mitchell, United States attorney, it is ordered, adjudged, and decreed that the judgment or decree of the said circuit court of the United States for the southern district of New York herein be, and the same is hereby, in all things reversed; and it is further ordered that a mandate issue to the said circuit court directing that court to make and enter a judgment herein affirming the decision of the board of general appraisers in this case.

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In re NG LOY HOE.

(Circuit Court, N. D. California. December 12, 1892.)

No. 11,692.

1. CHINESE—DEPORTATION—INDICTMENT NOT NECESSARY.

Under Act May 5, 1892, known as the "Geary Act," the government may, at its election, merely deport any Chinese person adjudged to be unlawfully in the United States, or imprison such person and deport him; and where the government elects to deport, only, the offense is not an infamous crime requiring procedure by indictment or presentment of a grand jury. U. S. v. Wong Sing, 51 Fed. Rep. 79, approved.

2. SAME—EXCLUSION ACTS—VALIDITY.

The Geary act (May 5, 1892) expressly provides that all prior acts regulating Chinese immigration are continued in force. Held, that the validity

of such prior acts is not affected by the constitutionality or unconstitutionality of other provisions of the Geary act.

On Habeas Corpus. Writ discharged.

Lyman I. Mowry, for petitioner.

W. G. Witter, U. S. Asst. Atty.

McKENNA, Circuit Judge, (orally.) This is a petition for writ of habeas corpus on behalf of a Chinese girl by her father or supposed father. She is imprisoned and detained by the United States marshal under an order made by L. S. B. Sawyer, United States commissioner; she having been adjudged by him a Chinese person unlawfully in the United States. His order recites that he acted "by virtue of the authority vested in him by section 12 of the Chinese restriction act of July 5, 1884, and the acts amendatory thereof and supplementary thereto." But petitioner insists that the offense (using the word only for convenience) is made infamous by section 4 of the act of congress approved May 5, 1892, known as the "Geary Act," and one punishment only is fixed by it, to wit, imprisonment at hard labor and deportation from the country,—not either, but both. And it is therefore urged that an offender can only be tried after presentment or indictment by a grand jury, and that a provision for a different proceeding is unconstitutional and void, violating sections 1 and 2 of article 3, and the fifth and sixth amendments to the constitution of the United States.

To work this result, counsel for petitioner ingeniously makes the acts of May 6, 1882, and July 5, 1884, and October 1, 1888, and the Geary act, one, and their remedial and punitive provisions so dependent and interwoven that, those of the latter being unconstitutional and void, all are unconstitutional and void. This is not justified. There is no repealing clause in the Geary act of previous acts. As far as it can, it continues them. It distinctly says "that all laws now in force, prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, are hereby continued in force for a period of ten years from the passage of this act." Its additional provisions are urged by petitioner to be unconstitutional ones. If so, there is an end to them. Indeed they cannot be said to have begun, and former acts would stand unaffected and unrepealed by them; and the commissioner having acted under the authority of the act of 1884, and within it, his order is legal.

But I am not disposed to rest the case here. Going no further than the necessities of the case require, I find no difficulty in sustaining all the acts. Their provisions are consistent and independent. It is a common rule of construction that the purpose of legislation can be resorted to to aid its interpretation; and it would be attributing very little care or intelligence to congress to assume that while passing the Geary bill, to execute more completely the purpose of Chinese exclusion, it had instead embarrassed, and may be defeated, it. The effect of petitioner's construction is obvious when we consider section 6. This section requires the registration of Chinese laborers within a certain time, and those not having a certificate after such time shall be deemed unlawfully in the United States. If the Chinese should re-

fuse to register, and there is no way to remove them from the country except by indictment or presentment by a grand jury and a trial by a petit jury, the act will be practically inoperative, and its purpose will be defeated. A construction leading to such result will only be made by a court when no other is open to it. But there is no trouble in holding the remedies of the act severable and cumulative,—deportation in all cases and imprisonment in some, even though the procedure in the latter should be held to be by indictment or presentment by a grand jury. On this, however, no opinion is expressed. This view was taken and announced by Judge Hanford in the case of *U. S. v. Wong Sing*, 51 Fed. Rep. 79, (decided June 24, 1892.) The pending petition vindicates with peculiar force the right of the government to elect a remedy according to circumstances. The person in whose behalf it is presented is a child. Presumably she neither came here nor stays here voluntarily. To deport her, and those like her, may be a proper policy. To imprison her, or those like her, would confound the distinction between innocence and guilt. No such intention should be imputed to the laws. The construction which requires it must be rejected. The writ is therefore discharged.

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ROBERTS v. H. P. NAIL CO.

(Circuit Court, N. D. Ohio, E. D. December 5, 1892.)

No. 4,925.

1. PATENTS FOR INVENTIONS—COMBINATION—CLAIMS.

In a combination patent it is permissible for the patentee, after claiming the whole machine, to claim the combination of fewer parts than the whole, if this combination of parts is new, even though, taken alone, it will not result in any known useful product. *Wells v. Jaques*, 5 O. G. 364, followed.

2. SAME—ROD-COILING CONES.

In letters patent No. 426,067, issued to Henry Roberts for an apparatus designed for coiling small red-hot metal rods as they run rapidly from the rolls, the patentee describes as the preferable form a rotary double cone, consisting of two concentric cones having a space between them, being united by a spiral rib, and terminating in a collar at the apex, through which the rod is received, being afterwards delivered, coiled, at the base. The second, third, and fourth claims cover substantially this double cone, but the first claim covers merely a rotary receiving and coiling cone, "having a channel," which receives the metal at the apex, and delivers it at the base. *Held* that, this latter combination of parts being new, the first claim is not invalid because it covers less than the whole machine.

3. SAME—ANTICIPATION.

In letters patent No. 444,652, also issued to Henry Roberts, the patentee dispenses with the outer cone, except so much of it as forms the hollow collar. The collar is connected with a single cone by means of pieces extending downward, and widening into longitudinal ribs with lateral flanges running spirally down opposite sides of the cone. Claim 3 reads: "In metal-coiling apparatus, having an exposed outer surface, along which the rod travels, a hollow collar and driving gear, substantially as and for the purposes described." The other two claims include, in addition, the longitudinal rib or ribs with a lateral flange. *Held*, that the third claim was not invalid because it covered less than the whole machine, and was not anticipated by the first Roberts patent, since it has the new feature, "an exposed outer surface."