

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.

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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.

This was a petition by John Y. McKane for a writ of habeas corpus, alleging that he was imprisoned at Sing Sing, N. Y., in violation of the laws of the United States.

Thos. A. Atchison, for petitioner.

E. M. Shepard, for respondent.

LACOMBE, Circuit Judge. The petitioner heretofore applied to this court for a writ of habeas corpus, under section 753, Rev. St. U. S., alleging that he was in custody in the state's prison at Sing Sing, under sentence of a state court, after conviction of a criminal offense, and that such custody was in violation of certain provisions of the constitution of the United States, which he duly set forth in his petition. His application for a writ was denied by this court, and from such final decision he duly appealed to the supreme court of the United States, under section 764, Id., as amended by the act of March 3, 1885, and, so far as appears, has complied with all the requirements of law and practice in the orderly prosecution of such appeal. That appeal is still pending, and the petitioner remains in the same custody in which he was held when his first application to this court for a habeas corpus was made and refused. Section 766, Id., is as follows:

"Sec. 766. Pending the proceedings on appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

The United States supreme court, in *Re Jugiro*, 140 U. S. 295, 11 Sup. Ct. 770, held that the object of this section was, "in cases where the applicant was held in custody under the authority of a state court, or by the authority of a state, to stay the hands of such court or state while the question as to whether his detention was in violation of the constitution, laws, or treaties of the United States was being examined by the courts of the United States having jurisdiction in the premises;" that is, until final determination of the appeal to the supreme court, if such appeal be taken.

The petitioner now presents this second application for a habeas corpus; contending that a law of the United States, to wit, section 766, above quoted, is being violated. He shows in his petition that by the terms of his sentence, and by the provisions of the state law regulating state's prisons, he is required to do hard labor when therein confined. Thus, as he contends, his sentence, under the conviction now coming on for review by his appeal to the United States supreme court in his first proceeding, is being executed on his person *die in diem*, and the warden or others in authority are each day proceeding against his person, by requiring him to do hard labor. Thus, as he insists, the hands of the state are not being stayed, as the federal statute, and the decision of the supreme court in *Re Jugiro*, *supra*, say they should be.

This is a new phase of an old question. Heretofore, the provisions of section 766 have been invoked, at least in this circuit, solely to

postpone the execution of persons under sentence of death. By reason of the circumstance that the federal statutes allow an indefinite number of applications and appeals, each appeal bringing section 766 into operation, without requiring any judicial certificate of reasonable doubt either by the court appealed from or by the court appealed to, these earlier attempts to postpone such execution were uniformly successful, whenever the attorneys conducting them were careful to conform to the statutes, the rules, and the practice of the federal courts. A reference to these proceedings will be found in Fost. Fed. Pr. § 367n. See, also, *Ex parte Jugiro*, 44 Fed. 754. The attention of the public being thus called to the unsatisfactory condition of federal legislation on this subject, a bill to correct possible abuses of the process of the federal courts was introduced in the senate by Mr. Senator Vest on January 12, 1891, and was referred to the judiciary committee. Apparently, it never passed, and the statutes remain as before.

The point raised here, however, is a new one. Manifestly, the infliction of the death penalty is a further "proceeding against the person" of the prisoner who has appealed from a refusal of the writ of habeas corpus. Whether the daily imposition of hard labor is or is not a further proceeding is an interesting question, which, however, need not be decided on this application. This is not a proceeding to enjoin state officers from doing any particular act, nor to punish them criminally for an assault committed in violation of law, nor to recover damages from them civilly for some wrong done to the complainant. It is an application to be discharged from a custody alleged to be illegal, and, if no sufficient warrant of law is shown for taking the prisoner out of that custody, a writ of habeas corpus will not be granted. Referring to the United States Revised Statutes, we find that sections 752 to 762 provide for writs of habeas corpus, and prescribe generally the practice to be followed upon applications therefor. Sections 763 and 764 authorize the taking of appeals from final decisions of the courts to which such applications are made, including cases where such final decision is a refusal of the writ. Then follows:

"Sec. 765. The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the supreme court, or in default thereof, by the court or judge hearing the cause."

Under this section the supreme court, in 1886, established the following regulations:

"Rule 34. Custody of Prisoners on Habeas Corpus. (1) Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed. (2) Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in the custody of the court or judge, or be enlarged upon recognizance as hereinafter provided. (3) Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of

appellate court, except where, for special reasons, sureties ought not to be required."

This rule is determinative of the pending application. It supplements section 766 by providing that, although "proceedings against the person" by state court or state authority are to be deemed null and void, the custody in which the prisoner was when he applied for the writ shall remain undisturbed despite the pendency of his appeal.

Relator's counsel insist that this clause of the rule is inconsistent with section 766, and therefore void. Evidently, the supreme court did not think so, or it would not have adopted the rule. In conformity to the regulations thus made by competent authority under a law of the United States (section 765, Rev. St. U. S.), McKane should, during the pendency of his appeal from this court's denial of his first application, remain in the custody in which he was when such application was denied. In that custody he now is, and therefore he is not in custody in violation of a law of the United States, as alleged in the petition now presented. Motion denied.

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GAMEWELL FIRE-ALARM TEL. CO. et al. v. MUNICIPAL SIGNAL CO.  
et al.

(Circuit Court of Appeals, First Circuit. January 4, 1894.)

No. 42.

1. EXPIRATION OF PATENT—INTERLOCUTORY INJUNCTION—APPEAL.

The expiration of a patent dissolves an interlocutory injunction restraining its infringement, and, where an appeal is pending, leaves nothing for the appellate court to act upon, and the appeal will be dismissed.

2. APPEAL FROM INTERLOCUTORY INJUNCTION—DECISION.

On an appeal from an interlocutory decree granting an injunction restraining the infringement of a patent, the court will not dispose of the entire case, except when the determination of the question whether the injunction was erroneous requires an examination of the whole case on the merits. *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, explained.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by the Municipal Signal Company, licensee, and James F. Oyster, assignee, to restrain the Gamewell Fire-Alarm Telegraph Company and others from infringing letters patent No. 178,750, granted June 13, 1876, to Henry Ennis. The patent was for an improvement in telegraphic fire alarms. The circuit court entered an interlocutory decree granting a perpetual injunction, and referred the cause to a master to take an account of profits. 52 Fed. 464. Defendants appeal.

Charles N. Judson and Richard N. Dyer, for appellants.

Fish, Richardson & Storrow, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. Pending the appeal, and before argument of the cause in this court, the letters patent in suit expired, and with that expiration the interlocutory injunction appealed from termi-