

"The grounds upon which the liability of the municipal corporation proper is usually placed are that the duty is voluntarily assumed, and is clear, specific, and complete, and that the powers and means furnished for its proper performance are ample and adequate. *Browning v. City of Springfield*, 17 Ill. 143. In such case there is a perfect obligation, and a consequent civil liability for neglect in all cases of special private damage. The nonliability of the public quasi corporation, unless liability is expressly declared, is usually placed upon these grounds: That the corporators are made such *volens volens*; that their powers are limited and specific; and that no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, in such case the liability is one of imperfect obligation, and no civil action lies at the suit of an individual for non-performance of the duty imposed."

Without further discussing the proposition, or the other points raised by the demurrer, which, in the view I have taken of the right to sue the reclamation district in this and the other cases, is unnecessary, I shall sustain the demurrer; and it is so ordered.

In re WONG FOCK.

(District Court, N. D. California. May 10, 1897.)

No. 11,333.

1. UNITED STATES COMMISSIONERS—JURISDICTION UNDER CHINESE EXCLUSION ACT.

A United States commissioner is "a United States judge," within the meaning of section 6 of the Chinese exclusion act of May 5, 1892, which provides that a Chinese laborer within the limits of the United States who shall neglect to comply with its provisions may be arrested and taken before "a United States judge," whose duty it shall be to order that he be deported, as that section is to be read in connection with section 3 of the same act, which provides that a Chinese person may be adjudged to be unlawfully within the United States "by a justice, judge, or commissioner."

2. SAME—VALIDITY OF ORDER OF DEPORTATION.

A commissioner having made an order of deportation under that statute, his further order that the person to be deported "be forthwith taken before the nearest United States judge, that a review of these proceedings may be had and proper order of deportation made," being unnecessary, may be treated as surplusage.

E. S. Solomon, for petitioner.

H. S. Foote, U. S. Dist. Atty.

MORROW, District Judge. A petition for a writ of habeas corpus was filed in this court by Wong Sing on behalf of Wong Fock, the detained, in which it is alleged that Wong Fock is unlawfully imprisoned, detained, confined, and restrained of his liberty by L. Ezekiel, a deputy United States marshal of the territory of Arizona, in the county jail of the city and county of San Francisco, state and Northern district of California; that the illegality of the imprisonment consists in the fact that said deputy United States marshal holds and keeps said Wong Fock in confinement for the purpose of deporting him to China, for an alleged violation by said Wong Fock of an act of congress of May 5, 1892, in not procuring the certificate of residence required by said act. It is further alleged in said

petition that said deputy United States marshal has no authority to confine and imprison, nor deport, said Wong Fock, for the reason that the latter was never brought before any judge of any district of the United States; that the accusation that said Wong Fock was without a certificate of residence was never heard by a judge of the United States, and that no order of deportation to China, directing and ordering the deportation of said Wong Fock, was ever issued by any judge of any United States district court, or of any court whatever, as required by said act of congress. The return of the deputy United States marshal of the territory of Arizona, upon whom the writ was served, shows that he holds the detained, Wong Fock, in his custody for the purpose of deporting him to China, under and by virtue of an "order of deportation" made and issued by J. H. Carpenter, United States commissioner of the Third judicial district of the territory of Arizona, at Yuma, which order was approved by Hon. A. C. Baker, the United States judge for that judicial district. The order of deportation recites that a verified complaint was made before the United States commissioner for the Third judicial district of the territory of Arizona, at Yuma, charging Wong Fock with having violated section 6 of an act of congress approved May 5, 1892, entitled "An act to prohibit the coming of Chinese persons into the United States," as amended by the act of November 3, 1893, in failing to register and obtain a certificate of residence as required by said acts; that a warrant was issued by such commissioner; that Wong Fock was duly apprehended upon said warrant and brought before the commissioner on April 21, 1897; that a hearing was had upon the charge made by said complaint; that testimony was taken and proceedings had before such commissioner; and that said commissioner on April 21, 1897, found, from the testimony and proceedings had before him, that Wong Fock was, by race, color, dress, and appearance, a Chinese person; that he was a laborer by occupation; that he was a resident of the territory of Arizona at the time of the passage of the act of congress of May 5, 1892, and had since continued such residence; that he was after November 3, 1893, found to be a resident within the jurisdiction of the United States, and of the Third judicial district of the territory of Arizona, without the certificate of residence provided for in the act of congress referred to; that he had neglected, failed, and refused to comply with the provisions of said act; that he had not established to the satisfaction of said commissioner that by reason of accident, sickness, or unavoidable cause, he was unable to procure such certificate of residence; and that said Wong Fock was unlawfully within the United States. Following these findings, the commissioner ordered that Wong Fock be removed from the United States to China; that the deportation of said Wong Fock be made from the port of San Francisco, within the limits of the Northern district of California, and that he be committed to the custody of the United States marshal for the territory of Arizona to carry out the order of deportation; and it was further ordered that Wong Fock be forthwith taken before the nearest United States judge, that

a review of the proceedings might be had, and a proper order of deportation made. The only record showing that this last order was carried out is the indorsement upon the "order of deportation" itself of the following: "Approved. A. C. Baker, Judge."

Upon the return of the writ in this court, the matter was referred to E. H. Heacock, Esq., the special referee and examiner, to ascertain the facts and report his opinion thereon. It was contended before him that the commissioner of the Third judicial district of the territory of Arizona, who made and issued the order of deportation, had no jurisdiction to hear and determine the alleged violation of the acts of congress referred to, for the reason that it is provided by section 6 of the act of May 5, 1892 (27 Stat. 25), that Chinese laborers, within the limits of the United States, who shall neglect to comply with its provisions, may be arrested, etc., "and taken before a United States judge whose duty it shall be to order that he be deported," etc. It is contended by counsel for the petitioner that it necessarily follows that the judicial power so conferred by this section upon "a United States judge" is exclusive, and can be exercised by him alone, and that a United States commissioner is not "a United States judge." The special referee held that this contention was untenable, inasmuch as section 3 of the same act provides that a Chinese person may "be adjudged to be unlawfully within the United States * * * by a justice, judge, or commissioner," and that the expression, "a United States judge," found in section 6, must be read in connection with section 3. He held, therefore, that the commissioner had full jurisdiction and power to hear and determine the question whether or not Wong Fock was lawfully within the United States. He recommended that the writ be dismissed, and the detained remanded to the custody of the United States marshal of the territory of Arizona, to be by him deported to China in pursuance of said order of deportation. To this recommendation, exceptions have been taken by counsel for the petitioner.

It is unnecessary to consider at length the question involved. The whole matter was critically discussed and considered by the special referee in his opinion and findings filed May 3, 1897. I agree with him that section 3 of the act is to be read in connection with section 6. Section 2 of the same act is also consistent with and fortifies the interpretation to be given to the expression "a United States judge." That congress intended that United States commissioners should have the power to determine whether Chinese persons were lawfully within the United States, and to make the appropriate order of deportation, if they were found to be within the United States in violation of section 6 of the act, is, I think, patent from a reading of the act of May 5, 1892, as amended by the act of November 3, 1893, in its entirety, and also from previous acts upon the subject. See section 13 of the act of September 13, 1888 (25 Stat. 476); section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat. 117). The expression "a United States judge," found in section 6 of the act of May 5, 1892, is, in my opinion, a general one, and refers to those judicial officers

(viz. "justice, judge, or commissioner") previously and specifically enumerated in sections 2 and 3 of the same act. A United States commissioner is certainly a judicial officer, and exercises—it is true, within very narrow limits—the functions of a United States judge. In the case of *Fong Yue Ting v. U. S.*, 149 U. S. 698, 728, 13 Sup. Ct. 1016, 1028, the supreme court, in considering the meaning of the identical expression in section 6 involved in the case at bar, said:

"The designation of the judge, in general terms, as 'a United States judge,' is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation in other statutes of the judges authorized to issue writs of habeas corpus, or warrants to arrest persons accused of crime;" citing sections 752 and 1014 of the Revised Statutes.

Section 1014 provides that:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court, * * * be arrested and imprisoned," etc.

While in the case above referred to the supreme court were considering the term "a United States judge" as applied to a district judge, still it would seem that the definition they then gave to the expression "a United States judge," in the sense in which it is used in the acts referred to, is broad enough to include United States commissioners, for they have the power to issue "warrants to arrest persons accused of crime." I come to the conclusion that United States commissioners not only have the power to adjudge whether a Chinese person is unlawfully in the United States, under sections 2 and 3 of the act, but that they have also the power to order a deportation, under section 6. I make this deduction, not alone by reason of the construction to which the several sections of the act in question seem to be reasonably susceptible, but because it would result, if judges of the district or circuit court only could take cognizance of this class of cases, that in many cases it would become almost impracticable to enforce the law, and certainly very expensive to do so, on account, as is very persuasively observed by the special referee in his opinion, of our extended territory, the limited number of our United States judges, and the great distance frequently intervening between the place of arrest and the place of trial. One of the strongest reasons for the appointment of United States commissioners in certain localities is because distance, or the difficulty of travel, render the court and the judge thereof difficult of access. It seems to me that congress must have had this in mind when it provided in sections 2 and 3 that United States commissioners, among other judicial officers, should adjudge whether persons of Chinese descent, arrested under the provisions of the act or the acts thereby extended, were or were not lawfully within the United States. In statutory construction, arguments of convenience often address themselves strongly to the court. As was aptly said by Mr. Chief Justice Marshall in *U. S. v. Fisher*, 2 Cranch, 386, "Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature is plain, in which case it must be obeyed." In the case of *U. S. v. Wong Dep Ken*, 57 Fed. 203, it appeared that a Chinese person had been adjudged by a United States commission-

er to be unlawfully in the United States, and the commissioner had made an order directing the Chinese person to be imprisoned at hard labor in the state prison at San Quentin, and thereafter to be deported to China. The case came up before Judge Ross upon the question whether Wong Dep Ken had the right to appeal to a district court under section 13 of the act of September 13, 1888 (25 Stat. 476), and it was held by the learned judge that he had. While, it is true, the question involved in the case at bar did not arise, still the effect of the decision necessarily is to recognize the power of a United States commissioner to make an order of deportation; otherwise no right of appeal could lie from his order of deportation. I agree with the special referee that the order of the commissioner that "said Wong Fock be forthwith taken before the nearest United States judge, that a review of these proceedings may be had, and proper order of deportation made," and the approval thereof indorsed by the judge for that judicial district on the order of deportation, were all unnecessary and immaterial, and may be treated as mere surplusage, if the view taken by the court of the power and jurisdiction of the commissioner to make and issue an order for deportation for a violation of section 6 of the act in question is sound. The report and recommendation of the special referee and examiner will therefore be confirmed, the writ of habeas corpus will be dismissed, and the detained, Wong Fock, remanded to the custody of the Deputy United States marshal of the territory of Arizona, to be by him deported to China; and it is so ordered.

In re TSU TSE MEE.

(District Court, N. D. California. May 10, 1897.)

No. 11,338.

1. UNITED STATES COMMISSIONERS—JURISDICTION UNDER CHINESE EXCLUSION ACT.

A commissioner has jurisdiction to make an order of deportation under section 6 of the Chinese exclusion act of May 5, 1892, and also to order the deportation of Chinese persons who are adjudged, under section 12 of the act of July 5, 1884, to have unlawfully entered the United States. In re Wong Fock, 81 Fed. 558, followed.

2. SAME—SUFFICIENCY OF FINDINGS.

It is enough if the order of deportation shows that the person to be deported has been adjudged to be unlawfully within the United States, without a finding stating where he came from, as the specification of the country to which he is to be deported concludes any inquiry on that point.

3. SAME—COUNTRY TO WHICH DEPORTED—HABEAS CORPUS.

The person ordered to be deported cannot, on habeas corpus, claim that he was entitled to be deported to a country other than China, as provided by section 2 of the act; his remedy being by appeal, if dissatisfied with the commissioner's findings in that respect.

4. SAME—SUFFICIENCY OF ORDER OF DEPORTATION.

The order of deportation need not explicitly refer to the specific act of congress under which the person to be deported is adjudged to be unlawfully in the United States.

5. SAME—RIGHT TO JURY TRIAL.

The order of deportation may be made without a jury trial, as it is not a punishment for crime. And the fact that a plea of "not guilty" is entered does not change the character of the proceedings.

Wm. Hoff Cook, for petitioner.

Bert Schlessinger, Asst. U. S. Dist. Atty.

MORROW, District Judge. A petition for a writ of habeas corpus was sued out on behalf of Tsu Tse Mee, it being claimed that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by a deputy United States marshal of Texas, on board the steamship the City of Peking, in the city and county of San Francisco, state and Northern district of California, previous to his being deported to China for an alleged violation, as averred in the petition, of an act of congress of May 5, 1892, for having failed to procure a certificate of residence as required by said act. It is further alleged in the petition that the accusation that he was without a certificate of residence was never legally heard by a judge of the United States, and that no legal or valid order of deportation to China was ever issued by any judge of the United States district court, or of any court whatever. The matter was referred to the special referee and examiner to ascertain the facts and report his opinion thereon. His report and recommendation, filed May 4, 1897, shows that a return was made to the writ that the United States marshal held and detained Tsu Tse Mee in pursuance of an order of the United States commissioner for the Western district of Texas, at El Paso, ordering the deportation of the petitioner. This order of deportation was offered in evidence as part of the return. It was also stipulated and agreed that the petitioner in this matter is the person described in the order of deportation, and is the same person mentioned in the return made by the United States marshal, and, further, that he is here under that order of deportation, and was about to be deported by the marshal when the writ of habeas corpus issued. Counsel for the petitioner demurred to the sufficiency of the order of deportation upon the grounds: (1) That the commissioner has no jurisdiction or authority to make such order. (2) That it does not appear from the order where or how the petitioner entered the United States; and, further, that the order charges him with having unlawfully entered, and also being in, the United States, in violation of the acts of congress, but does not designate what acts, if any, have been violated. (3) It was further objected that it appears affirmatively from the order that the commissioner made the order of deportation upon a plea of not guilty, which, under the laws and constitution of the United States, he had no right to do, because, if the party was charged upon a complaint, and called upon to plead, he was entitled to a trial by jury.

The special referee recommends that the demurrer be overruled, that judgment be entered dismissing the writ, and that the petitioner be remanded to the custody of the United States marshal of this district, to be by him deported to China in pursuance of said order of deportation. To this report and recommendation exceptions were

taken. The first ground of demurrer urged before the special referee may be dismissed with the observation that the commissioner has the jurisdiction and power to make an order of deportation where he finds that a Chinese person is unlawfully in the United States. I considered this question in *Re Wong Fock*, 81 Fed. 558, on habeas corpus, with reference to an order of deportation made by a commissioner for a violation of section 6 of the act of May 5, 1892, in an opinion handed down to-day. He also has the power of making an order of deportation of Chinese persons who are adjudged, under section 12 of the act of July 5, 1884, to have unlawfully entered the United States.

The second ground of demurrer urged is directed to the sufficiency of the findings of the commissioner as set out in the order of deportation. Findings should be mere statements of the ultimate facts in controversy, and the legal consequences from the facts admitted and proven. *Mathews v. Kinsell*, 41 Cal. 514; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696. In my opinion the findings set out in the order of deportation are sufficient. It is enough if the order of deportation shows that the Chinese person has been adjudged to be unlawfully within the United States. It is immaterial how he unlawfully entered the United States. A finding, stating where the Chinese person came from, while it may be proper and save any possible question, still is not necessary, for that part of the order of deportation which specifies the country to which he is to be deported concludes any inquiry on that point. Section 2 of the act of May 5, 1892, provides:

"That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner, before he or they are tried, that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: provided, that in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of the such person to that country, he or she shall be removed to China."

As the presumption is in favor of the regularity of the proceedings before the commissioner making the order of deportation, and that the law was complied with, the order that he be deported to China is sufficient for all purposes. Particularly so in the absence of any satisfactory showing that he should be removed to some country other than China. The Chinese person ordered to be deported in this matter had an opportunity to make this showing before the commissioner who adjudged him to be unlawfully within the United States. If dissatisfied with the findings of the commissioner in this respect, he certainly had the right to appeal to the district court for that district. *U. S. v. Wong Dep Ken*, 57 Fed. 203. He cannot do so now by means of a writ of habeas corpus. It is well settled that the writ of habeas corpus cannot be used as a writ of error or appeal. *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 96; *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050.

The fact that the specific act of congress under which the peti-

tioner was adjudged to be unlawfully in the United States is not explicitly referred to in the order of deportation is also unimportant. The broad statement is made in the order of deportation that the petitioner on the 16th day of February, 1897, unlawfully entered and was in the United States in violation of the acts of congress of the United States in such case made and provided, to wit, the Chinese exclusion acts. From a finding recited in the order of deportation, viz., "That the defendant * * * is guilty of having unlawfully entered the United States on the 16th day of February, A. D. 1897, as charged in bill of complaint," it is plain that he was adjudged unlawfully in the United States, and the order of deportation was made under and by virtue of section 12 of the act of July 5, 1884 (23 Stat. 115). In the petition to this court for a writ of habeas corpus it is alleged that Tsu Tse Mee was adjudged to be unlawfully in the United States because of his failure to obtain the certificate of residence required by section 6 of the act of May 5, 1892; but the special referee, in his opinion and findings, states that "the question of having a certificate of residence * * * does not arise in this case."

The last ground urged is that the petitioner was entitled to a jury trial before the commissioner who ordered his deportation, for the reason that he entered a plea of not guilty to the charge of being unlawfully within the United States. The order of deportation does not inflict any punishment in the way of imprisonment, as provided by section 4 of the act of May 5, 1892, but simply directs the deportation of the petitioner. The supreme court, in the case of *Wong Wing v. U. S.*, 16 Sup. Ct. 977, decided that the act of May 5, 1892, § 4, providing that a Chinese person adjudged to be not lawfully entitled to remain in the United States shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States, in effect provides for such imprisonment upon the adjudication of a justice, judge, or commissioner upon a summary hearing, and conflicts with the constitution of the United States (amendments 5 and 6), declaring that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury, and that the accused shall enjoy the right to a speedy and public trial by an impartial jury. See, also, *U. S. v. Wong Dep Ken*, supra. But in the present matter, while the petitioner was adjudged to be unlawfully in the country, the penalty of imprisonment was not visited upon him; he was simply ordered to be deported. This, so far as appears from the order of deportation, was the whole purpose, scope, and effect of the proceedings before the commissioner. In other words, he was not held to answer for an infamous offense, nor was he tried for the commission of any offense against the laws of the United States. As was said in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 730, 13 Sup. Ct. 1016, 1029:

"The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the con-

ditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."

The inquiry before the commissioner was confined to the simple fact as to whether or not the petitioner, Tsu Tse Mee, was lawfully within the United States. That, for the purpose of ascertaining and adjudging upon his status in this respect, he was not entitled to a jury trial, is well established. *Nishimura Ekiu v. U. S.*, 142 U. S. 657, 12 Sup. Ct. 336; *Fong Yue Ting v. U. S.*, supra; in re *Chow Goo Pooi*, 25 Fed. 77; *U. S. v. Wong Sing*, 51 Fed. 79; *U. S. v. Hing Quong Chow*, 53 Fed. 234. The power to pass upon the right of aliens to enter or remain in this country may, constitutionally, even be vested in executive officers. See cases cited above, particularly *Nishimura Ekiu v. U. S.*, 142 U. S. 657, 660, 12 Sup. Ct. 336. The mere fact that he entered a plea of not guilty is immaterial. It did not alter the real character of the proceedings before the commissioner, nor did it invest the petitioner with the privilege of a jury trial. At best, it can be considered but a mere irregularity, and simply tended to raise the issue to be heard and determined by the commissioner. The proceedings before him were, it is true, a trial; but they were not, and the law did not intend that they should be, a jury trial. I have carefully read the authorities cited by counsel for the petitioner, and find nothing inconsistent with the views herein announced. For these reasons, briefly stated, therefore, the exceptions to the report and recommendation of the special referee will be overruled, the report and recommendation adopted and confirmed, in so far as it overrules the demurrer to the return to the writ. As I understand that the petitioner desires to traverse the return to the writ, I will give him five days in which to do so, and let the matter be re-referred to the special examiner for further action thereon.

UNITED STATES v. GLASENER.

(District Court, S. D. California. May 10, 1897.)

No. 953.

1. FORGERY—NOTARY PUBLIC—FALSE JURAT TO AFFIDAVIT.

The making by a notary public of a jurat or certificate, containing false statements, to an affidavit in support of a pension claim, does not constitute an offense under Rev. St. § 5421, providing for the punishment of "every person who falsely makes, alters, forges or counterfeits * * * any deed, power of attorney, order, certificate, receipt or other writing for the purpose of obtaining or receiving, or enabling any other person, directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money * * *"; the offense defined by said section being the false making or forgery of the writings enumerated.

2. CRIMINAL LAW—FALSE AFFIDAVIT FOR PENSION—WHAT CONSTITUTES AFFIDAVIT.

An affidavit, within the meaning of Rev. St. § 4746, which provides for the punishment of "every person who knowingly or wilfully in any wise pro-