Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Attorney-General of Hong Kong v. *Kwok-a-Sing from the Supreme Court of Hong Kong: delivered* 19*th June*, 1873.

Present:

SIR JAMES W. COLVILE.
SIR ROBERT PHILLIMORE.
SIR BARNES PEACOCK.
LORD JUSTICE MELLISH.
SIR MONTAGUE SMITH.

THIS is an appeal by the Attorney-General of the Colony of Hong Kong, from a judgment of the Supreme Court of that Colony whereby the Respondent, Kwok-a-Sing, a Chinese coolie, who had been brought before the Court by writ of *habeas corpus* was ordered to be released from custody, and an order made thereon dated the 18th April, 1871, and also from a judgment and order of the same Court, dated the 22nd May, 1871, whereby he was again ordered to be released from custody. The first writ of *habeas corpus* was issued on the 7th February, 1871, and was directed to the keeper of the gaol at Victoria, Hong Kong. The return to the writ was dated the same day and set out a warrant of a police magistrate, which was as follows:—

"Whereas the above-mentioned Defendant was on this date duly convicted before Charles May, Esquire, one of Her Majesty's Justices of the Peace for the said Colony, for that a communication having been received requiring the rendition of the Defendant, on behalf of the Chinese Government as a subject of China, who has committed certain crimes and offences against the laws of China by participating in the murder of a portion of the crew

of the French ship ' Nouvelle Penelope," and it appearing to me, upon investigation of the case, that there is cause to believe that the said Defendant is a subject of China, and has committed the said crimes against the laws of China by feloniously seizing the said ship at sea, and by murdering the captain and certain of the crew of the said ship on the 4th October last past at sea; and, further, that after the commission of the said crime, did feloniously seize a boat belonging to the said ship, and land at a place called ' Pakha,' in Chinese territory, on the 11th October aforesaid, and it was thereupon adjudged that the said Defendant, for the said offence, should be committed to gaol for detention pending the receipt of orders from His Excellency the Lieutenant-Governor as to his further disposal.

"These are therefore to command you, the said constable, to take the said Defendant and safely to convey to the said gaol, and there to deliver him to the said superintendent or keeper, together with this precept; and I do hereby command you the said superintendent or keeper to receive the said Defendant into your custody in the said gaol, and there to imprison him as aforesaid.

Given under my hand and seal at Victoria aforesaid, this 7th day of February, in the year of our Lord one thousand eight hundred and seventy-one.

(Signed) C. May,
(L.S.) Police Magistrate."

This warrant was issued under an Ordinance of the Colony No. 2, of 1850. By the IXth Article of the Supplementary Treaty of Nankin, dated the 8th October, 1843, called the Treaty of the Bogue, it was agreed that, if lawless natives of China having committed crimes or offences against their own Government shall flee to Hong Kong, a communication shall be made to the proper English officer that the said criminals and offenders may be seized, and in proof or admission of their guilt be delivered up.

Ordinance No. 2, of 1850, was passed by the Legislative Council of the Colony and the material parts of it were as follows :—

"Whereas, by the Treaties between Great Britain and China, provision is made for the rendition for trial to Officers of their own country of such subjects of China as have committed crimes or offences against their own Government, and afterwards taken refuge in Hong Kong.

"I. Be it therefore enacted and ordained by his Excellency the Governor of Hong Kong, with the advice of the Legislative Council thereof, that if any complaint or information or any communication by any Officer of the Chinese Government be made or forwarded to any magistrate or Court (other than the Supreme Court) desiring the arrest of any person being a Chinese subject, and then within the said Colony of Hong Kong, and alleging that such person has committed, or is charged with having committed, any crime or offence against the laws of China, or if it shall appear in the course of any investigation before such

Magistrate or Court that any person, being a subject of China, has committed any such crime or offence, it shall and may be lawful for such Magistrate or Court to issue a summons or warrant for the appearance or apprehension of such person; or, if such person be already in custody, it shall be lawful to detain such person, and to investigate the alleged crime or offence in the same manner as if such person were charged with a crime or indictable offence committed within the said Colony.

"III. And be it further enacted and ordained, That if at the close of the said investigation it shall appear to the said Magistrate or Court that such person as aforesaid is a subject of China, and that there is probable cause for believing that the said person has committed such crime or offence, it shall and may be lawful for such Magistrate or Court to commit such person for safe custody to prison, and to direct the Gaoler to detain such person in prison until the said Gaoler shall receive some order or orders from the Governor of Hong Kong relative to the further detention, discharge, or transmission of such person to the nearest Chinese authorities, or to such other Chinese authorities as to the said Governor shall seem fit; and the said Magistrate or Court shall, upon making such committal as aforesaid, transmit to the said Governor of Hong Kong the Minutes of such investigation, and all documents in his or its possession connected with the charge against such person, in order that such person may be dealt with according to the Treaties aforesaid."

By the Treaty of Tientsin made the 29th June, 1858, new provisions were made with regard to the extradition of criminals from the Colony of Hong Kong to the Chinese Government in substitution of those of the Treaty of the Bogue, which was abrogated.

The depositions taken before the magistrates and the documents before him having reference to the committal of Kwok-a-Sing, were afterwards brought before the Supreme Court in obedience to a writ of *certiorari*. The depositions contained the evidence of Wong Akee and Chun Assan, two Chinese who had been passengers, and of Paul Verret and Joseph Simon, two Frenchmen, who had been seamen on board the French ship "Nouvelle Pénélope" which left Macao on the 1st October, 1870, with 310 Chinese coolies on board on a voyage to Peru. All the coolies were examined by the Portuguese authorities at Macao before they embarked to ascertain that they went voluntarily, but nevertheless Wong Akee said that he was kidnapped, which he explained to mean that he had been persuaded by a fraud to go to the barracoon, and that he told the authorities he was willing to go to Peru contrary to the truth, because, from the threats of the Chinese who brought him there,

he was afraid that his head would be cut off if he did not. It was also proved that about 100 of the other coolies said that they were kidnapped. There was no proof that Kwok-a-Sing had been kidnapped or that he was among those who said they had been kidnapped. The master of the ship and the charterer selected eight of the coolies to be headmen over the others and paid them 3 dollars a piece a month for acting as headmen. Kwok-a-Sing was one of those selected. At half-past 4 on the afternoon of the 4th of October, when the ship was prosecuting her voyage on the high seas, about twenty of the coolies collected near a seaman, who was keeping guard at a barrier that was placed across the deck, attacked him and threw him overboard. They afterwards attacked the captain, who was walking unarmed on the deck, killed him, and threw him overboard. They also killed several others of the crew and obtained complete command of the vessel and changed her course to the coast of China. It was positively sworn by Chun Assun that Kwok-a-Sing was one of those who attacked the captain, and the other witnesses prove that he was one of the coolies who kept the command of the vessel until the vessel arrived back on the coast of China. There was also some evidence that Kwok-a-Sing and other coolies took possession of the captain's watch and a quantity of dollars on board. When the ship arrived on the coast of China Kwok-a-Sing and other coolies left the vessel in a boat. The vessel itself was run aground, and was left to be plundered by the natives. Among the documents returned by the magistrate to the Supreme Court was the following letter from the Colonial Secretary to the magistrate :—

"Hong Kong, "Received 3rd February.
"No. 53. "Colonial Secretary's Office,
"Sir, "3rd February, 1871.

"I have the honour to acquaint you, by desire of his Excellency the Lieutenant-Governor, that an application has been received from Her Majesty's Consul at Canton, claiming on behalf of the Chinese authorities the rendition of the man 'Aping,' who is charged with participation in the murder of a portion of the crew of the French ship 'Nouvelle Penelope.'

"I have, &c.
(Signed) "J. GARDINER AUSTIN,
"Colonial Secretary.

"C. May, Esq.,
"First Police Magistrate."

Several objections were made to the validity of the return, and were argued before the Chief Justice. He delivered Judgment on the 29th of March, 1871, and held several of the objections to be valid, and afterwards, on the 18th of April ordered Kwok-a-Sing to be discharged.

On the 26th of April, 1871, the Attorney-General caused Kwok-a-Sing to be again arrested on a charge of piracy *jure gentium* with a view to his trial on that charge before the Supreme Court of Hong Kong. The evidence of witnesses was again taken, and Kwok-a-Sing was committed for trial. Another writ of *habeas corpus* was issued, and return made setting out the Magistrate's warrant by which he was committed to take his trial. On the 22nd of May, 1871, he was again ordered to be discharged upon the ground that his second arrest was a violation of the 6th section of the "Habeas Corpus Act."

The first question which their Lordships will consider is whether, assuming that there was sufficient *primâ facie* evidence against Kwok-a-Sing to prove that he was guilty of the murder of the French captain, and that he was guilty of piracy *jure gentium* in running away with the French vessel, these acts constitute crimes and offences against the law of China within the meaning of the first Section of Ordinance No. 2 of 1850, or crimes and offences against the Government of China within the preamble of the same Ordinance. There is no doubt that the extreme generality of the words "crimes and offences against the law of China," makes their construction very difficult. They cannot be intended to mean that every Chinese subject who is proved to have done something which, the law of China makes a crime or an offence, is to be given up to the Chinese Government. If this were the meaning of the words, every Chinese who had done something which the law of China treats as a political offence, or who had done anything which the law of China treats as criminal, though the law of all European countries treats it as innocent, might be given up. Some limitation, therefore, must be put upon the meaning of the words, and their Lordships think that, in determining what that limitation is to be, they ought to bear in mind the position of the Colony of Hong Kong with reference to China. There

was, when the Treaty was made, a manifest risk that the Colony of Hong Kong might become the refuge of the criminal classes of the city of Canton and other Chinese towns, and it was impossible that the Colonial Government could punish Chinese subjects for acts committed within the territory of China. Having regard to this object their Lordships think that the words crimes and offences ought to be confined to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China. In the Treaty of Tientsin the persons to be delivered up are described generally as criminals. All ordinary crimes—such as murder, robbery, theft, arson—committed by a Chinese within Chinese territory or in Chinese ships on the high seas would be within the meaning of the Ordinance. Their Lordships are also of opinion that piracy, at least in certain circumstances, would be within the meaning of the Ordinance. They think it may properly be assumed, without proof, that China has laws to punish piracy on her own coast, and if it was proved that a subject of China who had taken refuge in Hong Kong was a pirate in this sense, that he was a person who went from the Chinese coast to plunder ships at sea, returning with his plunder again to China, they are of opinion that such a person might be given up under the Ordinance. On a claim for the rendition of such criminals as these, it would not, in their Lordships' opinion, be necessary to produce the evidence of experts to prove what is the law of China.

Their Lordships have now to consider whether there was evidence that Kwok-a-Sing had been guilty of crimes against the laws of China within the meaning of the Ordinance. He is accused of two crimes, murder and piracy. The alleged murder was the murder of a Frenchman on board a French ship in which Kwok-a-Sing was a passenger on the high seas. They have, therefore, to consider whether murder by a subject of China of a person who is not a subject of China, committed outside the Chinese territory, is a crime against the laws of China within the meaning of the Ordinance; and they are of opinion that it is not. Their Lordships cannot assume, without evidence, that China has laws by which a Chinese subject can be punished

for murdering beyond the boundary of the Chinese territory a person not a subject of China. Up to a comparatively late period England had no such laws. Moreover, although any nation may make laws to punish its own subjects for offences committed outside its own territory, still, in their Lordships' opinion, the general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done. Now, the law as to what constitutes murder differs in different places. Suppose that a subject of China kills an Englishman within English territory, or on board an English ship, under circumstances which, according to English law, might amount to manslaughter only, could it possibly be right for the English Government to surrender such a person to the Chinese Government to be tried according to Chinese law, to which the distinctions between murder and manslaughter may be wholly unknown. On the whole, therefore, on these two grounds—first, that it cannot be assumed without evidence that there is any law in China to punish a Chinese subject for a murder committed upon a foreigner within foreign territory; and, secondly, because even if it could be assumed that there was such a law, still, this offence having been committed within French territory ought to be treated as an offence against French law, and not as an offence against Chinese law, their Lordships are of opinion that there was no evidence before the magistrate that Kwok-a-Sing in murdering the French captain, committed an offence against the laws of China according to the true construction of the Ordinance.

Their Lordships have next to consider whether there was sufficient evidence before the magistrate that Kwok-a-Sing had committed an act of piracy *jure gentium*, and, if there was such evidence, whether that would make his imprisonment, for the purpose of being delivered to the Chinese authorities, lawful.

Now, their Lordships are of opinion that there was before the magistrate sufficient *primâ facie* evidence that Kwok-a-Sing had committed an act of piracy *jure gentium* to justify his committal for trial for that offence at Hong-Kong. They see no reason to doubt that the charge of Sir Charles Hedges, Judge of the High Court of Admiralty, to the

Grand Jury, as reported in the case of Nix *v.* Dawson, 13 State Trials, 654, and which was made in the presence, and with the approval of Chief Justice Holt, and several other Common Law Judges, contains a correct exposition of the Law as to what constitutes piracy *jure gentium*. He there says "Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." Of course there can be no difference between mariners and passengers, and there was unquestionably evidence that Kwok-a-Sing was a party to violently dispossessing the master and carrying away the ship itself and the goods therein; and the only question can be whether there was sufficient evidence that the act was done with a felonious, that is a piratical, intention. In their Lordships' opinion, there was evidence of such an intention on the part of Kwok-a-Sing fit to be left to a jury, though they wish to be understood as giving no opinion which way a jury ought to find on this question.

Next, it must be considered what was the legal duty of the Magistrate when he had received the evidence; ought he to have signed a warrant enabling the Governor to deliver Kwok-a-Sing to the Chinese authorities to be tried for both murder and piracy, or ought he to have committed him to be tried for the piracy at Hong Kong? In their opinion he ought to have committed him to be tried for the piracy at Hong Kong. They think that the acts of piracy *jure gentium* with which Kwok-a-Sing was charged may be plainly distinguished from those acts of piracy which they have before stated to be, in their opinion, within the Ordinance and the Treaties. If Chinese subjects starting from, and returning to, Chinese territory, attack a ship of some other nation, whether in harbour or at sea, they, making that territory as it were the base of their operations, must be held to commit an offence against the municipal law of China and against the Chinese Government, whether they commit an act of piracy

jure gentium or not; but if Kwok-a-Sing committed an offence against the municipal law of any nation he committed an offence against the municipal law of France, to which he was subject at the time, and not against the municipal law of China, and if he is punishable by the law of China, he is only so punishable because he has committed an act of piracy which, *jure gentium*, is justiciable everywhere. They are of opinion that such an offence is not an offence against the law of China within the meaning of the Ordinance. On the whole, therefore, they are of opinion that the warrant by which the magistrate authorized the Governor, if he thought fit, to deliver Kwok-a-Sing to the Chinese authorities to be tried by them for murder and piracy, was an illegal warrant and one beyond his jurisdiction, and that, therefore, the first order of the Chief Justice for the release of Kwok-a-Sing was right and ought to be affirmed.

Having come to this conclusion, their Lordships need not give any opinion upon the validity of the other grounds on which the Chief Justice thought that Kwok-a-Sing ought, on the first occasion, to be discharged. They think, however, it is right to state that they do not agree with the Chief Justice that the evidence before him proved that "La Nouvelle Pénélope" was a slave-ship, and that Kwok-a-Sing and the other coolies who acted with him were justified in killing the captain and the French sailors, for the purpose of obtaining their liberty. There was evidence from which it might be inferred that some of the coolies had, by fraud or by threats on the part of other Chinese, been induced to go to the barracoon, and embark on board the ship against their will. They appear, however, all to have professed to the Portuguese authorities at Macao that they were willing emigrants; and there was, in their Lordships' opinion, no sufficient evidence upon the depositions that either the Portuguese authorities at Macao, or the French captain and crew, were any parties to compelling any of the coolies to leave China against their will.

Their Lordships have next to consider whether the judgment and order of the 22nd of May, 1871, whereby Kwok-a-Sing was, for the second time, discharged from custody, was valid. He was discharged solely upon the ground that he had been committed

a second time for the same offence, contrary to the 6th section of the 31 Charles II, c. 2. They cannot agree with the construction which the Chief Justice has put upon this section of the statute. The principal object of the section seems to have been to prevent persons who had been brought up on a writ of *habeas corpus*, and discharged on giving bail and entering into their own recognizance from being again arrested for the same offence, and obliged to sue out a second writ of *habeas corpus*. This appears from the provision by which the person discharged may be again arrested by the order of the Court wherein he shall be bound by recognizance to appear, or other Court having jurisdiction of the cause. The words, "other Court having jurisdiction of the cause," were probably added to meet the case of an indictment having been moved by *certiorari* from one Court to another.

They do not say, however, that the section may not also apply to cases, where a prisoner is discharged unconditionally upon the ground that the warrant on which he is detained shows no valid cause for his detention. They think, however, it can only apply, when the second arrest is substantially for the same cause as the first, so that the return to the second writ of *habeas corpus* raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first. In the present case the second warrant is a warrant by which Kwok-a-Sing was committed to take his trial at Hong Kong for piracy *jure gentium*, and was, in their opinion, a valid warrant. They think he ought not to have been discharged from his custody under that valid warrant, because he had been previously discharged from an unlawful imprisonment.

Their Lordships will accordingly humbly recommend to Her Majesty, that the judgments and orders of the Supreme Court of Hong Kong of the 29th March, 1871, and the 18th April, 1871, should be affirmed, and that the judgment and order of the 22nd May, 1871, should be reversed, and that there should be no costs of the appeal.

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