

court held that the plea must be filed at the first rules, and that the two cases are somewhat conflicting, and that the latter case overrules the first, although it does not say so in express terms. This claim is founded upon the supposed ruling of the court as announced in the first clause of the syllabus, which states that "a plea in abatement to the jurisdiction of the court cannot be filed after a conditional judgment or decree nisi." Upon a careful examination of this case I reach the conclusion that the time when such plea should be filed was not before the court. It was only necessary for the court to determine under the pleadings whether a plea filed to the jurisdiction of the court long "after the bill was taken for confessed" as to the defendant Edmiston was in time. The record shows that the summons in that case was returnable to March rules, and was served upon the defendant Edmiston before the return day, at which time there was a decree nisi, which was confirmed at April rules, but the plea in abatement was not filed until August rules. Upon this state of facts the only question that could arise was whether the plea was filed in time. It was not absolutely necessary for the court to determine at what state of the pleadings the plea must be filed, as no such question was properly before it. Upon the facts, as they appeared in the case, the court held that the plea came too late, and it seems to me that there can be no question as to this conclusion; and that this decision does not conflict with the ruling of the court in the case of *Hinton's Adm'r v. Ballard*, supra, which decides that plea in abatement may be filed before "office judgment entered." I am therefore of the opinion that the two cases are easily reconciled with each other, and that the rule of law laid down in that case is correct. But in this case, as we have seen, it is not necessary, in disposing of this motion, to decide whether the petition should have been filed at the first rule day, though I am inclined to concur with the learned judge in the case cited supra (70 Fed. 513), and hold that a plea in abatement "is not the sort of plea or answer contemplated in the act of 1888." The motion to remand is refused.

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MOORE v. BAHR et al.

(Circuit Court, D. South Carolina. July 8, 1897.)

1. INTOXICATING LIQUORS—INTERSTATE COMMERCE—RIGHT TO STORE ORIGINAL PACKAGES.

The right to import and sell intoxicating liquors in original packages in South Carolina being established by the law of interstate commerce, a dealer who is a citizen of another state has a right to store such liquors within the state for purposes of sale.

2. SAME—SALES IN ORIGINAL PACKAGES—DISPENSARY LAW OF SOUTH CAROLINA.

Sales of intoxicating liquors in South Carolina by citizens of other states, in the original packages in which they are imported into the state, are subject to the regulations imposed by the dispensary law of the state as to the times and quantities in which, and the persons to whom, they may be made, and all such provisions as are in the nature of police regulations.

Suit in equity by W. G. Moore, a citizen and resident of the state of New York, against W. N. Bahr, C. F. Glover, W. Livingston, S.

Duncan, J. J. Browning, William J. Schneider, E. V. Baker, and J. M. Scott, citizens and residents of South Carolina, and state constables. Heard on rule to show cause why injunction should not issue, and return thereto.

J. N. Nathans, for complainant.

Wm. A. Barber, for respondents.

SIMONTON, Circuit Judge. The complainant, a rectifier of liquor and wholesale liquor dealer in the city of New York, files his bill against the defendants, who are state constables appointed under the provisions of the dispensary act. The facts stated are that the complainant shipped to Charleston, by the Clyde Steamship Company, an interstate commerce carrier, certain liquors, wines, and beer, products of other states, in original packages, to be stored for the purposes of sale in such original packages by his agent in that behalf appointed; that the defendants had entered the premises, and had seized his goods, and had interfered with the sale thereof; that they are hopelessly insolvent; and that he has no remedy at law. The bill prayed an injunction. The return to the rule to show cause, after setting up certain objections to the jurisdiction, admits substantially the facts stated in the bill, and denies the right of the complainant to import into this state the wines, liquors, and beer mentioned in the complaint, or to store them therein, or to sell them by his agent, as claimed by him. The jurisdiction of this court, upon the facts stated in the bill, seems clear.

At the hearing it appeared that there was no difference of opinion between counsel as to what constituted an original package, and it was agreed that the packages which were stored and offered for sale in this case were original packages. The questions made were these: Has a dealer, a citizen of a state other than South Carolina, a right to import liquors, wines, and beer, in original packages, and to store them in this state for purposes of sale? If this question be answered in the affirmative, must such sales be conducted under the restriction of time, quantity, and persons made in the dispensary law?

In *Cantini v. Tillman*, 54 Fed., 969, after full discussion and consideration, it was held by this court that the dispensary law, in its general provisions, did not conflict with the constitution of the United States or of this state. In that case, Cantini, a wholesale and retail dealer in liquors, resident in Charleston, claimed the right to carry on his business, notwithstanding the dispensary law, both on the ground of the unconstitutionality of the law, and because he was a subject of the king of Italy, and was protected by treaty stipulations. The court decided the case on the facts before it, but it expressly reserved the question whether the act was not void in such of its provisions as were in conflict with the interstate commerce law. In the case *In re Langford*, 57 Fed. 570, it became necessary to discuss some provisions of the dispensary law conflicting with interstate commerce, and it was held that in so far as such conflict existed the law was inoperative and void. These two decisions are unreversed, and are the law for this court. In *Donald v. Scott*, 67 Fed. 854, a full dis-

cussion of the relations between the dispensary acts and the law of interstate commerce was had, and the decision was reached that under the protection of the interstate commerce law any resident of this state could, notwithstanding the dispensary acts, import liquors for his own use and consumption. This decision has been sustained by the supreme court of the United States in *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 262. In the *Vandercook Case* (recently heard and decided in this court) 80 Fed. 786, following the supreme court in *Scott v. Donald*, it was held that a producer of wines and other liquors in California had a right to import and sell in this state his products in original packages. No difference can be seen in principle between the right of a producer, as in the *Vandercook Case*, and that of the complainant in this case. Both are equally under the protection of the interstate commerce law. The conclusion reached in this line of cases is this: The state, in the exercise of the police power, can declare that the use of intoxicating liquors of all kinds as a beverage is noxious,—injurious to the health, welfare, and safety of the people,—and, having so declared, can forbid the manufacture, importation, and sale of such liquors within her borders. That such prohibition takes intoxicating liquors out of the category of articles of commerce, and is not in conflict with the interstate commerce law. But that so long as the state recognizes the use of intoxicating liquors as a beverage, and encourages such use by purchasing them in large quantities, and selling them for such use to the inhabitants within her borders, accompanying such purchase and sale with a prohibition to others from doing the like, this prohibition is not a lawful exercise of the police power. On the contrary, it is an attempt, under the guise of the police power, to secure for the state the benefits, profits, and emoluments of the liquor traffic heretofore enjoyed by individual citizens, and so increase her revenue. And for greater certainty in this behalf a monopoly in this traffic is created in the state. That the state cannot engage in this business for this purpose in contravention of the rights of citizens of the other states. This being so, and the right to import and sell in original packages being established, it necessarily follows that there must exist a right to have a place for the receipt and exposure for sale of the original packages so imported. The one is the inevitable consequence of the other. But when this has been accomplished the protection of the interstate commerce law ceases. This law protects the original package in its importation and in its sale. The hours within which the sale can be made, the persons to whom it can be made, the quantity at one time to be sold, and the disposition after sale are within the police power of the state. The provisions of the dispensary acts, except in so far as they conflict with the interstate commerce law, are absolutely binding on all persons within the state. So, when once a sale has been made of an original package, and its delivery within the state, it cannot again be sold by its recipient or any one else without violation of the law. No sale can be made of liquors, wines, or beer in original packages anywhere except between the hours by law appointed,—sunrise and sunset. No sales can be made in such packages of liquors, wines, or beer to be drank on the premises, none in quantities less than half a

pint, none on Sunday, and none to minors or habitual drunkards. These police provisions are irrevocably fixed in the public policy and police law of the state, and must be observed by all persons, citizens or strangers, doing business within the boundaries of the state. With these modifications and restrictions, let an injunction issue as prayed for in the bill.

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Ex parte SING.

(Circuit Court, N. D. New York. July 12, 1897.)

**ALIEN—DEPORTATION OF CHINAMAN—REFUSAL TO BE SWORN.**

A Chinese person, who is shown by uncontradicted evidence to be entitled to remain in the United States, cannot be deported because of his refusal to be sworn to testify at the request of the prosecution.

R. M. Moore, for petitioner.

Samuel M. Welch, Jr., Asst. U. S. Atty., opposed.

COXE, District Judge. The petitioner was brought before a United States commissioner charged with violation of the Chinese exclusion act of May 5, 1892, and, after hearing, an order was made removing him to the empire of China. A witness was produced who swore to facts which entitled the petitioner to remain in this country. This testimony was wholly uncontradicted. The district attorney, thereupon, requested that the petitioner be sworn, which, under the advice of counsel, he declined to do. The evidence being closed the commissioner ordered the petitioner deported upon the sole ground that his failure to be sworn cast so much doubt upon his right to remain in the United States as to justify his removal therefrom. The petitioner, thereupon, sued out this writ.

The simple question, then, is, whether the failure of a Chinese person to be sworn at the request of those who are endeavoring to deport him raises such a presumption against him as to warrant his removal. But for his refusal to be sworn he would be entitled to remain. This was conceded on the argument. Does his refusal raise a presumption against him sufficiently strong to overthrow the positive testimony in his behalf? Is his silence alone sufficient to support a judgment which involves imprisonment and custody for months while being transported thousands of miles by land and sea? It is thought not. If the petitioner were charged with an offense or a misdemeanor, then, under the act of March 16, 1878, his failure to be sworn "shall not create any presumption against him."

But it is said that the act of 1892 is political and not criminal in character and that the provision for imprisonment at hard labor is unconstitutional. The decisions upon this question are not in accord and it is unnecessary to decide it, for, upon the facts here, the presumption, assuming one to exist, is not sufficient to overthrow uncontradicted testimony and furnish the only foundation for the judgment. If something had occurred to discredit the testimony offered on behalf of the petitioner, if there had been a conflict upon the facts, if some witness had sworn to a circumstance

which called for explanation from the petitioner, if the commissioner had intimated that, for any reason, he did not credit the petitioner's witness, the rule might be different. But the judgment of the commissioner, in effect, declares that after a Chinese person has proved himself a citizen of the United States, unless he goes upon the witness stand, at the request of his prosecutors, the court will find that he is not a citizen and must be deported. I am familiar with no such rule of evidence and no authority has been cited warranting such a course. If not a criminal statute the act of 1892 is, concededly, a most drastic and summary law. Its machinery should not be set in motion by straining the evidence so as to convict those who, because of their ignorance of our language and institutions, are peculiarly helpless and unable to protect themselves. It is one of the safeguards of our organic law that no one shall be compelled to incriminate himself and the courts have gone to the greatest lengths in enforcing this principle by a broad and liberal interpretation. It has never been construed in a narrow or illiberal spirit or relaxed so as to endanger civil freedom or oppress one, no matter how lowly, whose liberty is threatened. A Chinese person is entitled to demand that the judgment of deportation against him shall be based on legal evidence. The petitioner is discharged.

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NIXON v. UNITED STATES.

(District Court, E. D. Tennessee. May 8, 1897.)

1. UNITED STATES MARSHALS—"ENDEAVOR EXPENSES"—VOUCHERS.

A marshal cannot recover in a suit against the government a charge of two dollars a day, under Rev. St. § 829, allowing him the sum actually expended in endeavoring to make an arrest under process, not to exceed two dollars a day, in addition to his compensation for service and travel, where his claim is not supported by vouchers or an itemized statement, and was for that reason disallowed by the comptroller.

2. SAME—MILEAGE—SERVING SUBPŒNA IN CRIMINAL CASES BEFORE COMMISSIONERS.

Where a United States commissioner, on issuing the warrant for the arrest of a person charged with the violation of the internal revenue laws, at the same time issued subpœnas for witnesses to be used to sustain such charge, which subpœnas were left blank as to time and place of return until return was made, the practice being for the marshal to serve such subpœnas only in case the arrest was made, the marshal is entitled, under Rev. St. § 829, to mileage on such subpœnas, when served, from the place of return to the place of service, the same as though issued after the warrant had been served and returned.

3. SAME—TRANSPORTATION OF PRISONER.

Where a defendant committed by a United States commissioner is confined in the nearest jail to await the action of the grand jury, and after indictment, on an order to bring him into court, is taken from such jail to court, the marshal is not entitled, in addition to the mileage allowed by Rev. St. § 829, "for transporting criminals," to treat the order as an original process, and charge thereon two dollars for service, and mileage at the rate of six cents from the place of holding court to the jail.

4. SAME—ATTENDANCE BEFORE COMMISSIONER.

A marshal attending criminal examinations in separate and distinct cases on the same day, before the same commissioner, is not entitled to fees in each case, but only to the two dollars per diem allowed by Rev. St. § 829.