in the street, so that he died, the plaintiff was entitled to recover, unless the boy, through his own want of care, so ran or placed himself before the horses as to wholly or partly bring the injury upon himself; or the managers of the team and car could not, by the exercise of all due diligence and care, prevent the injury.

The plaintiff did not ask, and does not appear to have been entitled to, any more favorable instructions; and on this motion she does not really claim that the rulings of the court were erroneous and injurious to her case, but complains that the verdict was wrong. Neither does she claim that the jury were actuated by partiality, prejudice, or unfairness, but that, upon the case as it stood, the finding should have been the other way. Had the state of the evidence been such that the result arrived at could not have been reached without some palpable error or mistake, there would be good ground for setting aside the verdict; but such was not the case. There was a fairly debatable issue of fact as to how, and through whose fault, the injury occurred; and each party had the right, under the constitution and laws, to have that issue passed upon by the jury, and to have their finding stand when lawfully and fairly reached. Another jury might find differently, and might not; but, whether they would or not, this was the jury to whom, under the law, the responsibility was committed, and whose decision must stand, unless error or mistake or unfairness has been shown to have brought it about. Nothing of that kind is shown. After careful and repeated examination and consideration of the case, no adequate ground for setting aside the verdict has appeared. *Marriott* v. *Fearing*, 11 FED. REP. 846.

Motion overruled, and judgment on the verdict ordered.

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## *In re* ALDRICH and others.

(*District Court, N. D. New York.* March, 1883.)

1. TAXATION OF NEGOTIABLE PAPER—NOTES PAYABLE IN GOODS.

Section 19 of the act of February 8, 1875, which provides "that every person, firm, association, other than national-bank associations, and every corporation, state bank, or state banking association, shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them," must be construed as limited in its effect to notes payable in money; otherwise all sorts of negotiable paper, such as "grain receipts," fare tickets, and the like, might be subject to the same taxation

2. SAME—NOTES CONTEMPLATED BY THE NATIONAL-BANK ACT.

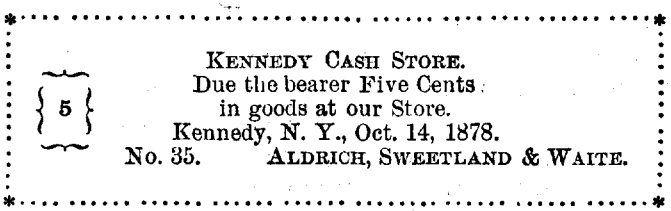
Section 5172 of the Revised Statutes provides how the notes contemplated by the national-bank act shall be printed and what they shall contain. No provision is made for a note for less than one dollar. A note for a fractional sum is not only unknown to the law, but its issue is unlawful. Section 3583. The supreme court, by deciding that an obligation "payable in goods" was not illegal, has left the inference to follow almost necessarily that it was not such a note as was contemplated by the statute, and therefore not taxable.

At Law.

*Martin I. Townsend*, Dist. Atty., for the United States.

*John L. White*, for the receiver.

COXE, J. In the years 1878, 1879, and 1880, George A. Aldrich, L. Orlando Sweetland, and Charles M. Waite were engaged in mercantile pursuits at Kennedy, New York. Prior to February, 1880, they issued promises or certificates, of various denominations, in the words and figures as follows:




The others issued were, *mutatis mutandis*, in the same form, the amounts ranging as high as five dollars. About $5,000 of this paper was circulated, to a limited extent, in the immediate locality. In February, 1880, the firm failed, and a receiver was appointed, who, having reduced the property to money, now holds it ready for distribution. The collector of internal revenue for the thirtieth collection district having assessed $498.88, or 10 per cent., on this circulation, demanded that sum of the receiver.

The questions involved are: *First*, whether the said obligations are taxable under the act of February 8, 1875; and, *second*, whether the United States should be paid in full, or *pro rata* with the other creditors.

Section 19 of the said act provides—

"That every person, firm, association, other than national-bank associations, and every corporation, state bank, or state banking association, shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them."

In *U. S.* v. *Van Auken*, 96 U. S. 366, the supreme court held that an obligation in almost precisely similar words was not, within sec-

tion 3583 of the Revised Statutes, "intended to circulate as money." The court says:

"Here the note is for 'goods' to be paid at the store of the furnace company It is not payable in money, but in goods, and in goods only. No money could be demanded upon it. It is not solvable in that medium. *Watson* v. *McNairy*, 1 Bibb, 356. The sum of 'fifty' cents is named, but merely as the limit of the value in goods demandable and to be paid upon the presentation of the note. Its mention was for no other purpose, and has no other effect. In the view of the law, the note is as if it called for so many pounds, yards, or quarts of a specific article."

Is such a paper taxable, as a note used for circulation? It is thought that it is not. If these papers, which are simply evidences of credit, and nothing more, are liable to taxation, it is difficult to perceive why any paper representing value and passing from hand to hand is not equally liable. Where is the collector to draw the line, if not at notes payable in money? If allowed to go beyond, how can he stop until every species of negotiable paper has been taxed? Why are not grain receipts, which circulate so freely on the Chicago market, bills of lading, and invoices, subject to the tax?

The construction of the statute contended for by the collector could be still further strained to include railroad, street-car, and ferry tickets; indeed, every peddler of milk on a country route might be required to pay on the milk tickets "circulated" by him. Where is the distinction in principle between these cases and the case at bar?

Mr. Parsons says, in his work on Contracts, (vol. 1, p. 247:) "As the negotiable bill or note is intended to represent and take the place of money, it must be payable in money, and not in goods." See also *Austin* v. *Burns*, 16 Barb. 643; *Jerome* v. *Whitney*, 7 Johns. 321; *Thomas* v. *Roosa*, Id. 461; Edwards, Bills & Notes, (3d Ed.) §§ 147, 148.

The obligations here are simply due-bills or certificates, giving the holder the right to exchange them for butter, eggs, tea, or coffee, at a certain place. If, instead of the language employed, they had recited that there was "due the bearer one pound of tea (50 cents per pound) at our store," etc., would the change be other than a verbal one? Does the fact that the holder has an option limited only by the capacity of the stock in trade change the nature of the paper? It cannot be successfully maintained that the statute was intended to cover such obligations. Section 5172 of the Revised Statutes provides how the notes contemplated by the national-bank act shall be printed, and what they shall contain. No

provision is made for a note for less than one dollar. A note for a fractional sum is not only unknown to the law, but its issue is unlawful. Section 3583, *supra*. The supreme court, by deciding that an obligation payable "in goods" was not illegal, has left the inference to follow almost necessarily that it was not such a note as was contemplated by the statute, and therefore not taxable.

The whole tenor of the act, and the sections relating to taxation, indicates that it was the intention of congress to tax only such obligations as circulated *as money*. Whenever a tax is laid on negotiable paper other than bank notes, its character is particularly specified, and it is always money or its equivalent; as, for instance, in section 3408, where a tax is imposed on the average amount of circulation, "including, as circulation, all certified checks, and all notes and other obligations calculated or intended to circulate or to be used as money." In *Nat. Bank* v. *U. S.* 101 U. S. 1, the chief justice, having under consideration section 3413, says:

"The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a state municipality has no right to put its notes in circulation as money. * * * The tax is on the notes paid out, that is, made use of as a circulating medium."

It is not contended that there was, prior to February 8, 1875, any law applicable to this case. 18 St. at Large, p. 311, §§ 19–21. A careful reading of these sections, however, would seem to justify the conclusion that they were intended to extend the law so as to apply to those, other than national-bank associations, engaged in banking business, whether corporations or individuals, to make the law applicable to new *persons*, but not to new *subject-matter*.

The tax, under the act of 1875, is paid in precisely the same manner as the tax on bank deposits, capital, and circulation; the meaning of the word "notes" is not enlarged or explained, and no language is used to indicate that it was the intention of congress to give to it any different signification than that given in the original act.

The conclusion reached is that the statute does not cover obligations which simply entitle the holder to a certain amount of merchandise—limited by the sum stated—at the store of the party who issues them. The system may be a pernicious one; very likely a tax should be imposed; but if the foregoing views are correct it cannot be done under existing laws.

The opinion of Attorney General Devens (25 Int. Rev. Rec. 167) is cited as holding a different doctrine. Although the collector was advised to proceed and levy the tax, the attorney general expressed

grave doubts regarding the legality of such action, and was apparently influenced in arriving at this conclusion by a desire to obtain a judicial construction of the statute, "since thus only can the question be brought to an authoritive determination of the highest federal tribunal." He doubted whether obligations payable in goods came within the letter of the statute, but thought that they did come "within the mischief intended to be remedied by the statute." Although the opinion is entitled to great weight, it cannot be regarded as controlling, especially where it is conceded that the question is a doubtful one.

As the conclusion reached disposes of the case, it will not be necessary to consider the second question stated above.

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## *In re* HUDDELL and another, Bankrupts.*

(*District Court, E. D. Pennsylvania.* February 9, 1883.)

TAXES—LANDLORD AND TENANT—MINING LEASE—LIABILITY OF PURCHASER AT SHERIFF'S SALE OF LEASEHOLD TO PAY TAXES UPON IMPROVEMENTS.

A purchaser at sheriff's sale of the unexpired term of a coal-mining lease takes the lessee's place under the lease, standing upon no higher plane in any respect, and, like the tenant, is liable for all taxes on improvements placed by himself on the land.

Exceptions to the Register's Report, allowing a set-off to the claim of P. W. Shaefer and others, executors and trustees under the will of John Gilbert, deceased.

The facts are fully set forth in the following portions of the register's report:

The claim of P. W. Shaefer and others was presented for $2,798.65, for rent of Draper Colliery, belonging to the bankrupt's estate, as follows:

| | | |
|---|---|---|
| On coal shipped from July 1, '77, to February 10, '78, - - | $20,456 38 | |
| Less amount paid on same, - - - - - - | 18,381 73 | |
| | | $2,074 65 |
| Right of way on 3,200 tons coal, - - - | | 160 00 |
| Taxes for 1877 on improvements above valuation of $24,000, | | 564 00 |
| | | $2,798 65 |

The colliery referred to had been purchased by certain trustees for the creditors of the bankrupts at a sheriff's sale, made under a judgment held by the

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

bankrupts against the Hickory Coal Company, and the business of mining carried on by the said trustees until a sale of the colliery by the assignees in bankruptcy. Pending this operation of the colliery, the lease had, on July 1, 1877, terminated. It, however, contained a provision for a renewal for a term of 15 years, "at the current rates of interest in the Mahoney valley at the time of renewal."

The claim for taxes paid was resisted on the ground that the taxes had been assessed against the owners of the land and improvements, and were properly payable by the landlords. For the same reason the assignees claimed they were entitled to set off against the claim for rent the sum of $738, taxes paid by the trustees on behalf of the estate of the bankrupts, the tenants, assessed in the same manner for the year 1876. It appears by the evidence that about the time of the lease the taxes upon the improvements were separately assessed, and continued to be so assessed for four or five years, the landlords only paying the taxes on the land; that subsequently the assessments were made against the land-owners for land and improvements; and that up to about the time of the purchase by the trustees aforesaid the matter of division of taxes was settled between the landlords and tenants upon the basis of valuation at the time of separate assessment. The lease contained no provision in regard to the matter, nor does it appear that the division of taxes referred to was the subject of any agreement which can be regarded as affecting a change in the relations and rights of the parties in this respect under the lease.

By an act of assembly of the state of Pennsylvania of April 3, 1864, it is provided that "every tenant who may or shall occupy or possess any lands or tenements shall be liable to pay all the taxes which during such occupancy or possession, may thereon become due and payable, and, having so paid such taxes or any part thereof, it shall be lawful for him, by action of debt or otherwise, to recover said taxes from his landlord, or at his election to defalcate the amount thereof out of the payment of the rent due such landlord, unless such defalcation or recovery would impair any contract or agreement between them previously made."

It is contended that the improvements are the property of the tenants, the landlord having only an option of taking them at the termination of the lease, at a valuation to be arrived at as provided therein; but they are required to be constructed by the tenants at their own expense and cost, and are of absolute necessity in mining coal, the amount of production of which determines the rental to be paid. They derive their value from their annexation to the land, and the value of the land is necessarily greatly enhanced by them. The assessor has, however, chosen to consider them and the land, for the purpose of taxation, as inseparable, and has assessed the whole tax upon the owner of the latter as the primary subject.

The wisdom or legality of this determination of the officer of the taxing power cannot be brought into question in this controversy; and, there being no contract or agreement to be impaired by the defalcation claimed, I am of the opinion that the amount of taxes paid by the trustees may be deducted from the rent, and that the claim for taxes paid by the landlord should be disallowed, and there should be awarded to P. W. Shaefer and others:

| | |
|---|---|
| Balance of rent, | $2,074 65 |
| Charge for right of way, | 160 00 |
| | $2,234 65 |
| Less amount of taxes paid by trustees, | $738 00 |
| | $1,496 65 |

To this report exceptions, *inter alia*, of P. W. Shaefer and others, executors, etc., were filed, as follows:

(1) That the register erred in reporting against exceptants, in the matter of their claims to be repaid, the amount of taxes for 1877, on improvements belonging to the bankrupts, $564.

(2) The register erred in reporting an allowance to the bankrupts of $738 for taxes on improvements belonging to the bankrupts, assessed for the year 1876, and paid voluntarily by the bankrupts.

*John G. Johnson*, for exceptions.

*Fergus G. Farquhar, contra.*

BUTLER, J. I cannot agree with the register, respecting the taxes on the tenants' "improvements." As conceded by counsel, the tenants would, clearly, be liable for these taxes were the assessment in the tenants' names. That the assessment is not so, is, in my judgment, unimportant. Under the lease, as the parties interpreted it, the liability for such taxes rested on the lessees. For some years, as the register finds, the improvements were assessed to the lessees, and the taxes paid by them. Subsequently they were assessed to the lessor with the land, but were still paid by the lessees—up to the time of the sheriff's sale. Manifestly this subsequent method of assessment was by assent of the parties, and without influence on their rights. The purchasers at the sale took the lessees' place under the lease,—standing upon no higher plane, in any respect. The lease provides against transfer, without the lessor's assent. Granting that this provision is inapplicable to a transfer by operation of law, as has been decided in this state, still the transferees take subject to the rights and equities of the original parties. It cannot be doubted that if the question were between these parties, the lessees would be liable for the taxes now in controversy. The suggestion that the transferees were ignorant of the lessees' liability for such taxes, is without force. Examination of the lease, and inquiry respecting the parties dealing under it, would have afforded this information. Where one virtually intrudes himself upon a lessor, as in the case of a purchaser at sheriff's sale of an unexpired term, under a lease stipulating against transfer, it is certainly not unreasonable to put him to such exami-

nation and inquiry, and to hold him to the equities existing between the original parties. The register's report must be corrected in accordance with the foregoing opinion.

The exceptions filed by the assignees were not pressed, and are dismissed.

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## UNITED STATES *v.* BAYAUD and another.

*(Circuit Court, S. D. New York.* March 30, 1883.)

1. INDICTMENT FOR REMOVING STAMPS FROM CASKS CONTAINING DISTILLED SPIRITS—SECTION 3324, REV. ST.—DOMESTIC OR FOREIGN SPIRITS.

   As the offense described in section 3324 of the Revised Statutes, as amended by the act of March 1, 1879, § 12, is committed by the removal, without destroying, of stamps from a cask containing distilled spirits, whether such spirits be foreign or domestic, it is not necessary in the indictment to describe the spirits as domestic in order to charge an offense.

2. SAME—LICENSED OR ILLICIT DISTILLERY.

   What is forbidden is the removal of the stamp from a package of distilled spirits without, at the same time, destroying it, and the offense is committed whether the spirits in the cask be the product of a licensed or an illicit distillery, and without reference to the circumstances under which the stamp was affixed.

3. SAME—CAPACITY OF CASKS.

   It need not be alleged in the indictment that the casks contained more than five gallons, and were not "standing casks."

4. SAME—DESCRIPTION OF STAMPS.

   It is not necessary in the indictment to set out the stamps removed *verbatim*. A description thereof by their statutory designation is sufficient.

5. SAME—BILL OF PARTICULARS.

   A bill of particulars cannot cure the omission of a material averment from an indictment; but when, as in this case, the indictment shows that the description of the stamps removed is all that was within the power of the grand jury to give, and such description is sufficient to show that an offense has been committed, and when it appears of record that further and full particulars were afterwards given under the order of the court, a bill of particulars so obtained is an answer to the suggestion that the accused will not be able to identify by evidence the stamps to which the indictment refers, and plead an acquittal or conviction on such indictment in bar of a subsequent charge for the same offense.

6. SAME—OBJECTIONS AFTER PLEA OF GUILTY.

   After a plea of guilty, the only objection that can be made to the indictment is that it fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment.

7. SAME—CHARGING INTENT.

   As neither an intent to use the stamps again, nor an intent to defraud the United States, nor any other particular intent, is made by the statute an ingredient of this offense, the indictment need not charge any such intent.