

labor, for the term of five years, and to pay the costs of prosecution. In pursuance of said sentence he was transported to the Ohio penitentiary, and has ever since been, and is now, a prisoner there.

It is conceded that the only statute under which the court could have had jurisdiction is the act of February 15, 1888, (25 Stat. 33,) and volume 1, Supp. Rev. St. U. S. (2d Ed.) p. 578. That statute provides "that any person hereafter convicted in the United States courts having jurisdiction over the Indian Territory or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass, or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than \$1,000, or by imprisonment not more than fifteen years or by both such fine and imprisonment at the discretion of the court." That the court had jurisdiction under this act is not conceded by counsel for the petitioner. It is unnecessary, however, to enter upon the discussion of that question, because of the concession on behalf of the government,—which is undoubtedly correct,—that, unless the court had jurisdiction under that act, it had no jurisdiction at all. Assuming, therefore, for the purposes of this case, that the court had jurisdiction under that act, the application must be granted, for the reason that the sentence was imprisonment at hard labor for five years, and the act provides for "imprisonment, not more than fifteen years." The general rule as stated by Justice Field in *Re Graham*, 138 U. S. 462, 11 Sup. Ct. Rep. 363, is "that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void." Accordingly, it was held in *Harman v. U. S.*, 50 Fed. Rep. 921, that where the penalty provided by a statute was imprisonment at hard labor, and the sentence was imprisonment, hard labor not being made part of the punishment, the sentence was void. See, also, *Ex parte Karstendick*, 93 U. S. 396; *In re Mills*, 135 U. S. 263, 10 Sup. Ct. Rep. 762; and *In re Johnson*, 46 Fed. Rep. 477.

The statement was made upon the hearing that the case of William Skagg, upon which an application, it was announced, is to be made, will present precisely the same state of facts, and this is conceded by the United States attorney. If so, the application will have to be granted in that case, also.

I have purposely avoided the consideration of other questions argued upon the hearing of the application, and confined myself to the discussion of the one which, in my opinion, is decisive.

UNITED STATES v. WILLIAMS.

(District Court, E. D. South Carolina. July 7, 1893.)

POST OFFICE—BREAKING AND ENTERING TO COMMIT LARCENY—INDICTMENT—
BUILDING PARTLY USED FOR OTHER PURPOSES.

An indictment under Rev. St. § 5478, charging that defendant broke into a building used in part as a post office, "with intent to commit there-

in larceny," and did then and there steal moneys belonging to the post-office department of the United States, is sufficient without charging that the intent was to commit larceny in that part of the building used as a post office, and that the breaking and entering was into that part. U. S. v. Campbell, 16 Fed. Rep. 233, distinguished.

At Law. Indictment against Prioleau Williams for breaking into a building used in part as a post office, with intent to commit larceny therein. On demurrer to the indictment. Demurrer sustained.

George Von Kolnitz, for the motion.

E. F. Cochran, Asst. U. S. Atty.

SIMONTON, District Judge. The defendant was indicted under section 5478, Rev. St., in these words:

"At a stated term of the district court of the United States for the eastern district of South Carolina, begun and holden at Charleston, within and for the district aforesaid, on the first Monday of July, in the year of our Lord one thousand eight hundred and ninety-three, the jurors of the United States of America within and for the district aforesaid, that is to say, upon their oaths respectfully do present that Prioleau Williams unlawfully and forcibly did break into a building used in part as the post office at Parlers, in the said county of Orangeburg, and in said state, with intent to commit therein larceny, and did then and there steal, take, and carry away moneys belonging to the post-office department of the United States, of the value of two dollars and sixty-nine cents, contrary to the act of congress in such case made and provided, and against the peace and dignity of the United States."

At the call of the case he interposed an objection to the indictment in the nature of a demurrer. His position is this: The indictment charges that the defendant forcibly broke into a building used in part as a post office, with intent to commit larceny therein; that, in order to give this court jurisdiction of this offense, the forcible breaking into must be in that part of the building used as a post office, and not in that part of the building not in such use; that by the terms of this indictment this does not appear, and that the word "therein" may mean any part of the building, only a part whereof is in use as a post office; that this makes the indictment fatally defective.

The indictment is in the words of the section, and, if the language in the section makes out the offense, the indictment must stand. This section is under a subdivision,—*"Postal Crimes."* The offense defined is "forcibly breaking into or attempting to break into any post office or building used in part as a post office, with intent to commit therein larceny," etc. Clearly, the word "therein," qualifying both members of the sentence, means "in the post office." The last part of the indictment fixes its meaning positively, so that the defendant is not unadvised of the charge against him, and is in no danger of surprise. The defendant quotes in support of his position the reasoning of Judge Deady in U. S. v. Campbell, 16 Fed. Rep. 233. The indictment before Judge Deady charged the defendant with breaking into a building used in part as a post office, with intent to commit larceny "in that building." It did not follow the

language of the statute, but made use of a word of much more wide signification than that used in the statute.

The demurrer is overruled.

UNITED STATES v. WONG DEP KEN.

(District Court, S. D. California. June 30, 1893.)

No. 437.

CHINESE—APPEAL FROM COMMISSIONER'S DECISION.

The right of appeal to a district court, given by Act Sept. 13, 1888, § 13, (25 Stat. 476,) to a Chinese person adjudged by a United States commissioner to be unlawfully in the United States, is not taken away by the "Geary Act" of May 5, 1892, § 3, (27 Stat. 25.)

Appeal from a Commissioner's Decision. On motion to dismiss. Denied.

A. B. Hotchkiss, Francis J. Thomas, and Thomas D. Riordan, for appellant.

George J. Denis, U. S. Atty.

ROSS, District Judge. This is a motion on behalf of the United States to dismiss an appeal taken by the defendant, a Chinese person, from an order made by a court commissioner for the district directing that he be imprisoned at hard labor in the state prison at San Quentin, and thereafter deported to China.

The proceedings before the commissioner were commenced by the filing with him of a verified complaint charging that after the passage of the act of congress entitled "An act to amend an act entitled 'An act to execute certain treaty stipulations relating to Chinese,'" approved May 6, 1882, (22 Stat. 58,) "one Ming Lee Tue did come into the United States from a foreign place, and, having come, has remained within the United States; that the said Ming Lee Tue has been found, and now is, unlawfully within the United States; and that at all the times herein mentioned the said Ming Lee Tue was and is a Chinese laborer."

Upon this complaint a warrant was issued by the commissioner, and the defendant, whose true name was found to be Wong Dep Ken, having been apprehended, an examination of the charge was had before the commissioner, who, from the evidence adduced, found him to be a Chinese person and a laborer by occupation, and who found and adjudged him to be unlawfully within the United States, and therefore ordered:

"First. That said Wong Dep Ken be imprisoned at hard labor for the period of two (2) days at the state's prison of the state of California, at San Quentin, in said state of California;

"Second. That thereafter said Wong Dep Ken be removed from the United States to China; and I order that said deportation of the said Wong Dep Ken be made from the port of San Francisco, within the limits of the northern district of California; and I further order that said Wong Dep Ken be, and he is hereby, committed to the United States marshal for the southern district of California for the purposes aforesaid."