

person, to produce the warrant under which he acted, but had neglected to do so, whereby the plaintiff was nonsuited, it was held that the officer's ability to produce the warrant, and his want of excuse for not producing it, were sufficiently alleged in the declaration, which stated that he could and might, in obedience to the said writ of subpoena, have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary.(e) It is not a preliminary objection to such an action that the defendant had sworn, at the trial at which he was ordered to produce the document, that he had not the warrant in his possession and knew nothing of it.(f)

JOHN D. LAWSON.

St. Louis, Missouri.

(e) *Amey v. Long*, 9 East, 473.

(f) *Amey v. Long*, 1 Camp. 14.

UNITED STATES *v.* BANK OF AMERICA.*

Circuit Court, E. D. Pennsylvania. January 15, 1883.

INTERNAL REVENUE—ASSESSMENT LIST—EVIDENCE—REV. ST. § 3408, SUBSEC. 2;
§§ 3224, 3226.

In an action by the United States to recover a tax of one twenty-fourth of 1 per centum each month upon the capital stock of a bank, under section 3408, subsec. 2, the assessment list made by the commissioner of internal revenue and not appealed from is not conclusive evidence, but the defendant may show that the assessment was excessive or illegal.

Rule for a New Trial. *Assumpsit*, for a tax of one twenty-fourth of 1 per centum each month upon the capital stock of a bank, amounting, with fines and interest, to \$3,168.12.

The plaintiff put in evidence the official assessment list, made by the commissioner of internal revenue, under section 3408, Rev. St., subsec. 2, and closed.

The defendant offered to prove (1) that the capital of the defendant was less than \$45,000, and not in the amount charged in the assessment list, put in evidence; (2) that at the time of said assessment the defendant was not engaged in business as a bank, and had no capital employed in the business of banking, or liable to be taxed.

The court rejected the offers, and directed a verdict for plaintiff, reserving the question of their admissibility.

H. T. Dechert and *Henry M. Dechert*, for the rule.

The assessment list was not conclusive evidence, and our offer was admissible to show that the assessment was erroneous and illegal

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

Clinkenbeard v. U. S. 21 Wall. 65; *U. S. v. Halloran*, 22 Int. Rev. Rec. 321; *Ketchum v. Pacific R. R.* Id. 383; *U. S. v. Myers*, 3 Hugh, 239; 5 FED. REP. 364; *Runkle v. Ins. Co.* 6 FED. REP. 143; *U. S. v. Rindskopf*, 105 U. S. 418.

Hood Gilpin, Asst. Dist. Atty., and *John K. Valentine*, Dist. Atty., *contra*.

The assessment, being regular and unappealed from, was conclusive, and the defendant may not set up as a defense to this action what could not be made a cause of action against the collector, nor upon which the collection of the tax would be restrained. Rev. St. §§ 3224, 3226; *Collector v. Hubbard*, 12 Wall. 1; *Bergdoll v. Pollock*, 95 U. S. 337.

Eo die. THE COURT. When the government elects to resort to the aid of the court, it must abide by the legality of the tax.

The defendant may show that it was not, at the time for which the assessment was made, doing business as a bank, within the definition in section 3407, Rev. St., and that the assessment was therefore illegal.

Rule absolute.

Oral opinion by McKENNAN, J.; BUTLER, J., concurring.

A corporation whose business is confined to the investment of its capital in bonds secured by mortgage on real estate, and to the negotiation, sale, and guaranty of them, is not a bank or banker within the meaning of section 3407 of the Revised Statutes. *Selden v. Eq. Trust Co.* 94 U. S. 419. Whether the mere business of buying, carrying, and selling stocks for others, on the deposit of money or property as a margin for their security, would come within the definition "bankers," *quære*. *Clark v. Bailey*, 12 Blatchf. 156. See *Northrup v. Shook*, 10 Blatchf. 243. Under the section taxing deposits in banks, an entry made in the depositor's pass-book of a deposit or payment is a "certificate of deposit" or "check" or "draft," within the meaning of the section. *Oulton v. Savings Institution*, 17 Wall. 109. Under the proviso of section 3408 of the Revised Statutes, savings banks are not exempt from taxation if they have a capital stock, or if they do any other business than receiving deposits to be lent or invested for the sole benefit of the depositor. Id. A construction of a proviso which makes it plainly repugnant to the act is inadmissible. *Savings Bank v. U. S.* 19 Wall. 228. If, after paying expenses, the bank sets apart a portion of the net earnings for a reserve fund, the moneys paid to depositors are dividends, within the meaning of this section, and not interest, within the meaning of the proviso. *San Francisco, S. & L. Soc. v. Cary*, 2 Sawy. 333; affirmed, 22 Wall. 38.—[ED.]

HUNTRESS v. TOWN OF EPSOM.

(Circuit Court, D. New Hampshire. March 20, 1883.)

1. COSTS—VIEW OF GROUND BY JURY—ALLOWANCE OF EXPENSES.

Where, by the practice and procedure of the state courts of record within the district, the costs and expenses of viewing the ground by the jury in civil actions are allowed, such costs and expenses may be allowed in courts of the United States held within such district, in civil suits other than suits in equity or admiralty, under the provisions of section 914 of the Revised Statutes, which adopts as near as may be the practice, pleadings, forms, and modes of procedure of the state courts of the district in which such United States courts are held.

2. DOCKET FEE.

Where there have been two trials of a cause, the first of which resulted in a disagreement of the jury and the second in a verdict for the defendant, but one docket fee of \$20 will be allowed.

Copeland & Edgerly and *Wallace Hackett*, for plaintiff.

Wm. L. Foster, *Thomas J. Smith*, and *John Y. Mugridge*, for defendant.

CLARK, J. This was an action by the plaintiff against the town, for damages to himself and team from a defect in a highway which the town was under obligation to keep in reasonable repair. There were two trials. On the first the jury disagreed; at the second there was a verdict and judgment for the defendant. At each of these trials the jury, upon motion of the defendant, was sent out by the court, under the direction of the marshal, to view the highway where the accident happened, and where the damage was sustained by the plaintiff.

The statute of New Hampshire provides (chapter 231, §§ 17, 18, p. 537, Gen. Laws) that—

“In trials of actions involving questions of right to real estate, or in which the examination of places or objects may aid the jury in understanding the testimony, the court, on motion of either party, may, in their discretion, direct a view of the premises by the jury, under such rules as they may prescribe.” “The cost of such view shall be subject to adjudication as to the whole or any part thereof, as the court may deem equitable.”

The statute of the United States provides, (section 914, p. 174, Rev. St., 2d Ed. 1878:)

“The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit or district courts, shall conform as near as may be to the practice, pleadings, and forms and modes