

petition to the state court, and by its order the petition and bond were approved. On 23d March the plaintiff filed the record in this court, and made a motion to remand, which was refused. The defendant filed the record in this court on the first day of the present term. The removal having been perfected, the cause proceeds in this court as if it originated here. *Henning v. Telegraph Co.*, 40 Fed. 658; *Thompson v. Railroad Co.*, 6 Wall. 134.

The action is at law. It appears that on 17th February, 1894, before the petition for removal, and before answering the complaint, the defendant in this suit filed an original complaint in the court of common pleas for Charleston county, setting forth the fact that, when the policy in this case sued on was originally issued, it had attached to it a coinsurance clause, the result of which was that the insured and insurer shared proportionately the risk insured against, and that on the first renewal of the policy the same clause was attached, but that on the third renewal of the policy it was either attached, and subsequently became detached, or it was inadvertently omitted. The complaint prayed that the policy be reformed, and that in the mean time the suit on the policy be stayed. The defendant has filed its answer in this court, which sets up as a further defense the pendency of this last-named complaint in the state court, its prayer for a reformation of the policy and for an injunction, and ends with a prayer in the answer that all proceedings in the present cause be stayed until the determination of the action in the state court. The plaintiff now moves to strike this defense out of the answer, as irrelevant. This is in accord with the practice in South Carolina. *State v. Norris*, 15 S. C. 256. This being a case at law, no defense can be interposed which is not strictly a legal defense. *Railroad Co. v. Paine*, 119 U. S. 562, 7 Sup. Ct. 323. If, therefore, we treat this as a defense, it is wholly inadmissible. The defendant seeks precisely the same relief which he would seek by bill in equity. In effect, he seeks the relief which he would have if he had obtained an injunction in the state court, and if such injunction could operate in this court. If we consider it as a plea of a suit pending, it would be equally inadmissible. The pendency even of a prior suit in another jurisdiction is not a bar to a subsequent suit in this court. *Stanton v. Embrey*, 93 U. S. 554. It could not operate even as a plea in abatement. *Gordon v. Gilfoil*, 99 U. S. 178; *Insurance Co. v. Brune*, 96 U. S. 593. If the defendant has a right to equitable relief, he must seek it in the circuit court of the United States, on its equity side. The motion to strike out this defense in the answer is granted.

UNITED STATES v. CHEW CHEONG.

(District Court, N. D. California. April 12, 1894.)

No. 3,032.

I. REGULATION OF CHINESE—DEPORTATION OF FELON.

A Chinese laborer, convicted of felony, is not entitled to register under the act (Nov. 3, 1893) extending the time for registration, and such person

may therefore be deported upon the expiration of the time fixed by the original act (May 5, 1892) for failure to register.

2. SAME—EXTENSION OF TIME—EX POST FACTO LAWS.

The act (Nov. 3, 1893) extending the time for registration of Chinese laborers is not *ex post facto* on the ground that it excepts from its provisions those who had been theretofore convicted of felony, as the deportation was only the consequence of a failure to register under the original act (May 5, 1892), and had no relation to the felony.

These were proceedings for the deportation of Chew Cheong under the provisions of the act of May 5, 1892, as amended by the act of November 3, 1893.

W. G. Witter, Asst. U. S. Atty.
John T. Dare, for defendant.

MORROW, District Judge. It has been established by the evidence in the case that the defendant is a Chinese laborer, and was, on the 25th day of July, 1879, tried in the municipal criminal court of the city and county of San Francisco, and convicted of the crime of an attempt to commit burglary in the second degree, and, on the 2d day of August, 1879, it was adjudged and decreed by the said court that the defendant should be punished by imprisonment in the state prison of the state of California for the term of two years, the sentence thereby fixing the grade of the crime as that of a felony. The present proceeding is for the purpose of having him deported, under the provisions of the act of May 5, 1892, as amended by the act of November 3, 1893. It is contended, however, on behalf of the defendant, that, notwithstanding he has been convicted of a felony, he is entitled to the full period of six months to register, as provided in the amended act, and that the proceeding is therefore premature; and, second, that to deport the defendant because of a crime committed in 1879 would be to give to the later act an *ex post facto* operation.

By the act of May 5, 1892, it was required that all Chinese laborers in the United States at the time of the passage of the act, and who were entitled to remain in the United States, should apply to the collector of internal revenue of their respective districts within one year after the passage of the act for a certificate of residence; and it was provided that any such Chinese laborer who should neglect, fail, or refuse to comply with the provisions of the act, or who, after one year from the passage thereof, should be found within the jurisdiction of the United States without such certificate of residence, should be deemed and adjudged to be unlawfully within the United States. It is a well-known fact that but few of the Chinese laborers in the United States made application for the certificate of residence as provided in that act. It has been claimed, as an excuse for such disregard of the law, that these people were advised by counsel that the law was not constitutional. The law was, however, sustained in the case of *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016. After this decision, congress passed the amendatory act of November 3, 1893, extending the provisions of the previous act relating to the certificate of residence for the period of six months. This period has not yet expired, but there

is a proviso in the amendatory act withholding the privilege of the extended period from Chinese persons who have been convicted of a felony. It is as follows:

"Provided, that no Chinese person heretofore convicted in any court of the states or territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in said act and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted."

The defendant allowed the year to expire in which he might have obtained a certificate of residence under the act of May 5, 1892. He had an opportunity to secure the evidence of his right to remain in the United States, but he declined to avail himself of that opportunity. It was his own fault that he did not comply with the requirements of the original act, and now that the period provided by it for registration has passed, how can he be heard to complain that he is not privileged to register under the terms of the amendatory act? So far as he is concerned, the act of May 5, 1892, is in full force and effect, and he is subject to be deported from the United States, because he failed to obtain a certificate of registration as required by that act. It is true that congress extended the period for obtaining a certificate of registration to certain Chinese persons, but not to the defendant. Having been convicted of a felony, he does not come within any of the privileges of the extended period, and cannot now, or at any time hereafter, obtain a certificate of residence under its provisions. This proceeding is, therefore, not premature.

It is contended, further, that at the date of the passage of the amended act the defendant was not subject to deportation, because proceedings were not then pending against him; but this objection is without force, in view of the fact that the statute provides for his deportation not only upon proceedings then pending, but upon a proceeding that might thereafter be instituted.

The claim that the amendatory act is *ex post facto* in this: that it adds an additional punishment for the crime of which the defendant was convicted in 1879, is also without merit. He is not being deported because of his conviction of a felony, but because he refused to comply with the act of May 5, 1892, and obtain a certificate of residence, when he had the opportunity to obtain it, in accordance with the provisions of that act. He determined to violate an existing law, and congress has simply refused to relieve him from the consequences of that act. There is clearly nothing *ex post facto* in such legislation. It does not inflict a greater punishment for the original offense than the law annexed to the crime when committed, nor does it, by reason of the original offense, alter the situation of the defendant to his disadvantage. His deportation arises out of the fact that he failed to comply with the act of May 5, 1892, and not because he has committed a felony. The latter fact operates simply to deprive him of a second opportunity to apply for a certificate of residence, and nothing more. But it is not necessary to rest this decision upon the determination

that the statute does not have an *ex post facto* operation. In the case of *Fong Yue Ting v. U. S.*, *supra*, the supreme court held that:

"The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."

And that:

"Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interests."

The power of congress to deal with aliens is, therefore, an absolute power, under which it may expel those of a particular class, and permit others to remain upon specified conditions. Under such a power, a classification that selects alien criminals for deportation is certainly the exercise of a just discrimination in the administration of the laws, and a wise authority in preserving the institutions of the country.

Ex parte RICKELT.

(Circuit Court, S. D. Ohio, W. D. April 25, 1894.)

No. 4,695.

HABEAS CORPUS—WHEN LIES.

Habeas corpus will not lie to determine the simple question of law whether the facts proved before a United States commissioner on preliminary hearing are sufficient to constitute the crime for which the prisoner has been committed.

This was a Petition by Gustave Rickelt for a writ of habeas corpus to procure his release from the custody of the marshal by whom he was held under commitment of a United States commissioner.

Jones & Herholz, for petitioner.

Harlan Cleveland and Henry Hooper, for respondent.

TAFT, Circuit Judge. This is a proceeding in habeas corpus to obtain the release of one Gustave Rickelt. On April 3d, W. W. Dickson, a post-office inspector, made an affidavit before S. C. McCandless, United States circuit court commissioner for the western district of Pennsylvania, at Pittsburgh, that Gustave Rickelt, on the 17th of February, 1894, in that district, "did unlawfully secrete, embezzle, or destroy a certain letter which had been in the custody of the post-office establishment of the United States, before the same had been delivered to the person to whom it was directed, with the design to obstruct the correspondence or pry into the business or secrets of other persons, the said letter then and there hav-

ing indorsed upon it the following: "Upon the left-hand upper corner thereof the following printed matter, to wit: 'Return to Dr. Julius H. Eichberg, No. 50 W. Ninth St., Cincinnati, O.,' and having upon the envelope the following address, 'To Miss Seraphine Erna, Member of German Theatrical Co. from Cincinnati, Seventh Ave. Hotel, Pittsburgh, Pa.' And upon the right-hand upper corner thereof a United States two-cent postage stamp." This was charged to have been a violation of section 3892 of the Revised Statutes of the United States, which provides as follows:

"Any person who shall take any letter, postal card, or packet although it does not contain any article of value or evidence thereof, out of a post-office or branch post-office or from a letter or mail carrier, or which has been in any post-office, or branch post-office, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall secrete, embezzle or destroy the same, shall for every such offence be punishable by a fine or not more than five hundred dollars, or by imprisonment at hard labor for not more than one year, or by both."

Upon the affidavit a warrant was issued by John E. Bruce, Esq., United States commissioner of the circuit court of this district, for preliminary examination and commitment, to await the issuance of the warrant of removal by the district judge of this district. A preliminary examination was held, and evidence was introduced before the commissioner tending to show that a letter like that described in the affidavit had been received at the Seventh Avenue Hotel in Pittsburgh, Pa., and delivered to the clerk of the hotel; that the hotel clerk handed the letter to Rickelt, who was the stage manager of the company of which the addressee of the letter was a member, and that he at first refused to take it, but finally said, "Give it to me, and I will give it to her," and that the addressee never received the letter. The evidence shows that letters not claimed at the hotel office after 10 days are always returned to the post office; that when carriers leave letters in the office, they are distributed, and put in pigeonholes kept in the hotel office for the use of the guests of the hotel; that three or four letters came to Miss Erna during the same week, addressed to the care of the hotel, and were received by her through that agency. The commissioner, upon this evidence, committed accused to the custody of the marshal to await the issuance of the warrant of removal by the district judge. Pending this commitment, and before the action of the district judge, these proceedings were brought.

The petition and writ of habeas corpus must be dismissed. The only question which it is sought to make here on behalf of the petitioner is that the facts developed before the commissioner were not evidence sufficient to constitute the offense described in section 3892. That is a mere question of law, the decision of which is in the first instance committed by section 1014, Rev. St., to the jurisdiction of the United States commissioner before whom the preliminary examination is had. There is no doubt that the consideration of the offense charged was within the jurisdiction of the commissioner before whom the examination took place. There is no doubt that the courts of the United States for the western

district of Pennsylvania have jurisdiction to try the offense charged in the affidavit upon which the warrant has issued. The question of law here raised will come up regularly for decision before the grand jury of the western district of Pennsylvania when it considers the finding of an indictment, and before the district court of that district when the indictment found is tried. The writ of habeas corpus cannot be used as a writ of error to review the action of the United States commissioner within his jurisdiction. If it were a question whether the crime charged had been committed in the district to which the removal was about to be made,—that is, whether the crime charged was within the jurisdiction of the courts of that district,—this would be a proper proceeding to test it. If it were a question whether the act under which the prosecution is being conducted was constitutional, that, too, might be tested by habeas corpus proceedings. Not so, however, the simple question whether the facts alleged and proven are in law sufficient to constitute the crime described in the statute. That is a question for the consideration of the regular tribunals before whom it may be raised in the due procedure of preliminary examination, indictment, and trial. The writ of habeas corpus is a collateral proceeding, and its scope is limited, as above stated. This conclusion is fully supported by the decision of the supreme court of the United States in *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522. In that case it was sought by writ of habeas corpus to test the question whether the prisoner was properly committed by a United States commissioner under the lottery act for sending circulars through the mails for the sale of certain Austrian bonds, which were charged to be nothing but a scheme for a lottery.

The question made on the petition for the writ of habeas corpus was that the bonds were not a lottery, within the meaning of the federal statute. The supreme court held that the question whether the scheme was a lottery was a question to be determined by the commissioner, by the grand jury, and by the district or circuit court in which the indictment was to be tried, and that it was not for the circuit court or for the supreme court, on the writ of habeas corpus, to determine this question in advance. Mr. Justice Blatchford cites a number of cases to sustain this holding, one of which was an extradition case,—*In re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031.

The writ is accordingly dismissed, at the costs of the petitioner.

In re M'KANE.

(Circuit Court, S. D. New York. April 11, 1894.)

HABEAS CORPUS—APPEAL—CUSTODY OF PRISONER.

Pending an appeal from a refusal to grant the writ in behalf of a person confined under sentence of a state court, the custody of the prisoner cannot be disturbed (Rev. St. § 765; Sup. Ct. Rule 34, cl. 1); and the fact that he is daily required to perform hard labor pending the appeal gives no authority, under Rev. St. § 766, for any interference on a subsequent application for the writ.