

ought not to be objected to, and it is probably true, as the proctor for the appellant urges, that many of the claims that have been brought against vessels were to recover for injuries alleged to have been received by reason of the breaking of old and defective ropes, and that this is the first case in his experience where the furnishing of a new rope is assigned as a specification of negligence on the part of the ship. At the same time, we are of opinion, from the evidence in this case, that, in combination with the toggle, the new rope furnished was too stiff and too large for the purpose intended, and so stiff that, on the short toggle furnished, the rope, by reason of its unpliability, could not be made to grip or bind hard enough to hold the toggle in place, or to hold the half hitches or turns made around the same by the running part of the gantline, and we are satisfied that this was the direct cause of the accident. It may be, as urged so strongly by the appellant, that the libelant received these appliances and proceeded to use them without objection, but, if this be so, it must be considered that on board ships a sailor is not expected to, nor, as for that matter, permitted, before executing an order, to question the propriety of the order or the sufficiency of the materials furnished. As we find both the libelant and the ship in fault, we consider it a proper case to divide the damages between the negligent parties. The libelant lost his leg below the knee, suffered much from pain in the hospital, and, instead of being an able-bodied seaman, has now become a cripple, and no doubt an inefficient landsman. The district court, without specifying whether the fault was mutual or the ship only in fault, awarded damages to the libelant in the sum of \$4,000. Conceding the certain injuries suffered by the libelant, we are inclined to hold that the libelant has not recovered more than half his actual damages by the decree of the district court, and that said decree should therefore be affirmed; and it is so ordered.

CITY OF NEW YORK v. DU BOIS.

(Circuit Court, W. D. Pennsylvania. December 23, 1897.)

1. POWER OF ATTORNEY—CONSTRUCTION—AUTHORITY TO COMPROMISE SUIT.

A power of attorney given by a plaintiff in a pending suit, which empowered the agent "to carry on and conduct to final consummation, or to compromise" the case, and all damages or demands therein claimed in such manner and on such terms as to him might seem expedient, does not authorize the agent to withdraw the litigation from the court in which it is pending, and by agreement with the defendants to create a special tribunal to determine the rights of the parties. The power given to compromise implies the exercise by the agent of his own judgment as to the terms accepted, and cannot be delegated by the agent to any other person or tribunal.

2. SAME—EXERCISE OF POWER—UNUSUAL AND UNREASONABLE SETTLEMENT.

Under a power of attorney authorizing an agent to compromise a pending suit, an agreement by the agent to a method of settlement which is unreasonable and unusual in its terms, and unfair, is not binding on the principal.

3. REFERENCE—CONDUCT OF HEARING—NOTICE OF TAKING OF EVIDENCE.

The taking of evidence by referees without notice of the time or place to the parties, or the conducting of private inquiries by a referee regarding matters involved, outside of the hearing, vitiates the award or findings.

4. SAME—REFERENCE UNDER STIPULATION COSTS.

Where referees were appointed, and entered upon their duties, under a stipulation between the parties which provided that their fees should be a stipulated sum for each session between certain hours, to be paid by the successful and taxed against the losing party, the successful party cannot recover from the losing party for fees paid the referees, in the absence of proof as to the number or length of sessions held, or that any fees were taxed against the defendant.

This was an action by the mayor, aldermen, and commonalty of the city of New York and the city of Brooklyn against John E. Du Bois. A jury having been waived, the court made the following finding of facts:

(1) On the 24th day of June, 1885, John Du Bois executed, and, on the 24th day of July, 1885, delivered to Thomas B. Farrington, a power of attorney, of which the following is a copy:

"John Du Bois vs. The Trustees of the New York and Brooklyn Bridge, impleaded with the Mayor, Aldermen, and Commonalty of the City of New York and the City of Brooklyn.

"In the Circuit Court of the United States, Southern District of New York.
In Equity.

"Know all men by these presents, that I, John Du Bois, of the borough of Du Bois, in the county of Clearfield, in the state of Pennsylvania, being the above-named plaintiff, do hereby make, constitute, and appoint, and I have hereby made, constituted, and appointed, Thomas B. Farrington, of Minneapolis, state of Minnesota, my true and lawful attorney for me and in my name and stead to carry on and conduct to final consummation or to compromise the above-stated case, and all claim, demand, or damages therein claimed or mentioned, in such manner or on such terms as to my said attorney may seem expedient, with the same power, force, and effect as I could do if personally present; also to receive and receipt for all money in any manner accruing from or out of the same and for the same; and this power is hereby, in consideration of other valuable considerations and one dollar to me in hand paid, made irrevocable for and during the period of three months from the 14th day of September, A. D. 1885, this instrument being a renewal and extension for three months of a similar power of attorney executed on the 14th day of March, 1885, and made irrevocable for six months thereafter. As witness my hand and seal this 24th day of June, A. D. 1885.

"[Signed] John Du Bois. [Seal.]

"Witness: Geo. R. Vosburg."

(2) At the same time said Thomas B. Farrington executed and delivered to John Du Bois a separate instrument in writing, of which the following is a copy:

"Whereas, John Du Bois has delivered to me a power of attorney this day to settle and compromise a certain case in the circuit court of the United States in the Southern district of New York, wherein he is plaintiff, and the Trustees of the New York and Brooklyn Bridge, impleaded with the commonalty, the mayor and aldermen of the cities of New York and Brooklyn, the defendants: Now, in case I shall settle and compromise said claim, I agree that immediately after the receipt of the money, or so much thereof accruing from settlement, to pay over and deliver to my said principal, John Du Bois, the sum of twenty-five thousand dollars, and in no event to settle said case by compromise in such a manner that he shall not receive and realize said sum out of said compromise. As witness my hand and seal this twenty-fourth day of July, A. D. 1885.

"Attest: Geo. R. Vosburg."

Thos. B. Farrington.

(3) John Du Bois died May 5, 1886, having by his last will (duly probated after his death) devised and bequeathed his entire estate to John E. Du Bois, the defendant herein, whom he named as his executor, and to whom letters testamentary on said will were issued on May 18, 1886, by the register of Clearfield county, Pa.

(4) On the 10th day of June, 1886, the defendant executed and delivered to said Thomas B. Farrington an instrument of writing extending said power of attorney, of which the following is a copy:

"I, John E. Du Bois, in my own right and as executor of John Du Bois, deceased, do hereby make, renew, and extend the within power of attorney according to its terms, and with all the powers therein set forth, and make the same irrevocable for one year from this date. As witness my hand and seal this 10th day of June, A. D. 1886.

"[Signed]

John E. Du Bois. [Seal]"

(5) At the same time said Thomas B. Farrington executed and delivered to said John E. Du Bois a separate instrument of writing, of which the following is a copy:

"Whereas, John E. Du Bois has delivered to me a renewal and extension of a power of attorney this day to settle and compromise a certain case in the circuit court of the United States in the Southern district of New York, wherein he is plaintiff and the Trustees of the New York and Brooklyn Bridge, impleaded with the commonalty, the mayor, and aldermen of the cities of New York and Brooklyn, the defendants: Now, in case I shall settle and compromise said claim, I agree that immediately after the receipt of the money, or so much thereof accruing from settlement, to pay over and deliver to my said principal, John E. Du Bois, the sum of twenty-five thousand dollars, and in no event claim or charge him for my services therein, nor for fees, charges, or costs thereof, nor to settle said case by compromise in such a manner that John E. Du Bois shall not receive and realize said sum out of said compromise; and I agree to indemnify him against all fees, costs, and charges on account of said case. As witness my hand and seal this tenth day of June, A. D. 1886.

Thomas B. Farrington. [Seal]"

(6) By divers instruments of writing, signed by the defendant, and delivered to said Thomas B. Farrington between June 25, 1887, and September 10, 1892, the above power of attorney was extended upon the terms and conditions upon which it had theretofore been held, the last thereof being as follows:

"I hereby extend the above power of attorney upon the same terms and subject to the same conditions and stipulations under which it has heretofore been held for the term of one year from the 10th day of June, 1892. As witness my hand and seal this 10th day of September, 1892.

"[Signed]

John E. Du Bois. [Seal]"

(7) On the 9th day of June, 1888, the legislature of the state of New York passed an act, of which the following is a copy:

"Chap. 564.

"An act to authorize the adjustment of a claim by John E. Du Bois, as executor of the last will and testament of John Du Bois, deceased, and, in his own right against the cities of New York and Brooklyn, in relation to the construction of the bridge between those cities.

"Section 1. The mayors of the cities of New York and Brooklyn, are each authorized to appoint one person, and John E. Du Bois may appoint a third person, and the three persons so appointed shall examine and report whether or not the said John E. Du Bois, as executor of the last will and testament of John Du Bois, deceased, or in his own right, has a just and valid claim against the said cities, for the use, in the construction of the bridge between the said cities, of improvements in the mode of building piers for bridges and other structures, for which it is claimed that letters patent were granted to the said John Du Bois, now deceased, by the United States, dated the twenty-third day of September, eighteen hundred and sixty-two, which have been sustained by a decision of the supreme court of the United States, and if

they find that he has such a claim, what would be a fair and reasonable compensation for the use of said improvements, and upon a report by the three persons so appointed, or a majority of them, that such a claim is just and valid, if the report shall be approved in writing by the mayors of both of the said cities, the comptroller of each city shall pay to the said John E. Du Bois, as executor as aforesaid and in his own right, or his legal representatives, out of any of the revenues of the city the amount reported by the three persons so appointed to be a fair and reasonable compensation for such use, or such part thereof, as shall be authorized and directed in writing by the mayors of both of the said cities, in the proportion in which payments by the said cities, on account of the said bridge, are required to be made by law, upon the execution and delivery by the said John E. Du Bois as executor, as aforesaid and in his own right or his legal representatives, to each of the said comptrollers, of a release of any and all claims against the said cities for the use of said improvement.

"Sec. 2. The persons so appointed, shall have power in the performance of the duty aforesaid, to take testimony under oath, which any of them may administer, and to procure proper evidence by experts.

"Sec. 3. This act shall take effect immediately."

(8) Afterwards, and before June 4, 1891, the following stipulation in writing was executed:

"In the matter of the claim of John E. Du Bois, as executor of the last will and testament of John Du Bois, deceased, and in his own right, against the cities of New York and Brooklyn, in relation to the construction of the bridge between those cities.

"Before Stephen V. White, Jasper W. Gilbert, Charles M. Clancy, referees appointed pursuant to chapter 564 of the Laws of 1888.

"It is stipulated as follows: The fees of the referees shall be to each the sum of \$25 per session of from 12 to 4 o'clock, these fees to be paid at the close of the reference and the rendition of the report of the referees, and to be advanced by the successful and taxed against and paid by the defeated party. John E. Du Bois, individually and as executor, and the mayor, aldermen, and commonalty of the city of New York and the city of Brooklyn, and the Trustees of the New York and Brooklyn Bridge, agree that the action pending between them in the United States circuit court for the infringement of patents relating to the placing of piers in deep water shall be discontinued immediately upon the report of the referees appointed under chapter 564 of the Laws of 1888 being made, providing the same shall be adverse to the claimant, or in case the said report be favorable to the said claimant and the report be approved in writing by the mayors of both the said cities, and the amount awarded by the report so approved be paid; but it is expressly understood and agreed that nothing contained in this minute shall be construed as a stipulation or agreement on the part of the said mayors, or either of them, that the said report, when made, shall be approved by them, or either of them. Such discontinuance shall not be made provided the said act shall be repealed before the payment of the award. Written pleadings shall be prepared by the parties, the claimant to submit his pleadings within seven days, and the cities of New York and Brooklyn to have thirteen days thereafter in which to answer; and, if no further pleadings are submitted, the issues arising to be tried according to law, and that the rules of law governing the admissibility of testimony in cases in the courts of law shall be adhered to. Either party may read the testimony of the witnesses in the case of John Du Bois against the mayor, aldermen, and commonalty of the city of New York, the city of Brooklyn, and the Trustees of the New York and Brooklyn Bridge in said United States circuit court, with the same force and effect, and subject to the said objections, as though the same were taken herein, the parties so reading to produce, upon reasonable notice, for cross-examination, the witness whose testimony he reads. It is also stipulated that two referees may hold meetings and take testimony in the absence of the third referee. It is further agreed that nothing contained in the act of the legislature under which the referees are appointed shall be construed to affect in any way any defense before the referees which the two cities, or the trustees, or either of them, might urge in the courts of

the United States to answer to a suit upon the patent in question; and every such defense shall be available herein to the two cities and the trustees.

"Almet F. Jenks,

"Corporation Counsel of Brooklyn.

"Wm. N. Clark,

"Corporation Counsel of New York.

"Knevals & Perry, and

"N. J. & N. J. Waterbury, Jr.,

"Attorneys for John E. Du Bois."

(9) The said Thomas B. Farrington, assuming to act for the defendant, John E. Du Bois, but without any authority to do so other than that conferred by the above-recited power of attorney and the renewals thereof, of his own motion joined in the aforesaid reference under the said act of the legislature of New York, and employed therein counsel and attorneys at law, namely, Knevals & Perry and N. J. & N. J. Waterbury, Jr., and by his (Farrington's) authority, and not otherwise, they signed the above-recited stipulation. The defendant personally did not take any part in entering into said reference, or in making said stipulation, or in the proceedings thereunder. The defendant did not attend any of the meetings of the referees, and it does not appear that he had any knowledge of any of these matters until after the proceedings under the reference had fully terminated.

(10) On the 15th day of February, 1893, the above-named referees made a report in writing against the aforesaid claim of the defendant, and favorable to the plaintiffs herein, and delivered a copy of their report to each of the plaintiffs, but none to the defendant.

(11) On or about the 24th day of March, 1893, the referees rendered to the plaintiffs herein a bill for their services, namely, \$3,000 for each referee, making a total of \$9,000; and this sum was paid to the referees by the plaintiffs. For the reimbursement of the plaintiffs this suit was brought upon the above-recited stipulation.

(12) There never was any taxation of the fees of the referees. In making out their bill the referees paid no regard to the terms of the above stipulation, but charged what they considered was a fair compensation for their services, without taking into account the number of days they held sessions.

(13) It is difficult to determine with precision from the evidence the number of days upon which sessions were held by the referees. It would seem that they did not exceed eighteen. On several of these days only one referee attended, and on only about six days were the three referees present.

(14) The sessions of the referees were conducted without any regard to the provision in the stipulation, "The fees of the referee shall be to each the sum of \$25 per session of from 12 to 4 o'clock." It does not appear that a single one of the sessions held by the referees lasted four hours, or that they sat that long on any day.

(15) One of the referees,—Jasper W. Gilbert,—not regarding the reference "as a trial in court," privately consulted Mr. Van Buren, the engineer of the New York City waterworks, in respect to mechanical and engineering subjects connected with the subject-matter of the controversy, and these private consultations with Van Buren were for the purpose of "posting" said referee, or giving him information upon which to act, and they took place while the case was under consideration by the referees, and before report made.

At the trial the defendant's counsel submitted to the court the following propositions or points, to which the court made the subjoined answers:

(1) The plaintiffs have declared upon a certain contract which they allege was made between John E. Du Bois and them. Answer. This point is affirmed.

(2) That the contract referred to in the first point was not executed by John E. Du Bois personally, but, if executed at all, it was executed by Knevals & Perry and N. J. & N. J. Waterbury, Jr., claiming to act as his attorneys. Answer. This point is affirmed.

(3) There is no evidence sufficient to prove that Knevals & Perry and N. J. & N. J. Waterbury, Jr., or either or any of them, were agents or attorneys of John E. Du Bois. Answer. This point is affirmed.

(4) That the power of attorney from John Du Bois, dated 24th day of June, 1885, to Thomas B. Farrington, which was continued on the 10th of June, 1886, subject to conditions set forth in defendants' Exhibit 'C,' by John E. Du Bois, did not authorize Farrington to intrust a compromise to any other agent or attorney, or to employ any attorneys, for John E. Du Bois to compromise his claim. Neither was Thomas B. Farrington himself authorized in any event to compromise the claim as to John E. Du Bois on any basis by which John E. Du Bois should receive a less sum than twenty-five thousand dollars. Answer. This point embraces two propositions, each of which is sound. Thus regarded, the point is affirmed. But I do not mean to declare that the collateral papers which Farrington executed have any binding effect as against the plaintiffs. My views upon Farrington's authority are expressed in my opinion herewith filed.

(5) The alleged attempted compromise set out in the act of legislature and contract is so unreasonable, unequal, unfair, and outside of the usual and legitimate means and modes of compromise, that it was not within the power of either Farrington to employ attorneys to make such a contract for John E. Du Bois, nor of the attorneys who purported to execute for him to make it. Answer. This point is affirmed.

(6) The referees, having been selected as per stipulation entered into by attorneys at law claiming to represent the plaintiffs and defendant to pass upon issues referred to by act of 9th of June, 1888, were bound by the limitations agreed upon, and were obliged to conduct their investigation and make their report substantially as set forth in said agreement. Answer. This point is affirmed.

(7) Neither the referees nor either of the parties without the consent of the other party could change or vary any of the terms of the agreement of reference. Answer. This point is affirmed.

(8) The taking of evidence on the investigation of the case by the referees, or either of them, without notice of time or place to the parties to be affected by the testimony so as to permit a direct or cross-examination of the persons examined, was such an error or misconduct on the part of the referee or referees as would vitiate the award or finding, and would not be validated by the payments of fees by plaintiffs in this case, so as to compel the other party to pay back the fees thus advanced. Answer. This point is affirmed. Vide *Speer v. Bidwell*, 44 Pa. St. 23, 27; *Passmore v. Pettit*, 4 Dall. 270.

(9) If the uncontradicted testimony of Jasper W. Gilbert be regarded as true that he "did not regard it as a reference at all, as a trial in court, and therefore I spent considerable time in posting myself by consulting with Mr. Van Buren particularly, the engineer of our waterworks, on mechanical and engineering subjects," it was such an error or misconduct as vitiated the award or finding; and particularly would this be so when it is remembered that in the agreement of reference it is stipulated by the attorneys that the issues arising are to be tried according to law, and the rules of law governing the admissibility of testimony in cases in the courts of law shall be adhered to. Answer. This point is affirmed. Vide *Speer v. Bidwell*, 44 Pa. St. 23, 27; *Passmore v. Pettit*, 4 Dall. 270.

(10) As it does not appear the referees or the plaintiffs ever reported the alleged award to John E. Du Bois, nor gave him any notice thereof, nor taxed any fees or costs, nor gave him any notice of any claim for taxation, the plaintiffs are not entitled to recover. Answer. This point is affirmed in view of the lack of evidence to supply the place of taxation, or evidence to show that the referees earned any fees under the stipulation.

(11) That under the evidence in the case the judgment of the court should be for the defendant. Answer. This point is affirmed.

And thereupon the court delivered the following opinion.

Johns McCleave, for plaintiffs.

Geo. A. Jenks, for defendant.

ACHESON, Circuit Judge. It is not necessary to decide whether or not the collateral papers of July 24, 1885, and June 10, 1886, ex-

ecuted by Thomas B. Farrington, have any binding force as against the plaintiffs. In the view I take of the case, they may be and are excluded from consideration. Putting them aside altogether, with what authority was Thomas B. Farrington clothed? The utmost extent of his agency is to be found in the power of attorney of June 24, 1885. He had no other authority than is there defined. Now, clearly, he was thereby constituted a special agent, empowered to do specific acts only. There was then pending in the United States circuit court for the Southern district of New York a suit in equity, brought by John Du Bois against the plaintiffs in the present action, for the infringement of letters patent and the recovery of damages therefor. The power of attorney concerned that case, and empowered Farrington "to carry on and conduct to final consummation or to compromise the above-stated case, and all claim, demand, or damages therein claimed or mentioned, in such manner or on such terms" as to him might "seem expedient," with power to receipt for money accruing from the same, and to give a release and discharge therefor. Farrington was thus authorized to do one of two things, namely, either to carry on and conduct the patent suit in the circuit court to a finality, or to compromise it. In the attempted execution of his authority he did neither. Instead of carrying on the case in the circuit court, which was learned in the patent law, Farrington undertook, in connection with the defendants in the action, to withdraw the litigation from that jurisdiction, and to create a special tribunal to determine the rights of the parties. No such course of action was within the terms of the power of attorney, or the scope of the agency thereby created. Nor can the reference be sustained as a "compromise." In empowering Farrington to compromise the case Du Bois relied on the personal knowledge, ability, and integrity of his chosen agent. The agency was a personal trust and confidence. To compromise implied the exercise by Farrington of his own judgment as to agreed terms of settlement. Upon the plainest principles of the law of agency, the authority conferred on Farrington to compromise could not be delegated by him to others. Yet nothing less than this was attempted here. The decision of the three referees was to be substituted for the judgment of the agent, who had been selected because of his supposed personal fitness. Moreover, the stipulation pursuant to the New York act was, in its terms, very unusual. It was wonderfully one-sided. It secured to Du Bois nothing; not even fair play. A report favorable to him would have availed him naught unless approved by the mayor of each of the two cities,—his antagonists. Yet he was clothed with no such veto power in case of a report adverse to him. It is not to be believed that a mode of procedure so extraordinary and unnecessary was contemplated by Du Bois. By no fair reading of the power of attorney can its scope be extended so as to cover the transaction upon which the plaintiffs' claim rests. For these reasons, and other reasons appearing in the answers to the defendant's points, the finding of the court must be in favor of the defendant. And now, to wit, December 23, 1897, the court finds in favor of the defendant.

In re LI SING.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 93.

1. HABEAS CORPUS—EFFECT OF WRIT.

The questions which can be presented upon the writ of habeas corpus to review the decision of a United States commissioner relate to the jurisdiction of the commissioner and the legality of his order.

2. CHINESE—ACT OF SEPTEMBER, 1888.

Section 12 of the act of September 13, 1888, making the decisions of collectors of customs as to the right of Chinese persons to enter the United States final, in all cases, unless reversed on appeal to the secretary of the treasury, even if it ever went into effect, is no longer so since the act of August 18, 1894.

3. SAME—ACT OF 1894—DECISION OF COLLECTOR OF CUSTOMS.

The provision of the act of August 18, 1894, making the decisions of collectors of customs, when adverse to the right of Chinese persons to enter the United States, reviewable by the secretary of the treasury alone, does not make such decisions conclusive upon the federal courts when favorable to such right.

4. CONSTITUTIONAL LAW—RULE OF EVIDENCE.

Section 3 of the act of May 5, 1892, requiring Chinese persons arrested under the act to establish by affirmative proof their right to remain in the United States, is constitutional.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In June, 1893, Li Sing, then a resident of Newark, N. J., returned to China, and took with him a certificate issued by the imperial government of China at its consulate at New York, and signed by its consul, that he was permitted to return to the United States, and was entitled to do so, and which furthermore styled him a "wholesale grocer." This certificate was viséed in Hong Kong by the United States consul on June 27, 1896, when Li Sing was about to return to this country. He thereafter returned by the way of Canada, and presented the certificate to the United States collector of customs at Malone, N. Y., who canceled it on August 28, 1896, and permitted him to enter the country. On January 6, 1897, the United States officer who is called the "Chinese Inspector for the Port of New York" represented, in writing and under oath, to John A. Shields, Esq., United States commissioner for the Southern district of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was, and had been for many years, a Chinese laborer, whereupon he was brought before the commissioner for examination. The counsel for Li Sing insisted before the commissioner that, by the action of the collector of customs at Malone, the question of the Chinaman's right to be and remain in this country was res adjudicata, and, furthermore, that he was a merchant. Testimony to this effect was given by Chinese witnesses exclusively, which was received by the commissioner, notwithstanding the objection of the attorney for the United States. The commissioner found upon all the evidence that Li Sing was at the time of the examination a Chinese laborer, was such at the time he departed for China, and for a term of years prior thereto, and was such after his return from China in August, 1896; and simply ordered his deportation, and did not order imprisonment, as a punishment or penalty. A writ of habeas corpus and a writ of certiorari were thereupon allowed by the circuit court for the Southern district of New York, upon Li Sing's petition; and after a hearing the writ of habeas corpus was dismissed, and the relator was remanded to the custody of the United States marshal for deportation. This appeal was taken by the relator from the order of the circuit court.

Wm. C. Beecher, for relator.

Max Kohler, Asst. U. S. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The questions which can be presented upon the writ of habeas corpus relate to the jurisdiction of the commissioner, and the legality of the order of deportation. It is claimed that he had no jurisdiction, because the action of the collector at Malone was a finality, and that the relator cannot be detained, because the provisions of the third section of the act of May 5, 1892 (27 Stat. 25), under which his examination was conducted, were in violation of the constitution. The proceedings for Li Sing's deportation were instituted by Inspector Scharf, under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat. 115), which provides that:

"No Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came."

The required certificate in regard to persons not laborers was specified in the sixth section of the same amended act; was to be obtained from the Chinese government by every Chinese person, other than a laborer, who was about to come to the United States; and was for the purpose of identifying the person, and evidencing the permission of the government for his departure. The section provided that this certificate—

"Shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

It is not now contended that, under sections 6 and 12, the opinion of the collector of customs in regard to the character of the certificate was final. "On the contrary, the implication of section 12 is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with." U. S. v. Jung Ah Lung, 124 U. S. 621, 629, 8 Sup. Ct. 663. Section 12 of the act of September 13, 1888 (25 Stat. 476), is the one upon which the relator relies. This act was passed to take effect, as a whole, upon the ratification of a treaty then pending between the United States and the emperor of China, which was never ratified. Section 12 of this act provided that:

"The collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States and his decision shall be subject to review by the secretary of the treasury and not otherwise."

If this section had gone into effect, and had continued to be in effect until August 27, 1896, when the collector at Malone acted in

the matter, his decision would have been final. *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 660, 12 Sup. Ct. 336. The treaty not having been ratified, a new act, of October 1, 1888 (25 Stat. 504), was passed, which, as stated in *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729—

“Declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States, and who had departed or might depart therefrom, and should not have returned before its passage, to remain in the United States. And it further declared that no certificates of identity, under which, by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued; and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue thereof.”

It will be noticed that section 4 of the statute of May 5, 1882, had provided for certificates of identity which could be given to Chinese laborers departing from this country and intending to return, and that this new statute of 1888 prohibited the future issuance of such certificate to the laboring class, so that:

“The result of the legislation respecting the Chinese would seem to be this: That no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein, and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be viséed by a representative of the government of the United States.” *Wan Shing v. U. S.*, supra.

Section 3 of the act of October 1, 1888, provided that all the duties prescribed and powers conferred by section 12 of the act of May 6, 1882, already referred to, were made applicable to the provisions of the new act. It would seem from the contrariety between the acts of September and of October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect. *U. S. v. Gee Lee*, 1 C. C. A. 516, 50 Fed. 271. We intend to express no opinion in regard to section 13 of that act. The question is no longer a living one, for subsequently, in the act of August 18, 1894, c. 301 (28 Stat. 390), congress provided that:

“In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury.”

This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter, such decision has no more force, as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the supreme court in *U. S. v. Jung Ah Lung*, su-

pra. In re Li Foon, 80 Fed. 881; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967.

The relator asserts the unconstitutionality of the provisions of section 3 of the act of May 5, 1892, supra, which required a Chinese person who was arrested under the act to establish by affirmative proof his lawful right to remain in the United States, and of the provisions of section 2 of the act of November 3, 1893 (28 Stat. 7), which required a Chinaman to establish certain facts by the testimony of two credible witnesses, other than Chinese, upon an application for entrance into the United States on the ground that he was formerly a merchant in this country. It appears from the return to the writ of certiorari that all the witnesses for the relator were Chinese, but that the commissioner excluded nothing, and decided, upon the entire conflicting testimony, that the defendant was a Chinese laborer. The question of the constitutionality of section 2 of the act of 1893 does not, therefore, arise upon this record. The question of the constitutionality of provisions akin to those in section 3 of the act of May 5, 1892, in regard to requirements of proof, was settled in Fong Yue Ting v. U. S., 149 U. S. 698, 729, 13 Sup. Ct. 1016. The opinions of the supreme court in Wan Shing v. U. S., 140 U. S. 424, 11 Sup. Ct. 729, and in Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, are also suggestive upon the extent of the power of congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully in the country. The order of the circuit court is affirmed.

UNITED STATES v. BORGFELDT et al.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 27.

CUSTOMS DUTIES—CLASSIFICATION—"BROWNIE ALBUMS."

"Brownie Albums," or decalcomanie books, containing lithographic prints so prepared that they may be transferred to articles by what is known as the "decalcomanie process," were dutiable, under paragraph 436 of the act of 1890, as toys not otherwise provided for, and not, under paragraph 308 of the act of 1894, as lithographic prints.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by George Borgfeldt & Co. for a review of a decision of the board of general appraisers reversing the action of the collector in classifying for duty certain imported goods. The court below affirmed the decision of the board, and the United States have appealed. The opinion filed below by TOWNSEND, District Judge, was, in full, as follows:

"The articles in question are 'Brownie Albums,' or decalcomanie books, containing lithographic prints so prepared that they may be transferred to articles by what is known as the 'decalcomanie process.' They were assessed, under paragraph 308 of the act of 1894, as lithographic prints. The importer protested, claiming that they were dutiable under various other provisions of said act, and, under paragraph 436 of the act of 1890, as toys. The board of general appraisers found that the articles were toys, and sustained the protest of the importer.