

be issued upon complaint under oath by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner, or before any United States court, and that provides for a conviction of the person found unlawfully in the United States. The former acts simply provided for the removal of a Chinese person found unlawfully in the United States after being brought before some justice, judge, or commissioner, and found to be one not lawfully entitled to be in the United States. No mode of proceeding was prescribed, and no process provided for upon which said removal should be made. Clearly, under the acts of 1882 and 1884, the president alone, as the chief executive of the government, had the authority to prescribe and direct the proceeding and the mode of procedure in the removal of the person so unlawfully found in the United States. And, again, if the arrest was to be made under the process of any court or officer, such process could only be executed within the jurisdiction of such court or officer, and made returnable there. In this case the complaint was made before a United States court commissioner in Louisiana, and a warrant issued by him returnable before a United States court commissioner in Alabama, and directed to be executed by the marshal in Alabama. Now, I take it that a commissioner in Louisiana, independently of the act of September 13, 1888, would have no authority to issue a warrant to be executed in Alabama, and be made returnable before a commissioner in Alabama. I am sure it would not be contended that this court, or the judge thereof, could here issue process to be executed and made returnable before the district court or judge in Louisiana; and it would hardly be contended that a commissioner has greater powers than the court from which, it may be, he receives his commission and authority. But the act of September 13, 1888, by giving it a liberal construction, obviates all this. Congress, obviously seeing the *casus omissus* existing under the former legislation on the subject, has provided for it in the act of September 13, 1888. Without that act this proceeding must fail. Being of opinion, then, that the defendant has a right of appeal, the motion to dismiss the appeal in this case is denied.

I will now briefly consider the merits of the case on the proof submitted. The effect of a conviction of the defendant is to deprive him of his liberty in this country, and he cannot be convicted and removed without its being shown that he is unlawfully here. If the evidence fails to establish beyond a reasonable doubt that he is unlawfully in the United States, then the judgment of the commissioner must be reversed, and the defendant be discharged. Objection is made to certain parts of witness Brodie's testimony as illegal and inadmissible. The testimony objected to includes some hearsay, which, however, is not material, and a statement that the witness saw defendant's name on a list of 56 Chinese at New Orleans in transit through from San Francisco to Cuba. The objection to the testimony about the list is well taken (1) because it is not shown who made the list; that it was an authorized list; that it was the list required by law to be made by the customs officials at San Francisco on the arrival of the Chinese there, or the list of the shipmaster re-

quired by law to be made; and (2) because, if it was either of such lists, a certified copy of the same should have been produced, as the only legal evidence of the contents thereof in the absence of the original. While the witness Brodie, in his testimony, says that he is confident the defendant was one of the 56, he qualifies this statement by saying it is his opinion that he was, but that he cannot positively swear that he was. Now, excluding the illegal testimony referred to, the substance of the evidence in the case is that the defendant was in the United States for many years, at least six or eight, before the passage of the act of September 13, 1888, and was doing business in New Orleans, and that he left New Orleans, saying to two or three of the witnesses that he was going to China. The testimony as to the time when he left New Orleans is not harmonious. Some of the witnesses say that he sold out his business,—that of a laundry,—and left New Orleans in the spring of 1890; others say that it was in 1889; and one of them, the man who purchased the laundry, testified that it was about a year ago, which would fix the time about the last of 1890, or early in 1891. The testimony is without conflict that he was in New Orleans in May or June, 1891, and has been there and in Mobile ever since that time. It appears that, when he left New Orleans, he said he was going to China, and one witness testifies that defendant told him last July that he sold his laundry to go to China in 1889; that he went to China in 1889, and came back to the United States in 1891. The defendant testifies that he did not go to China when he left New Orleans; that he went to California in 1890, and remained there until he returned to New Orleans, in May, 1891; and that he has not been out of the United States since he came here, more than 10 years ago. Certain it is that he did not go to China in 1889, as the proof is overwhelming that he was in New Orleans in 1889, and as late as the spring of 1890. Now, no one saw him leave the United States. No one saw him enter the United States on his return from China. No passenger list from the vessel on which he is supposed to have entered the United States as a passenger is produced. No list required by law to be kept by the customs officials at the port where he is supposed to have entered the United States is produced, and from which it could be ascertained if a Chinese person of his name had entered there. It was in the power of the government to have produced these lists or certified copies of them. The law requires them to be made and kept by the government officers, and it is presumed that they performed their duty in the premises. Now, the only evidence we have that tends to show that the defendant left the United States and went to China is that he left New Orleans, and said he was going to China; that he was absent some time from New Orleans, and returned there in 1891; and that, on his return, said to one of the witnesses that he went to China in 1889, and had just returned. Whatever his statements to the witness may have been, the proof is that he was in New Orleans in 1889, and as late as the spring 1890, and he could not have been in China at that time. But, as I have said, the defendant testifies that he did not go to China; and, as suggested by one of the counsel, a circumstance, small though it

be, corroborative of this statement of defendant, is the fact that he said nothing to his fellow countryman and old friend Charles Emanuel, when he met him in June, 1891, shortly after his return to New Orleans, about China, or that he had been to China. It seems to me it would have been most natural for him to have spoken to his friend about their country if he had in fact just returned from it. Due process of law requires that the government should show that the defendant is unlawfully in the United States, and not that he should show a right to be here; but, whatever the truth may be, I cannot, from the evidence before me, say that he is in the United States unlawfully. It is my judgment, therefore, that the decision of the commissioner must be reversed, and that the defendant be released and discharged; and it is so ordered.

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LOEWER et al. v. C. P. FORD & CO.

(Circuit Court, N. D. New York. April 8, 1893.)

No. 6,033.

PATENTS FOR INVENTIONS—NOVELTY—SOLE-CUTTING MACHINES.

Letters patent No. 407,735, granted July 23, 1889, to Henry Loewer and Barton L. Blair, were for an improved sole-cutting machine, consisting of a stationary frame carrying a rapidly revolving shaft on which are a cutter and a guide wheel, together with a swinging frame, moving to and from the stationary one, carrying a shaft on which are mounted clamps opposite the cutter, for holding the leather blanks, and others opposite the guide wheel, for holding the pattern. In operation, when pattern and blanks are clamped in position, the latter frame is moved forward and its shaft slowly revolved, so that the edges of the blanks come in contact with the cutter, and are pared down to the precise size and shape of the pattern, the edge of which strikes against the guide wheel, and thus limits the depth of the cut. *Held*, that while the principle is old, having been embodied in a lathe invented by Thomas Blanchard over 70 years ago, the application of it to this purpose, and the construction of the mechanism necessary therefor, involved invention, and the patent is valid.

In Equity. Suit by Henry Loewer and George Schelster against C. P. Ford & Co. for the infringement of a patent. Decree for complainants.

George B. Selden, for complainants.

E. E. Wood, for defendant.

COXE, District Judge. This is an infringement suit founded upon letters patent No. 407,735, granted, July 23, 1889, to Henry Loewer and Barton L. Blair, for an improved sole-cutting machine. The patent is now owned by the complainants. The object of the inventors was to construct a machine which should cut from leather blanks one sole, or several soles, to the exact size and shape desired. This is accomplished by means of a stationary frame provided with a rapidly revolving shaft which carries a cutter and a guide wheel. A second swinging frame, which moves to and from the stationary frame, is provided with clamps, opposite the cutter, for holding the leather blanks, and other clamps opposite the guide