

UNITED STATES v. BELDING.
UNITED STATES v. MYNDERSE.
{12 Int Rev. Rec. 39.}

Circuit Court, N. D. New York. 1870.

INTERNAL REVENUE—ILLEGAL
DISTILLATION—RECOVERY OF
PENALTY—FORFEITURE OF
PROPERTY—CHARACTER OF PROCEEDING.

- {1. Act July 1, 1862. providing that one using or owning appliances for the distillation of liquors, who neglects to report the same, shall forfeit the spirits made by him as well as the apparatus and shall pay a penalty of \$500, authorizes a suit to recover such \$500, and also a separate proceeding in rem to enforce the forfeiture of the property by condemnation.}
- {2. The provision that there must be a seizure of the property within 30 days after the cause for the same occurred, and that proceedings to enforce the forfeiture shall be begun within 20 days after the seizure, does not apply to or affect the recovery of the penalty.}

{Error to the district court of the United States for the Northern district of New York.

{These were actions by the United States against Edward Belding and Edward Mynderse, respectively, brought to recover the statutory penalty for the violation of the revenue laws. The judgments rendered in the court below were in favor of the defendants. Cases unreported. The causes are now before this court upon a writ of error to review its judgments.}

WOODRUFF, Circuit Judge. These two cases, argued together at the recent session of the court in March last, present one and the same question, touching the construction of section 54 of the act to provide internal revenue, etc., passed July 1, 1862. 12 Stat. 452. By that section it is enacted "that the owner, agent, or superintendent of any vessel or vessels used in making fermented liquors, or of any still, boiler,

or other vessel used in the distillation of spirits on which duty is payable, who shall neglect or refuse to make true and exact entry and report of the same, or to do or cause to be done any of the things by this act required to be done, as aforesaid, shall forfeit, for every such neglect or refusal, all the liquors and spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, together with the sum of \$500, to be recovered with costs of suit; which said liquors or spirits, with the vessels containing the same, with all the vessels used in making the same, may be seized by any collector, of internal duties, and held by him until a decision shall be had thereon according to law: provided, that such seizure be made within thirty days after the cause for the same may have occurred, and that proceedings to enforce said forfeiture shall have been commenced by such collector within twenty days after the seizure thereof. And the proceedings to enforce said forfeiture of said property shall be in the nature of a proceeding in rem, in the circuit or district court of the United States, for the district where such seizure is made, or in any other court of competent jurisdiction.”

These actions were brought to recover several sums of \$500, liability for the payment of which is alleged to have been incurred by the defendants in each, by sundry violations of the 45th section of the same act, at sundry times in the declaration stated. On the trial of the actions respectively, proof of such violations was given on the part of the plaintiffs. But “it was conceded that no seizure of the property of the defendant had been made, and that no proceedings to enforce the forfeiture were commenced within fifty days after the cause for the same occurred.” Thereupon the question arose, can the action to recover the several sums of \$500 be maintained? Or was a seizure of the liquors, spirits, stills, boilers, and other vessels, within

thirty days after the cause for the same occurred, and the commencement of proceedings to enforce the forfeiture, necessary and precedent conditions of the right to recover from the owner personally the \$500? The seizure of the property and the commencement of proceedings to enforce the forfeiture within the times respectively mentioned, were held on the trial indispensable conditions precedent to a recovery of the \$500 from the owner, and the jury were, therefore, on that sole ground, instructed to find a verdict for the defendant in each case. The plaintiffs, by their writ of error, seek to review such ruling, and allege that it was an erroneous construction of the act.

In support of the ruling below, it is insisted that the fifty-fourth section, upon which the actions respectively are based, contemplates one entire forfeiture and one only proceeding for its enforcement, including therein the condemnation of the property seized, and a judgment against the owner personally for the \$500, or several sums of \$500, if he be liable for more than one; and that the proviso forbids any seizure or forfeiture, unless such seizure be made within the number of days mentioned after the cause of seizure occurred. The statute is expressed in terms which are, in many respects, liable to criticism, and the structure of the section is somewhat confused. The meaning is, nevertheless, sufficiently clear and intelligible, and I think it does not at all import that there shall be but one proceeding founded upon a violation of the law. The purpose was to secure obedience to the statute by subjecting its violators to a loss of the property produced and the instruments employed in the production, and to impose upon them personally a penalty. The penalty is to be recovered with costs of suit. This language is to be understood in the usual sense in which it is employed, viz. in a suit to be brought therefor, in which the person liable may be charged by a judgment against him with

1078 costs. The statute uses the ordinary form of the “ideo consideratum est,” which embodies and declares the judgment of the court in an action for the recovery of money.

On the other hand, the section says expressly that the proceedings to enforce the forfeiture of the property shall be in the nature of proceedings in rem, in which proceedings there is no personal judgment, and in which the property is defendant. Indeed, if in such proceedings the owner of the rem does not see fit to appear and claim, he will not be before the court at all, to be charged by any judgment. The giving of a recovery, with costs of suit, per se, indicates a discrimination intentionally made between the action for the penalty and the proceeding in rem, for in the latter all that is secured to the plaintiffs is the rem itself for condemnation and appropriation to their use; and when the owner does not see fit to appear and claim, the whole subject of condemnation comes to the plaintiff, and no more whether the costs are greater or less. The costs of suit spoken of are not costs of the proceeding in rem, but costs of suit for the \$500. No mode is pointed out by which the owner can be required to appear in the proceeding in rem, and the construction in this respect would deprive the plaintiffs of any power by any practice of the courts of law to obtain such judgment against the owner personally if he preferred not to intervene by claiming the property. There can be no just reason to suppose that congress intended to prescribe the practice of courts of admiralty for the enforcement of this statute. The proceeding in rem must by the terms of the section be taken in the district where such seizure is made. The owner of the property seized may reside in another district. Is it to be held that by this section congress intended a constructive repeal, pro hac vice, of the eleventh section of the judiciary act of 1789 [1 Stat. 78], which declares that no civil

suit shall be brought against any defendant (being an inhabitant of the United States) out of the district in which he resides or may be found, etc.? If so, then by what process, citation, or notice, can the court acquire jurisdiction of his person? Can the district court send its *capias ad respondendum* to another district? Upon its mandate, can the marshal of the other district act in serving a citation or other process or notice? Can he be made a party by advertisement? Clearly it is competent for congress to devise and provide for these and all like questions, and construct a proceeding which might accomplish the condemnation of the property and give jurisdiction to order a recovery of the money penalty with costs of the entire proceedings, but in my judgment they have not done nor attempted to do so. The learned attorney for the United States has forcibly and I think justly and truly suggested the reason why, under other rules and principles governing the subject, the congress cannot be deemed to intend by the section under consideration to work such a result as would flow from holding the proceedings to be necessarily single, and for both the condemnation of the property and the collection of the money from the owner, viz.: that it “confounds modes of procedure which have always been held to be distinct; seeks in one action remedies wholly dissimilar; invents a new form of action in which an individual and his property shall be pursued at the same time; an action a part of which (by the death of the owner) might abate and another part survive, and in which there must be two judgments, one to be enforced by writ of execution, the other by an order of sale. To one side of such a hybrid-mongrel proceeding, any person having a claim to the property might become a party; to another side or part of the proceeding, he who had incurred the penalty would be the party as sole defendant”

I repeat that, conceding the power of congress to do all this, they have not in this fifty-fourth section

done so. Although not so expressed in distinct terms, the intention sufficiently appears to authorize a suit for the recovery of the 8300 with costs, and a proceeding in the nature of a proceeding in rem, to enforce the forfeiture of the property, by condemnation, to the use of the plaintiffs. So far, therefore, as the support of the ruling below depends upon the idea that there can be but one suit or proceeding, I think it fails.

Second. But the views above stated are not necessarily conclusive upon the principal question under examination. It is insisted that, whether the condemnation of the property and the recovery of the pecuniary penalty from the owner are to be effected by one or by two suits or proceedings, the condition annexed to both is that a seizure be made within thirty days, and proceedings to enforce the forfeiture be commenced within twenty days thereafter; that the entire penalty and forfeiture, or whatever consequence the statute denounces for the violation of the law, is dependent on the performance of that condition. Although the disposition of the first point above stated is not necessarily conclusive upon the present it is, nevertheless, of great significance, and at once lets in with great force the inquiry, what reason can exist for making the collection of the penalty from the owner dependent upon the seizure of the property also?

I have had occasion to observe in substance, in another case, argued at the same term, that this statute is not to be construed with rigid strictness, so as to favor any possible construction by which a defendant may be saved from the consequences of its violation. But, on the contrary, it is to be interpreted with just and fair liberality, so as to promote the object of the statute and secure obedience to its requirements. The argument in behalf of the defendants in error 1079 places great stress upon the contrary rule of interpretation, viz.: that a penal statute should be construed strictly, and if there may be two

constructions, that which is most in favor of the citizen should prevail. But in the language of the court in the case of *Clicquot's Champagne*, 3 Wall. [70 U. S.] 145, substantially borrowed from the opinion of the court in *Taylor v. U. S.* [3 How. (44 U. S.) 107]; "Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects." Construed in this spirit, I think the proviso should be held to relate to the forfeiture of the property, or rather to the seizure of the property. Indeed, it is no violence to the words or to the structure of the section to say, that it qualifies the paragraph immediately preceding, and that only, to wit; "which said liquors, etc., may be seized, etc., provided that such seizure be made within thirty days, etc." There is reason for some limitation of the right to seize the liquors or spirits. They may pass lawfully into the hands of innocent third parties, and so also the stills, boilers, and other vessels may be sold. It was therefore fitting that the right of seizure for past offences by the owner should have a limit in respect of time, which could have no application to the personal liability of the offender.

If such seizure were declared a condition of such liability, on the rule of strict construction which is invoked, another question would at once arise, viz.: How extensive must the seizure be? The literal meaning of "such seizure," in the proviso, is of "all the liquors and spirits made," and the stills, boilers, and other vessels used in distillation; these are what the collector is authorized to seize. Now, if the liability of the owner for the \$500 depends on the making of the seizure, who shall say that the condition is

satisfied by anything less than a seizure as extensive as the terms authorize? Authority being given to seize all the spirits made, and it being a condition that “such” seizure shall be made, can the court say that a seizure of a part of the spirits, etc., satisfies the conditions? Not if the statute is to be construed with such literal strictness as would apply the proviso to the liability of the owner; while on the other hand a just construction in respect to the proceedings for a forfeiture of the property is that that which is seized may be condemned, and obviously no more than is seized can be. Any other construction would defeat the statute, for obviously portions of the property might be disposed of or eloiigned so that it could not be seized. This brings into view another consideration in support of the views of the plaintiff’s counsel: the seizure of property has no relation to the owner’s liability, or the suit that is brought to collect the \$500 from him; while, on the other hand, the seizure of property and the proceedings to enforce the forfeiture in rem are related, the latter being in its very nature dependent upon the former.

If the intention of the legislature in enacting this section may be inferred from subsequent legislation, or if we may be aided by the latter in ascertaining such intention, then the amendment of the section by the act of March 3, 1803 [13 Stat. 409], furnishes (as was, I think, well insisted by the counsel for the plaintiffs) a significant if not conclusive guide to their meaning. By that section, an addition was made providing for the punishment of the offending party by imprisonment, and the declaration of that punishment was introduced after and in immediate connection with the declared liability for the \$500 and costs of suit, “together with the sum of \$300 to be recovered with costs of suit; and shall be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year.” The construction contended for by the

defendants would therefore involve the serious absurdity that unless a seizure of the property of the owner was made within thirty days, he could not be prosecuted at all for his offence against the law, nor punished for his misdemeanor.

Upon the most careful reflection, I am constrained to conclude that the ruling upon the trial was erroneous. The judgment must be reversed, and a new trial ordered.

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